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# **Aviation Emergency Response Handbook**

## Foreword

Fox Rothschild LLP is a law firm with a strong litigation and regulatory compliance practice for many industries including aviation. This experience includes representation of transportation operators in major NTSB investigations following accidents. We have successfully guided operators through the NTSB investigative process and other sensitive issues that affect not only the probable cause findings, but also areas that may ultimately have bearing on civil liability, criminal liability and regulatory compliance.

We represent a multitude of transportation entities (i.e., airlines, pipelines, railroads, component manufacturers, etc.) in major and catastrophic accidents throughout the United States. This background allows us to understand what our clients experience during the aftermath of a major transportation accident, and develop plans, practices and procedures to assist our clients during such a difficult period. Our intimate knowledge of, and strong relationships throughout, the transportation industry, allow us to provide a quality of representation to our clients that is unparalleled.

This manual contains the basic advice and resource materials that we have found to be helpful in the aftermath of a transportation accident. We believe these materials will help a company faced with a major accident to avoid the common missteps that can derail an otherwise valid accident response plan. While this manual cannot replace the advice and assistance of legal and technical experts on the scene, it provides a solid basis from which an accident response plan can be developed. In fact, if you are reading this manual, you are taking the single most critical step toward ensuring the best possible outcome following an accident: you are planning ahead. The period after an accident is so overwhelming and so hostile to learning, that only by planning ahead can you hope to avoid becoming a casualty of the accident response process.

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## Initial Response

### 1. Accident Response Checklist

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#### ACCIDENT CHECKLIST

In general, the following priority of actions should be followed:

**Protect People**  
**Protect Property**  
**Protect Evidence**  
**Notify and Investigate**  
**Accomplish Recovery**

#### Initiate Emergency Plan

- The airline's emergency plan should be initiated. It is important for legal counsel to review the corporate emergency manual and make sure the plan is being implemented, in particular the notification of key personnel.
- Create a list of key persons and their cell phone numbers. Include both airline employees and outside contacts such as FAA, NTSB, DOD, outside counsel, insurance brokers and underwriters, etc. Provide the control center with the phone numbers of key persons on your list. Bring portable charger/power banks and power strips!

#### Notify NTSB

- The local field office of the NTSB must be notified of an accident "immediately and by the most expeditious means available," which typically means by telephone. (See 49 CFR § 830.5). The aircraft operator may also report an accident or incident by calling the NTSB Operations Center at 844-373-9922 or 202-314 6290.
- The notification must include, to the extent then available: the type, nationality and registration marks of the aircraft; name of the owner and operator of the aircraft; name of the pilot in command; date and time of the accident; last point of departure and intended point of landing; position of aircraft with reference to some easily defined geographical point; number of persons aboard, number killed, and number seriously injured; nature of the accident, the weather, and extent of damage to the aircraft; and a description of any explosives, radioactive materials and other dangerous articles aboard. (See 49 CFR § 830.6).

#### Coordinate with your Response Team

- Ensure both investigatory and family assistance teams are in motion.
- Ensure logistics such as accommodations and transportation are arranged.
- Coordinate with Public Relations Department on initial communications.
- Coordinate with inside and outside counsel for initial team briefings.

#### Notify FAA/CMO

#### Notify Department of Defense

- Notify the Casualty Assistance Office of each respective service if any military or government personnel were aboard the aircraft.

Army:	888.276.9472	For civilian U.S. government personnel
Navy:	800.368.3202	casualties in international flight,
Air Force:	800.525.0102	the Dept. of State Operations Center: 202.647.1512
Marines:	800.847.1597	
Coast Guard:	571.266.2375	

### **Notify U.S. Postal Service**

- The U.S. Postal Service should be notified if the aircraft was carrying US mail. For foreign accidents, notify Department of State and the relevant Civil Aeronautics Administration or similar foreign aviation authority.
- If an accident occurs abroad, the airline is expected to notify the Foreign Service Post (U.S. Embassy or Consular Office) for the consular district in which the accident occurs, as well as the nearest office of the Civil Aeronautics Administration for the country in which the accident occurred. The State Department is required to notify next of kin.

### **Notify Insurance Broker and Underwriters**

- Aviation insurance policies typically require immediate notification in the event of an accident.

### **Notify Corporate Security**

- Corporate security personnel should be advised of the accident so they can ensure security at key corporate facilities. It is not unusual for the press to seek access to corporate offices and key personnel immediately after an accident.
- Security at the "situation room," the accident site and on-site facilities is especially critical.

### **Notify Environmental Programs Department**

- The airline's environmental programs department should be notified of the accident to evaluate for a possible fuel spill or hazardous cargo situation.
- The Environmental Protection Agency, and local government agencies, may need to be notified.

### **Notify Outside Counsel**

- Outside counsel should be notified and advised to stand by as legal questions arise and employee interviews are requested.

### **Coordinate with Public Relations and Corporate Communications Departments**

- All press releases and statements to the press should be reviewed and approved by the general counsel's office.

### **Dispatch Legal Representative to Scene**

- An attorney from the airline's Office of General Counsel should be dispatched to the accident site to provide advice on legal issues as they arise. It is helpful to have someone permanently assigned to the accident investigation and litigation.

### **Provide Representation to Interviewees**

- All persons interviewed by the NTSB are entitled to legal representation. (See 49 CFR § 831.7). Given today's potential for criminal prosecution, as well as civil liability, the airline should not allow any employee to be interviewed by the NTSB without adequate preparation and legal representation. Outside counsel may be best suited to this task.

### **Preserve Aircraft Wreckage**

- The airline is responsible for preserving aircraft wreckage, cargo and data recorders until the NTSB takes custody of it or issues a release. (See 49 CFR § 830.10(a)).
- The wreckage and cargo cannot be disturbed or moved except where necessary to remove persons injured or trapped, to protect the wreckage from further damage, or to protect the public from injury. (See 49 CFR § 830.10(b)).
- When it is necessary to move wreckage or cargo, sketches, descriptive notes and photographs shall be made, if possible, of the original positions and condition of the wreckage and any significant impact marks. (See 49 CFR § 830.10(c)).

- Prior to turning wreckage over to the NTSB, access should be restricted to emergency workers and airline personnel whose presence is necessary.

### Identify and Secure Key Documents

- The airline must retain "all records, reports, internal documents, and memoranda dealing with the accident or incident, until authorized by the NTSB to the contrary." (See 49 § CFR 830.10(d)).
- The airline must permit NTSB investigators to inspect, photograph, or copy pertinent records, including medical records. (See 49 CFR § 831.9(a)).
- The airline should always retain the original records. There is no requirement that original records be given to the NTSB. In fact, it may be a violation of Federal Aviation Regulations if an airline does not maintain custody of certain documents.
- Create and maintain a document transmittal log that includes, at a minimum, document title or description, date of request, requested by, date delivered, person delivered to, and number of pages.
- Documents that are produced for the NTSB should generally be stamped "confidential" to ensure that proprietary information is protected. It is best to err on the side of marking documents confidential since the airline can always retract the confidential designation at a later date.
- Failure to preserve key documents is not only a violation of federal regulations, but can also be construed as spoliation of evidence in any civil litigation or criminal investigation that may ensue.
- Access to the records should be limited to NTSB personnel, persons authorized by the NTSB to participate in the investigation, and legal representatives of the airline.
- The following documents, at a minimum, should be immediately identified and secured by the airline's general counsel's office:
  - Aircraft Maintenance Records. All maintenance records for the accident aircraft, including any that are not normally retained, should be immediately impounded and placed under lock and key. No one, including the NTSB and FAA, should be allowed to take these documents. The NTSB takes custody of the wreckage and cargo, but the operator is responsible for retaining the original records. (See 49 CFR§830.10(d)). Do not lose control of these records!
  - Operational and Maintenance Manuals. All manuals that are updated periodically should be "frozen" in the state of revision that existed on the day of the accident. These manuals include, but are not limited to, the Flight Operations Manual, Pilot Operating Handbook, Quick Reference Handbook, Aircraft Maintenance Manual, General Maintenance Manual, Flight Attendant's Manual, etc. Copies of the frozen manuals should be retained until the investigation and all litigation has ended.
  - Flight Records. Identify and secure all flight planning and release documents for the accident flight.(Flight plan, weather briefing, NOTAMS, aircraft maintenance history, current deferred items, planned and final weight manifest, ACARS/ARINC communications traffic.)
  - Passenger Records. Passenger tickets and computerized passenger records should be identified and secured.
  - Training Records. Flight and cabin crew training records should be identified and secured. If there seems to be a maintenance or dispatch issue, secure those training records as well.
  - Personnel Records. Flight and cabin crew personnel records should be identified and secured. If there seems to be a maintenance, dispatch or ramp issue, secure those personnel records as well.
  - Passenger and Crew List. A list of passengers and crew on board the accident aircraft should be created and maintained.
  - Company email messages that may be pertinent to the event.
  - All documents related to any code share agreement that applies to the accident flight.

### **Drug and Alcohol Tests for Personnel Serving a "Safety-Sensitive Function"**

- Every employee serving a "safety-sensitive function" must be tested for drugs and alcohol if that employee's performance either contributed to an accident or cannot be completely discounted as a contributing factor to the accident. (See 14 CFR § 120.109(c) and § 120.217(b)).
- Drug tests must be accomplished as soon as possible, but no later than 32 hours after the accident. (See 14 CFR § 120.109(c)).
- Alcohol tests must be accomplished as soon as possible. If not done within two hours, reasons for the failure to test must be documented. If not done within eight hours, cease attempts at testing. (See 14 CFR 120.217(b)(2)).

### **Assist in Selection of Airline Participants in NTSB Investigation**

- The NTSB will request the airline to assign personnel to various NTSB working groups, such as flight operations, maintenance, aircraft systems, cockpit voice recorder, flight data recorder, air traffic control, survival factors meteorology, etc.
- Expect that the NTSB will require FDR and CVR specialists to travel to Washington, DC, as soon as practical after the accident.
- The airline should assign its very best people to these groups. Many of them will be key witnesses in civil litigation and possibly criminal investigations. All of them must be capable of recognizing and intervening when the airline's interests are being compromised by actions taken, or neglected, by the NTSB or other parties.
- The NTSB will also seek representatives from the pilots' union, the mechanics' union, and the flight attendants' union. Be mindful that the unions have their own interests, some of which may be adverse to the airline. Be sure to consider union affiliation and activity when choosing the airline's representatives.
- Brief the personnel assigned to the NTSB about their role and the meaning of party status.

### **Brief All Personnel Involved in the Investigation on Legal Ground Rules**

#### Discussing the accident

- NTSB. No one should give an impromptu interview to the NTSB. All such interviews should be arranged through the airline's Party Coordinator to the NTSB. Counsel should be present for all employee interviews, which is a right provided by NTSB regulations. (See 49 CFR § 831.7.) If anyone observes an unapproved NTSB interview, he or she should intervene to stop the interview and reschedule it for a later time.
- Press. All press contacts and all requests for information should be directed to the corporate communications department or some other person or department designated to be the primary press contact. You should emphasize corporate policy on contacts with the press, which typically requires employees to refer reporters to a particular person or department.
- Law Enforcement. Be mindful that it is illegal to instruct employees not to speak with law enforcement officials. You may, however, advise employees that they are free to speak with law enforcement personnel, if they choose to do so, but are urged to coordinate interviews with the airline's in-house or outside legal counsel.
- Employee Communications. All employee communications should be made through normal company channels. It should be assumed that all communications, even those to be distributed internally, will be made public. The rules for public disclosures should apply.
- Cause of Accident and Admission of Liability. Under no circumstances should an airline employee speculate about the cause of an accident or admit liability or wrongdoing on the part of the airline or any employee.

#### Release of Documents

- No documents should be given to anyone, including the NTSB and the FAA, until they have been copied, cataloged and cleared through legal counsel.
- All documents provided to the NTSB should be accompanied by a cover letter/email as approved by counsel, as approved by counsel.

- Company documents should be considered confidential and proprietary unless and until legal counsel determines otherwise. Documents provided to the NTSB's and FAA should generally be stamped "confidential."

#### Signing Things

- Under no circumstances should an airline employee sign anything without approval of counsel. This is particularly important for airline personnel participating in the NTSB investigation. For example, NTSB fieldnotes that are incomplete, inaccurate and misleading are frequently signed by airline employees who are pressured by the NTSB to sign them. This can cause great difficulties in any ensuing civil litigation and criminal investigations.

#### Nature of the NTSB Process

- Airline employees who participate in the investigation should be warned that other parties to the investigation, such as the aircraft manufacturer and the FAA, have interests that differ from and often conflict with the airline's interests.
- Other parties to the investigation, in particular the aircraft manufacturer and the FAA, have a lot of experience in accident investigations and therefore know the NTSB investigators and the NTSB process. These parties can manipulate the investigation by suggesting certain areas of inquiry, downplaying areas that are problematic to them, and providing information and analysis that is slanted to serve their interests. The airline's representatives on the investigation team should be made aware of this fact and be ready to intervene if something is being improperly driven in a direction that could have a negative impact on the airline.
- Personnel assigned to the investigation will be expected by the NTSB to participate for the entire investigation and generally may not be replaced by alternates or relieved of duty without the NTSB's approval.
- The Party Coordinator will be the primary focal point for all contact with the NTSB on the accident investigation.

#### Potential for Criminal Investigation

- Recent history has demonstrated that law enforcement officials are quick to initiate criminal investigations following an aircraft accident.
- Everything that is developed in an NTSB investigation has potential to be used in a criminal prosecution of both the airline and its employees. This makes it critically important that those involved in the investigation follow these guidelines and remain in close communication with counsel.

#### Key Legal Issues

- Criminal Investigation. The trend is for law enforcement officials to consider a criminal investigation whenever there is an airline accident. They no longer focus just on "intent" crimes, but also look for criminal negligence on the part of the airline and its employees, including officers of the corporation. The legal standard is akin to gross negligence and may be met in circumstances little worse than simple negligence, particularly if there was an operational or profit motive for the subject actions.
- Under federal law, if an employee commits a crime in the course of his or her employment, the employer is also guilty of a crime. Legal counsel may consider criminal defense counsel for the airline as well ascertain employees if there is any suggestion of criminal negligence or a criminal investigation.
- Family Assistance Act. The Family Assistance Act governs an airline's communications with accident victims and their families. The Act prohibits any unsolicited contact with injured passengers or the families of deceased passengers for 30 days following an accident for the purpose of discussing settlement, claims or litigation. The Act also required airlines to develop family assistance plans. The general airline's counsel office should ensure that the Family Assistance Act and the airline's family assistance plan are being followed.
- Liability for Losses Arising From the Accident. There are many laws and treaties that may affect an airline's liability for injuries, wrongful death, clean-up, and rescue and recovery operations. They should be explored early to determine the losses for which the airline may be liable.

## 2. Foreign Accident Supplemental Checklist

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### SUPPLEMENTAL CHECKLIST FOR ACCIDENTS/INCIDENTS IN FOREIGN COUNTRIES

#### In General

- The International Civil Aviation Organization (ICAO) is the United Nations civil aviation agency that sets international standards and regulations necessary for safe, regular, efficient air transport, and serves as the medium for cooperation in all fields of civil aviation among the 187 Contracting States, i.e., country. (See Tab 37.)
- Article 26 of the Convention on International Civil Aviation states that, in the event of an accident to an aircraft of a contracting State occurring in the territory of another contracting State, and involving death or serious injury, or indicating serious technical defect in the aircraft, **the State in which the accident occurs will institute an inquiry** into the circumstances of the accident, in accordance, so far as its law permits, with ICAO procedures.
- The State of Registry, the State of the Operator, the State of the aircraft design and the State of the aircraft manufacturer are each entitled to appoint an accredited representative to participate in the accident investigation. (ICAO Annex 13, § 5.18.) Each accredited representative is entitled to appoint one or more advisors, proposed by the Operator, to assist. (ICAO Annex 13, § 5.19.)
- When there is an accident involving an International Civil Aviation flight, Annex. 13 of the International Civil Aviation Convention sets forth the rules on notification, investigation and reporting of the accident. (See FAA Order 8020.11C, pp. 1-8, 7-1.)
- The NTSB and FAA may participate in foreign accident investigations upon request by the State in which the accident occurred. (See FAA Order 8020.11C, pp. 7-1 – 7-2.)
- The NTSB is responsible for investigating accidents/incidents involving civil aircraft that occur outside the United States when the accident/incident is not in the territory of another country (i.e., international waters). (49 CFR § 31.22.)

#### Notification

- If the incident/accident involves a civil aircraft of the United States, notify the local field office of the NTSB “immediately and by the most expeditious means available.” (See 49 CFR §§ 830.1(a) & 830.5.)
- The notification must include, to the extent then available: the type, nationality and operator of the aircraft; name of the owner and operator of the aircraft; name of the pilot in command; date and time of the accident; last point of departure and intended point of landing; position of aircraft with reference to some easily defined geographical point; number of persons aboard; number killed and number seriously injured; nature of the accident, the weather and extent of damage to the aircraft; and a description of any explosives, radioactive materials and other dangerous articles aboard. (See 49 CFR § 830.6.)
- Notify the Foreign Service Post (US Embassy or Consular Office) for the consular district in which the accident occurs, and the nearest office of the civil aeronautics administration for the country in which the accident occurs. The U.S. State Department is required to notify next of kin of US victims. (See 22 U.S.C. § 5503.)
- Notify the Managing Director of Overseas Citizen Services, Bureau of Consular Affairs, U.S. Department of State immediately if the operator is a U.S. certificated air carrier or foreign air carrier and the accident flight was to or from the United States – 202.647.1512 (U.S. Dept. of State Operations Center). (See 14 CFR § 243.11.)
- Notify the Casualty Assistance Office of each respective service if any military or government personnel were aboard the aircraft.

Army: 800.626.3317  
Navy: 800.368.3202  
Air Force: 800.433.0048  
Marines: 800.847.1597

- Notify U.S. Postal Service if the aircraft was carrying U.S. mail.
- Notify your insurance broker and underwriters. Aviation insurance policies typically require immediate notification in the event of an accident.
- Notify corporate security. Corporate security personnel should be advised of the accident so that security can be ensured at key corporate facilities because the press may seek access to corporate offices and key personnel immediately after an accident. Security at the “situation room,” accident site and on-site facilities is especially crucial.
- Notify Environmental Programs Department. The airline/company environmental programs department should be notified of the accident in order to evaluate for a possible fuel spill or hazardous cargo situation.
- Notify code share partners.
- Notify outside counsel. Outside counsel should be notified and advised to stand by as legal questions arise and employee interviews are requested.

#### **Coordinate with Response Team**

- Ensure both investigatory and family assistance teams are in motion.
- Ensure logistics such as accommodations and transportation for response teams are arranged.
- Coordinate with the Public Relations Department on initial communications.
- Coordinate with inside and outside counsel for initial team briefings.

#### **Provide Passenger Manifest to U.S. State Department**

- If the accident flight was operated by a US or foreign air carrier to or from the United States, the airline must provide a passenger manifest to the U.S. State Department Operations Center “not later than one hour after any such carrier is notified of an aviation disaster” or, if not technologically reasonable or feasible within one hour, then as expeditiously as possible but no later than three hours after such notification. (See 7 FAM § 1834.1; 14 CFR § 243.11(b).)

#### **Coordinate with Public Relations and Corporate Communications Department**

- All press releases and statements should be reviewed and approved by the general counsel’s office.

#### **Dispatch Legal Representative to Scene**

- An attorney should be dispatched to the accident site to provide advice on legal issues as they arise. It is helpful to have someone permanently assigned to the accident investigation and litigation.
- In addition, coordinate with local legal representation to protect the company/employees in the context of accident investigation, civil litigation and criminal issues.

#### **Provide Representation to Interviewees**

- All persons interviewed should be entitled to legal representation. An airline/company should not allow any employee to be interviewed by investigating personnel without adequate preparation and legal representation. Outside counsel may be best suited to this task.

#### **Protect/Preserve Aircraft Wreckage**

- In a foreign accident, the State where the accident occurred is responsible for protecting the evidence and maintaining safe custody of the aircraft and its contents for such a period as may be necessary for purposes of the investigation. (ICAO Annex 13 § 3.3.)
- Protection of evidence will include preservation of any evidence that may be removed or destroyed. (ICAO Annex 13 § 3.2.)

### 3. Practical Considerations for Emergency Response

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#### PRACTICAL CONSIDERATIONS FOR EMERGENCY RESPONSE

The most successful emergency response is thoroughly planned and regularly practiced. Review your emergency response manual and procedures to ensure you have considered the following:

- Family assistance plan.
- Primary and alternate contacts for each person/entity on your notification list.
- On-site work may continue for several days or even weeks. Plan on back-up personnel to relieve those on site too long.
- Have a specific, easily identifiable location where the go-team meets. Make sure the location is known by all response personnel and is written in their manuals.
- If someone gets left behind, have an alternate plan for them to get to the accident site.
- Plan transportation to the accident scene:
  - Designate a go-aircraft or how to select one on short notice.
    - Plan should include dispatching and crewing.
  - If an accident results in airport closure, be prepared to travel to nearest suitable airport and travel by car to accident site.
  - Consider and plan for bad weather at and near the scene.
  - All response personnel should join a frequent car rental program to speed the process.
  - Designate and train certain pass bureau/company travel personnel to handle short-notice travel plans.
- Plan what equipment and personnel needed on go-plane.
  - Plan on how to transport heavy items from aircraft to scene.
  - Weigh and size “go-kits.”
- For communications:
  - Ensure emergency response center has conference call capability and that it works.
  - Ensure long distance calls can be made from the phones that will be used during response.
  - Consider adding a satellite phone to the go-team in case cell coverage is unavailable.
- Review emergency manual entries on a regular basis for accurate contact names and numbers.
- Replace perishable items in go-kits on a regular basis. Extra dead batteries will not help.
- Consider, plan for and train personnel how to deal with immediate media inquiries.
- Plan hotel needs for team:
  - How many rooms
  - Who will reserve rooms
  - Consider security measures at hotel for team and equipment
- Consider and plan who will need identification/badge for on-site visits:
  - Go-team members
  - Company officers

- Legal counsel
- Third-party partners
- Agencies and clergy

Every member of the accident response team (go-team) should have a “go-kit” ready to go with the following items:

**Personal gear:**

- Personal protective equipment for biohazards
- Insect repellent
- Sunblock
- Basic first aid kit
- Gloves
- Weather-appropriate clothing and footwear
- Other safety equipment

**Identification and money access:**

- Company identification
- Passport
- Vaccination record
- Driver’s license
- Credit and ATM cards
- Expense forms

**General support items:**

- Cell phone
- Cell phone batteries and charger
- Digital camera with extra batteries
- Laptop computer with cellular wireless card, extra battery and charger
- At least one response member should have a satellite phone
- Batteries
- Instructions for use
- Emergency response manual
- Contact lists
- Notepads

#### **4. Media Relations at a Major Aviation Accident**

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##### **MEDIA RELATIONS AT A MAJOR AVIATION ACCIDENT Airlines and the NTSB**

If an airline experiences a major accident, that company will be confronted with many public relations challenges. This document has been prepared by the National Transportation Safety Board (NTSB or Safety Board) to help the airline public relations staff understand the Board's philosophy and procedures in the hours and days immediately following a major airline accident, and specifically to provide companies with guidance about parameters established by Safety Board procedures that an affected air carrier, as a party to the investigation, has agreed to follow.

The Safety Board understands and appreciates the multiple public affairs responsibilities that the air carrier faces when a major accident occurs. It is the policy of the Safety Board to work cooperatively with the public relations representatives of the affected carrier both as the air carrier and the NTSB are responding to the scene and at the scene of the accident, itself. However, it should be understood that the NTSB public affairs staff are few and until such time as a routine working relationship is established on-scene, it would benefit the carrier's representatives to seek out Safety Board public affairs staff for information, guidance and coordination.

Congress created the National Transportation Safety Board in 1967, charging it with, among other things, investigating all civil aviation accidents in the United States. In addition to determining probable cause, the Board issues safety recommendations in an effort to prevent future accidents. The Safety Board is an independent agency, not part of the Department of Transportation, and has no organizational connection to the Federal Aviation Administration (FAA).

For more than 30 years, the Board has conducted investigations under a party system, using experts from other agencies and organizations to provide expertise it does not or may not possess. By legislation, the FAA has the right to be a party to the investigation. All other parties are selected by the NTSB based on the Board's needs for that particular investigation. Generally some or all of the following groups will be parties to an investigation: the airline; the aircraft manufacturer; the engine manufacturer; unions representing the airline's pilots, flight attendants, machinists and dispatchers; the airport authority; the National Air Traffic Controllers Association; and local crash/fire/rescue authorities. Additional parties may be added as needed.

Upon being notified of a major accident, the Board dispatches a "go team" from Washington. The closest NTSB regional office will immediately respond to control the scene until the go team arrives. The team conducts an on-site investigation typically lasting anywhere from four to 10 days (some, notably ValuJet Flight 592 and TWA Flight 800, have lasted a substantially longer period of time). Sometimes there is a public hearing held near the accident location (usually about six months later), and the Board's final report is typically issued 12 to 24 months after the accident. Parties will be afforded the opportunity to provide the Safety Board with their findings, conclusions and analysis of the events of the accident, although they will not participate in developing NTSB's analysis or probable cause. Throughout this period, press and public interest can be relentless. It is important to know what areas of inquiry are appropriately answered by the airline, and which are to be answered by the Safety Board. A more detailed account follows.

##### **The First Few Hours**

The Board is almost always initially notified of a major aviation accident by the FAA's Operations Center in Washington. An evaluation is quickly made to determine the level of NTSB response. Sometimes, an accident can be handled by one of the Board's regional or field offices (list attached), but for most major airline accidents (both Part 121 and Part 135), a full go team is assembled. The team usually travels to the accident on a government aircraft, but occasionally flies commercial transportation.

Representatives of the Board's Public Affairs Office always accompany the go team. This office has an answering machine that during non-duty (evening and weekend) hours gives the home telephone number of the public affairs officer (PAO) on call. Therefore, someone can often be reached in an emergency.

Safety Board family support personnel also travel to the accident scene. They facilitate and integrate the resources of the federal government and other organizations to support the activities and efforts of the local and state government and the airline to meet the needs of victims and their families.

#### Airline Public Affairs Response

When an air carrier has been involved in an accident, we encourage one of its public relations representatives to call the NTSB's Public Affairs Office at (202) 314-6100. If the office is closed, the answering machine during the evening and on weekends will have the name and home number of the PAO on call; this individual will likely be the Board's primary press officer at the scene. A Safety Board PAO will attempt to contact a public relations representative from the airline in those initial hours after an accident.

#### **The Go Team**

The go team could consist of as many as a dozen or more NTSB investigators. The Investigator-in-Charge (IIC), a career employee of the Safety Board, manages the investigation. The investigative team is made up of NTSB investigators who are experts in various disciplines. Each of these investigators serves as a group chairman with representatives from the appropriate parties, including the airline, assigned to his or her group. Typically, groups are formed on scene in all or some of the following disciplines: structures, systems, power plants, operations, air traffic control, weather, survival factors, human performance, aircraft performance and witness interviews. Flight data recorder (FDR) and cockpit voice recorder (CVR) groups work out of NTSB headquarters in Washington.

In addition to the investigative teams, the NTSB group is also made up of support teams covering public affairs and family affairs. Press officers are dispatched to accompany go teams, sometimes with a Board member who serves as principal spokesperson. The IIC can also fulfill that responsibility. Safety Board legal officers may also provide support.

There are five members of the National Transportation Safety Board, nominated by the President and confirmed by the Senate to serve five-year non-concurrent terms. The members serve on go teams on a rotating basis and accompany the teams to serve as principal spokespersons for the investigation while on scene. It is the five Board members who, under law, will eventually analyze the factual information collected by the investigators to determine probable cause and issue safety recommendations.

If the aircraft was operated by a foreign carrier or is manufactured outside the United States, the foreign government authority will also be present in accordance with international agreement.

#### **At the Accident Scene**

The Safety Board immediately establishes a command post as close to the accident scene as possible, most often in a hotel. Press telephones are installed and those numbers are publicized as soon as they are known.

Once the go team arrives on scene, the Board holds an organizational meeting during which parties are designated and the investigative groups are defined. Every evening, a progress meeting will be held. Public relations representatives from the parties, attorneys and news media are not permitted in these meetings. The airline's party representative (known as the coordinator) should brief public relations staff on the progress of the investigation, but PR representatives should not hesitate to arrange to meet with NTSB PAOs on-scene on a regular basis. The initial meeting should be held as soon after the go team's arrival as possible.

It is during the organizational meeting that the parties agree to follow the Board's procedures, part of which affects airline PR staff. The IIC's standard prepared opening statement contains the following paragraph:

*"The Safety Board will disseminate to the public all information regarding the accident [investigation], either through our Board Member, public affairs officer, or me. We will hold regular briefings to the press. Please refrain from discussing the accident [investigation] in public, or giving information about it to the press. Any violation of this request will be considered a serious infraction of Board rules."*

This rule protects everyone. Typically, the NTSB conducts press briefings during the day and at night following the progress meeting. Only factual information – that all the parties have heard – is released. The NTSB does not speculate or give out unverified information. With all parties deferring to the Board to release information on the investigation, the team speaks in a coordinated, consistent and orderly manner. Through this procedure, competition for “spin” is thus minimized, and the maximum opportunity for coordination and cooperation among the parties is maintained.

The Board has no objection if the airline sends a public relations representative to the accident site. In fact, because there are many questions the press asks that we cannot or will not comment upon (see below), we encourage carriers to send public relations staff to the scene, keeping in mind the rules of participation. If the airline does send press representatives to the scene, we encourage that person to make contact as soon as possible with the NTSB PAO so that formal communication lines are established. It is the goal of the NTSB not to “blind side” anyone and to work cooperatively with the air carrier within the established guidelines. This is facilitated by regular discussions during the on-scene phase.

Access to the accident site is controlled by the NTSB. At a time deemed appropriate by the IIC, the press is usually escorted to a site close to the wreckage, either in total or represented by a pool. Under recent federal laws for protecting people from blood-borne pathogens, it has become increasingly more difficult to allow the press access to the accident site immediately.

### **What A Carrier Can Do**

The Safety Board is cognizant of the increasing pressures all of us are subjected to because of the changed nature of our news media. We do not wish to prevent an airline from assuring its customers, employees and the general public of their concern for the victims and their commitment to aviation safety.

We intend to give airline spokespersons latitude to meet the press and disseminate information, provided that such information does not interfere with the goals of our investigation and does not damage the integrity of the party process. Therefore, an airline should stay away from any judgments about the significance of issues, and nothing that is released should suggest that another party (or other entity) may have played a role in causing the accident. Remember, one benefit of our procedures is to prevent a party from offending—inadvertently or otherwise—another party and provoking a reaction in kind.

Admittedly, this is not a matter that lends itself to plain black and white assessments or rules. There is some factual information that is obviously related to the investigation that nevertheless can be released without compromising the integrity of the investigation or damaging the party system. For example, the date the aircraft was purchased is a fact we will need for our investigation, yet its revelation by you in the hours after the accident will not harm the investigation in any way and is therefore not prohibited under our regulations. Similarly, the release of the last date of major inspection or a description of the airline’s inspection program would be permitted, but a statement like “This aircraft has no maintenance issues relevant to this accident” would clearly be prohibited because it calls for a judgment that is not the carrier’s to make; that matter will be a subject of the investigation.

Information readily available to the public in the FAA data base may be released by the airline without first presenting it to the NTSB.

The following is a non-exhaustive list of what an airline may say following an accident and what it may not. There is no way all situations can be foreseen, but this list should provide a carrier with enough guidance that, combined with common sense and a commitment to our shared goal of promoting aviation safety, spokespersons should have a good idea of what is an appropriate post-accident response.

### **What Can Be Said**

In considering what would be appropriate to say, a carrier can start off with the concept that anything that could have been said the day before the accident can be said the day of the accident and thereafter. However, even this needs to

be carefully considered. In general, after giving the information to the NTSB, the airline should feel free to discuss the aircraft's registration number and history, and the pilots' training and work history, in general terms. Here are things that can definitely be discussed in a post-crash press conference:

#### The Aircraft:

- Registration and serial numbers
- Dates of manufacture and acquisition
- Cabin configuration and cargo capacity
- Systems aboard the aircraft (however, this could be troublesome as questions could easily lead a spokesperson to speculate on how these systems could have been used)
- When it last underwent a major inspection and its general inspection schedule
- Whether it is fly-by-wire or not
- How many of these aircraft are in the airline's fleet
- Manifest information like numbers of passengers aboard (in-lap infants if known) and cargo listed on the manifest

#### The Crew:

- Their names (and personal information like their ages)
- How long they've been employed by the carrier
- What aircraft they're type-rated for
- Where they were on their trip (the second day of the three-day trip, for example)
- What previous legs they flew that day and how long they'd been on duty
- (All of this information should be given by your company to the NTSB first under any circumstances.)

#### The Accident:

- When the airline was notified of the accident and how it responded, both with family matters and in providing support and cooperation to the NTSB in its investigation
- Only general circumstances of the accident should be discussed; for example, it was raining, the flight was on time or 30 minutes late, etc.

#### The Company:

- In general terms, factual information about your corporate philosophy and structure, and practices on training, maintenance and operations
- Company size, number of employees
- History (including previous accidents)
- Business alliance
- Size and makeup of aircraft fleet

#### Family Assistance:

Virtually anything connected with this is well within the carrier's purview for post-accident press conferences at any time. An airline should feel free to discuss its family disaster plan and publicize its toll-free number. Carriers are strongly encouraged to keep the media informed about the carrier's progress in contacting family members of the passengers and crew involved in the accident. For example, let the media know that 24 families of the 120 passengers have been contacted. An hour later, the airline could report that 52 families have been contacted. Such reports should continue until all passengers' families have been contacted.

#### **What the Airline Shouldn't Say**

#### The Aircraft:

- Characterizations of what is in the maintenance records or any other characterization that calls for a judgment or implies involvement or non-involvement in the accident
- Any speculation about the possible role the plane's components might have played
- Any discussion of wreckage patterns or aircraft breakup

#### The Crew:

- Actions of the crew leading up to the accident
- Any relationship between crew training and the accident
- Any speculation about what the crew might have done or not done during the accident sequence or to prevent the accident
- While there's nothing wrong with saying the captain is a good pilot (why else would you employ him or her?), stay away from statements that suggest the unlikelihood of the crew doing something wrong, or that implicitly or explicitly point fingers at others

#### The Accident:

- Descriptions of the plane's "final moments"
- What the investigation will focus on or how it will be structured
- Descriptions about wreckage path or suppositions about break-up sequence
- Announcements about finding flight recorders and how they will be handled
- Descriptions of airport equipment and capabilities
- Speculation on the role elements like the weather or air traffic control might have played in the accident
- No judgments about what the issues in the investigation are going to be and nothing that implicitly or explicitly points the finger at another potential party to the investigation

#### Family Assistance:

Avoid commenting on areas that the medical examiner or coroner should officially address. Such areas include:

- Identification procedures and length of time it may take to complete all positive identifications
- The search and recovery process
- Condition of recovered remains
- It is also important to let the medical examiner or coroner officially release the names of the fatalities that have been positively identified. Once this information is released by the medical examiner/coroner, the carrier is free to discuss this with the media.

While the Safety Board does not officially prohibit parties from providing spokespersons on morning or evening news and interview programs, as the investigation progresses it generally will be less and less appropriate for an airline to do so.

#### **Family Assistance: The Airline and the NTSB**

At all times following an accident—both on-scene and in the months that follow—public discussion by the airline about what it is doing in the area of family affairs is appropriate.

Immediately after it is known that an accident has occurred, the involved airline starts the process of notifying families of the passengers and crew. It is the airline's prerogative to determine how often and in what manner it wishes to brief the public on its efforts to support the survivors and the families of those involved.

While the airline will always be the primary source of public information on these matters, the Safety Board's family assistance officer will probably be asked to disseminate information on the Board's interaction with the airline and other supporting organizations, the medical examiner and the families.

## **After the On-Scene Investigation**

When the Board shuts down its on-scene press activity, the press officers return to Washington and issue any information from there. Several days after that, the investigators themselves come home.

There are a few significant milestones during the course of the investigation. First, several months after the accident, when we have verified the contents of the certified transcript of the air traffic control communications, we will authorize the FAA to release the recorded ATC communications and transcript to the public. These are not to be confused with the CVR tape, the audio portion of which is never authorized to be released to the public by the NTSB. The original CVR tape is always returned to the airline. The transcript is released by the NTSB when it opens the public docket—months after the accident.

In an effort to collect additional information from sworn witnesses, the Board sometimes holds a public hearing (or, less often, staff-conducted depositions). The hearing is typically held near the accident location, usually around six to eight months after the accident. The factual reports from the various investigative groups, as well as the transcript of the pertinent portions of the CVR, are released on the first day of the hearing. If no hearing is held, those documents are released in a public docket from the Board's Washington headquarters, again about six months after the accident.

Toward the end of the process, parties have an opportunity to submit to the Board (and provide to all other parties) their proposed conclusions, findings of probable cause and safety recommendations. There are no restrictions on public release of these documents, although traditionally parties have tended not to discuss them until the time of the Board meeting.

Eventually, the Board members discuss and vote upon a final report on the investigation—the draft of which is prepared by NTSB staff—in a public “Sunshine” meeting (so named after the government in the Sunshine Act). The final report is the vehicle through which the Board determines the probable cause of the accident and announces its safety recommendations (although recommendations can be issued at any time during the investigation). An abstract of the conclusions, probable cause and safety recommendations is issued within an hour of the end of the meeting and placed on the Board's website. The full report will appear on the website some weeks after the meeting, with printed copies available a few weeks after that.

During all of these post-accident-scene events, an airline will be asked by the media to comment on the information released. As a party to the investigation, the carrier cannot speculate as to the cause of the accident or offer analysis of the factual information. Keep in mind at all times the guidance in our regulations, Part 831.13, Chapter 49 of the Code of Federal Regulations, “Provision and dissemination of accident or incident information:”

*All information concerning the accident or incident obtained by any person or organization participating in the investigation shall be passed to the IIC through appropriate channels before being provided to any individual outside the investigation...[N]o information concerning the accident or incident may be released to any person not a party representative to the investigation...before initial release by the Safety Board without prior consultation and approval of the IIC.*

## **Accidents Overseas**

Under international treaty obligations, the Safety Board provides the US Accredited Representative to accidents occurring in foreign territories involving aircraft of US design, manufacture, registration or operator, or having major U.S.-made components. The airline's participation in these investigations will be under the NTSB accredited representative and will function as a technical advisor. Only the investigating nation may release information on the findings of the investigation.

Therefore, the Safety Board refers inquiries to that country's investigating agency, and an airline would be required to do the same.

### **Summary**

The NTSB was established in 1967. Since that time, we've investigated more than 110,000 aviation accidents.

We are a public agency, doing the public's business. Our release-of-information procedures have worked well for decades. We hope an airline never needs the information in this document, but please do not hesitate to contact us if more assistance is needed.

## 5. NTSB Document Collection/Production

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### NTSB Document Collection/Production

Collecting and producing documents to the NTSB can be one of the most difficult efforts a party will undertake immediately following an accident. It is also an area where mistakes are frequently made. The NTSB will apply heavy pressure for prompt production of key documents, sometimes with multiple requests to multiple party employees. Notwithstanding this urgency, it is critical that you control and protect the flow of documents. The key is to have a single point of contact for documents and establish a system by which documents can quickly be found, logged, digitized, marked confidential and produced to the NTSB. All requests for documents should flow through a single person and all group participants should be instructed that they are not to produce anything to the NTSB directly.

The person in charge of documents should direct the collection of key documents, assemble the documents, log them into a production log, stamp or watermark them as confidential and arrange for their production to the NTSB. If possible, all documents should be digitized. Once that is done, a PDF watermark can be applied identifying documents that should not be released by the NTSB to the public. Regulations require that each page of a confidential document be so designated. If a confidential document is produced in hard copy, each page of the document must be stamped confidential. While a generic "Confidential" stamp will suffice, we recommend a stamp or watermark that says:

**Trade Secret and/or  
Confidential Commercial Information  
[Company Name]**

***The standard for whether a document should be designated as confidential is whether it is "of a kind that would customarily not be released to the public."*** *Critical Mass Energy Project v. Nuclear Reg. Comm'n*, 975 F.2d 871 (D.C. Cir. 1992 (en banc)). This is the most liberal of the court rulings on this topic. While the NTSB may later argue that another standard applies, the use of this standard in the beginning will prevent you from producing documents that may be protected from public disclosure under federal law. Once designated as confidential, the NTSB must advise you that it wishes to disclose the document publically. When in doubt, it is better to designate a document as confidential. You can always waive that designation later. If a document is not readily available to the public, we recommend that you designate it as confidential.

#### Quick Summary:

- Make one person responsible for producing all documents to NTSB
- If a document is not readily available to the public, mark each page confidential
- If possible, digitize all documents before producing them
- Log all documents before producing to NTSB and keep a copy

#### Identifying and Isolating Key Documents

The NTSB provides its investigators with checklists of key documents, organized by investigation group. The list that appears below is adapted from those checklists. Not all of these documents will be relevant to every accident, but you should immediately isolate all of these documents to the extent you believe they may be relevant to your accident.

#### Operations/Training

1. Airline Operations Specifications
2. Operations Manual
3. Aircraft Flight Manual
4. Flight Attendant Manual
5. Ground Operations Manual
6. Weight & Balance Manual

7. Training Program Manuals (Flight Crew, Cabin Crew, Dispatch, Maintenance)
8. Training Materials and Syllabi (Flight Crew, Cabin Crew, Dispatch, Maintenance)
9. Check Airman Manual
10. Dispatch/Flight Following Manual
11. Minimum Equipment List (MEL)/Configuration Deviation List (CDL) Manual
12. Performance Manual
13. Ground School/Simulator Instructor Manual
14. Company Organizational Chart
15. Checklists (Normal and Emergency)
16. Quick Reference Handbook
17. Safety Briefing Card
18. Service Difficult Reports for Cabin Safety Equipment
19. Cockpit Panels
20. Company Pilot Bulletins in Effect
21. Dispatch/Flight Release
22. Weather Package provided to crew
23. Aircraft Maintenance Log
24. Aircraft Communications, Addressing, and Reporting System (ACARS) Communications
25. Computer Flight Plan
26. Current Navigational Charts and Approach Plates
27. Notice to Airmen (NOTAMs)
28. De-Icing Records
29. Weight & Balance/Load Manifest
30. Cargo Manifest
31. Passenger Manifest
32. Fuel and Oil Records
33. Documentation of Flight Crew Pre-Employment Checks
34. Personnel Records for Crew, Dispatcher and other involved employees
35. Training Records for Crew, Dispatcher and other involved employees
36. Duty Schedules for Crew, Dispatcher and other involved employees
37. Documentation of Toxicological Testing
38. Toxicological Test Results
39. DOD Audit Records
40. International Air Transport Association Operational Safety Audit (IOSA) Records
41. Air Transportation Oversight System (ATOS) Job Aids/Audits

## **Maintenance**

1. Parts "D" and "E" of the Operating Specifications
  - a. General aircraft maintenance requirements
  - b. Short-term escalation authorization
  - c. Leased aircraft maintenance program (U.S.)
  - d. Leased aircraft maintenance program (foreign)
  - e. Parts-borrowing authorization/program
  - f. ETOPS maintenance program authorization
  - g. Maintenance inspection time limitations
  - h. Minimum equipment list and configuration deviation list authorization/program
2. The operator's General Maintenance Manual
3. Aircraft Maintenance Manual and Relevant Component Maintenance Manuals
4. A copy of the general airframe manuals

5. A diagram (with names) showing the structure of the maintenance management system. This diagram should delineate management positions down to the level of shop supervisor for each shop (e.g., avionics, engines, etc.)
6. A list of all maintenance and non-maintenance bases (to include the maintenance level classification of each base).
7. A list of all contract maintenance providers (to include maintenance level authorizations and the primary point of contact at each station).
8. A copy of the components repetitive inspection list for the accident aircraft model list component inspections by ATA code.
9. A copy of the conditional inspections list for the model aircraft involved in the accident. (These inspections are only performed when the aircraft has experienced some uncommon condition, e.g., severe turbulence, hard landing, flap over speed, etc.)
10. A list of all of the operator's aircraft by make, model and tail number.

**Collect the following items for the accident aircraft:**

1. Aircraft maintenance logs for the last 90 days. Make sure to record the station identifier, mechanic's identification number and ATA chapter code for any suspicious write-up or corrective action.
2. Aircraft maintenance history data printout for the last 120 days. Print out this history by an ATA code and for any time period that you feel is important.
3. All non-routine work cards for the last periodic check and for the last "D" or "C" level Heavy Check. For a transport category aircraft, there will probably be hundreds of cards from a "C" or "D" check.
4. All overhaul records for the aircraft's engines, propellers and primary system components.
5. Routine work cards. If there is a suspect system or component, the routine work cards signed off during the last applicable inspection should be requested. Each action box on the relevant card should be reviewed for inspection findings and corrective actions taken.
6. Conditional inspection history for life of aircraft. Because these inspections are only performed if the aircraft has experienced a special or unusual condition, it is important to search the work cards for evidence of damage and repairs.
7. Contract maintenance before final flight. Talk directly to the contract shop supervisor to determine if maintenance was performed.
8. Aircraft damage report. This might be the only place that will say if the aircraft was damaged while out of service (e.g., service truck colliding with engine pylon while aircraft is parked at gate overnight).
9. List of major repairs and alterations.
10. A list of all Supplemental Type Certificate (STC) work that has been accomplished on the accident aircraft.
11. Engine condition monitoring data for the last 30 days. There may be a formal or informal program or just untracked data recorded on the daily aircraft maintenance log.
12. Engine change log. This log will show you which aircraft within the fleet the engines on the accident aircraft have been on in the past. If there is a suspect engine, you can review its maintenance history (by engine ATA code) for the period it was on the previous aircraft.
13. Engine and airframe vibration monitoring data.
14. List of MEL/CDL items currently being carried on the accident aircraft. Determine from the master MEL the category (A, B, C or D) of any carried items, and whether any B or C category items are on an extension.
15. List of all Airworthiness Directives (ADs) for the accident aircraft. Confirm compliance date and methods.

16. Service difficulty reports (SDR) or maintenance defect reports (MDR) for any suspect component. Data may be obtained through the local Flight Standards District Office (FSDO) or by calling 405.954.6509. Be very specific and narrow the request as much as possible (there may be thousands of MDRs for a specific model of aircraft.)
17. List of service bulletins/letters, by title, that apply to the accident aircraft and its components.
18. List of cancellations/diversions/deviations for the accident aircraft (and all others of the same model) for the last six months. If possible, have data listed separately for each maintenance base.
19. Weight and balance sheet. If weight or cg might an issue, check the compliance date, location and method used for the last weight and balance check. If electronic scales were used, check the method and date of calibration and certification.
20. Import and return-to-service documentation. If the accident aircraft or its engines were imported from a foreign country in the recent past, review all import process documentation and the actions taken qualifying the aircraft to be returned to service. You may have to contact and possibly interview the involved designated airworthiness representative (DAR) who handled this process. You may also need to contact the FAA office that provided oversight of the DAR.
21. Maintenance training program. Collect in-house training program documentation for engine, airframe and systems, to include curriculum, instructor qualification/training, participation percentage, recurrent training, training on special systems and record-keeping.

**6. NTSB Form 6120.1 – Pilot/Operator Aircraft Accident/Incident Report**

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[INSERT FORM]























**7. 49 CFR §830: Notification and Reporting of Aircraft Accidents or Incidents and Overdue Aircraft, and Preservation of Aircraft Wreckage, Mail, Cargo and Records**

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**TITLE 49—TRANSPORTATION  
CHAPTER VIII--NATIONAL TRANSPORTATION SAFETY BOARD  
PART 830 NOTIFICATION AND REPORTING OF AIRCRAFT ACCIDENTS OR INCIDENTS**

**Subpart A—General**

**§830.1 Applicability.**

This part contains rules pertaining to:

- (a) Initial notification and later reporting of aircraft incidents and accidents and certain other occurrences in the operation of aircraft, wherever they occur, when they involve civil aircraft of the United States; when they involve certain public aircraft, as specified in this part, wherever they occur; and when they involve foreign civil aircraft where the events occur in the United States, its territories, or its possessions.
- (b) Preservation of aircraft wreckage, mail, cargo, and records involving all civil and certain public aircraft accidents, as specified in this part, in the United States and its territories or possessions.

[60 FR 40112, Aug. 7, 1995]

**§830.2 Definitions.**

As used in this part the following words or phrases are defined as follows:

*Aircraft accident* means an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage. For purposes of this part, the definition of “aircraft accident” includes “unmanned aircraft accident,” as defined herein.

*Civil aircraft* means any aircraft other than a public aircraft.

*Fatal injury* means any injury which results in death within 30 days of the accident.

*Incident* means an occurrence other than an accident, associated with the operation of an aircraft, which affects or could affect the safety of operations.

*Operator* means any person who causes or authorizes the operation of an aircraft, such as the owner, lessee, or bailee of an aircraft.

*Public aircraft* means an aircraft used only for the United States Government, or an aircraft owned and operated (except for commercial purposes) or exclusively leased for at least 90 continuous days by a government other than the United States Government, including a State, the District of Columbia, a territory or possession of the United States, or a political subdivision of that government. “Public aircraft” does not include a government-owned aircraft transporting property for commercial purposes and does not include a government-owned aircraft transporting passengers other than: transporting (for other than commercial purposes) crewmembers or other persons aboard the aircraft whose presence is required to perform, or is associated with the performance of, a governmental function such as firefighting, search and rescue, law enforcement, aeronautical research, or biological or geological resource management; or transporting (for other than commercial purposes) persons aboard the aircraft if the aircraft is operated by the Armed Forces or an intelligence agency of the United States. Notwithstanding any limitation relating to use of the aircraft for commercial purposes, an aircraft shall be considered to be a public aircraft without regard to whether it is operated by a unit of government on behalf of another unit of government pursuant to a cost reimbursement agreement, if the unit of

government on whose behalf the operation is conducted certifies to the Administrator of the Federal Aviation Administration that the operation was necessary to respond to a significant and imminent threat to life or property (including natural resources) and that no service by a private operator was reasonably available to meet the threat.

*Serious injury* means any injury which: (1) Requires hospitalization for more than 48 hours, commencing within 7 days from the date of the injury was received; (2) results in a fracture of any bone (except simple fractures of fingers, toes, or nose); (3) causes severe hemorrhages, nerve, muscle, or tendon damage; (4) involves any internal organ; or (5) involves second- or third-degree burns, or any burns affecting more than 5 percent of the body surface.

*Substantial damage* means damage or failure which adversely affects the structural strength, performance, or flight characteristics of the aircraft, and which would normally require major repair or replacement of the affected component. Engine failure or damage limited to an engine if only one engine fails or is damaged, bent fairings or cowling, dented skin, small punctured holes in the skin or fabric, ground damage to rotor or propeller blades, and damage to landing gear, wheels, tires, flaps, engine accessories, brakes, or wingtips are not considered "substantial damage" for the purpose of this part.

*Unmanned aircraft accident* means an occurrence associated with the operation of any public or civil unmanned aircraft system that takes place between the time that the system is activated with the purpose of flight and the time that the system is deactivated at the conclusion of its mission, in which:

- (1) Any person suffers death or serious injury; or
- (2) The aircraft has a maximum gross takeoff weight of 300 pounds or greater and sustains substantial damage.

[53 FR 36982, Sept. 23, 1988, as amended at 60 FR 40112, Aug. 7, 1995; 75 FR 51955, Aug. 24, 2010]

## **Subpart B—Initial Notification of Aircraft Accidents, Incidents, and Overdue Aircraft**

### **§830.5 Immediate notification.**

The operator of any civil aircraft, or any public aircraft not operated by the Armed Forces or an intelligence agency of the United States, or any foreign aircraft shall immediately, and by the most expeditious means available, notify the nearest National Transportation Safety Board (NTSB) office,<sup>1</sup> when:

<sup>1</sup>NTSB headquarters is located at 490 L'Enfant Plaza SW., Washington, DC 20594. Contact information for the NTSB's regional offices is available at <http://www.nts.gov>. To report an accident or incident, you may call the NTSB Response Operations Center, at 844-373-9922 or 202-314-6290.

- (a) An aircraft accident or any of the following listed serious incidents occur:
  - (1) Flight control system malfunction or failure;
  - (2) Inability of any required flight crewmember to perform normal flight duties as a result of injury or illness;
  - (3) Failure of any internal turbine engine component that results in the escape of debris other than out the exhaust path;
  - (4) In-flight fire;
  - (5) Aircraft collision in flight;
  - (6) Damage to property, other than the aircraft, estimated to exceed \$25,000 for repair (including materials and labor) or fair market value in the event of total loss, whichever is less.
  - (7) For large multiengine aircraft (more than 12,500 pounds maximum certificated takeoff weight):

- (i) In-flight failure of electrical systems which requires the sustained use of an emergency bus powered by a back-up source such as a battery, auxiliary power unit, or air-driven generator to retain flight control or essential instruments;
  - (ii) In-flight failure of hydraulic systems that results in sustained reliance on the sole remaining hydraulic or mechanical system for movement of flight control surfaces;
  - (iii) Sustained loss of the power or thrust produced by two or more engines; and
  - (iv) An evacuation of an aircraft in which an emergency egress system is utilized.
- (8) Release of all or a portion of a propeller blade from an aircraft, excluding release caused solely by ground contact;
- (9) A complete loss of information, excluding flickering, from more than 50 percent of an aircraft's cockpit displays known as:
- (i) Electronic Flight Instrument System (EFIS) displays;
  - (iii) Engine Indication and Crew Alerting System (EICAS) displays;
  - (iv) Electronic Centralized Aircraft Monitor (ECAM) displays; or
  - (v) (Other displays of this type, which generally include a primary flight display (PFD), primary navigation display (PND), and other integrated displays;
- (10) Airborne Collision and Avoidance System (ACAS) resolution advisories issued when an aircraft is being operated on an instrument flight rules flight plan and compliance with the advisory is necessary to avert a substantial risk of collision between two or more aircraft.
- (11) Damage to helicopter tail or main rotor blades, including ground damage, that requires major repair or replacement of the blade(s);
- (12) Any event in which an operator, when operating an airplane as an air carrier at a public-use airport on land:
- (i) Lands or departs on a taxiway, incorrect runway, or other area not designed as a runway; or
  - (ii) Experiences a runway incursion that requires the operator or the crew of another aircraft or vehicle to take immediate corrective action to avoid a collision.
- (b) An aircraft is overdue and is believed to have been involved in an accident.

[53 FR 36982, Sept. 23, 1988, as amended at 60 FR 40113, Aug. 7, 1995; 75 FR 927, Jan. 7, 2010; 75 FR 35330, June 22, 2010; 80 FR 77587, Dec. 15, 2015]

**§830.6 Information to be given in notification.**

The notification required in §830.5 shall contain the following information, if available:

- (a) Type, nationality, and registration marks of the aircraft;
- (b) Name of owner, and operator of the aircraft;
- (c) Name of the pilot-in-command;
- (d) Date and time of the accident;
- (e) Last point of departure and point of intended landing of the aircraft;
- (f) Position of the aircraft with reference to some easily defined geographical point;
- (g) Number of persons aboard, number killed, and number seriously injured;
- (h) Nature of the accident, the weather and the extent of damage to the aircraft, so far as is known; and
- (i) A description of any explosives, radioactive materials, or other dangerous articles carried.

## Subpart C—Preservation of Aircraft Wreckage, Mail, Cargo, and Records

### §830.10 Preservation of aircraft wreckage, mail, cargo, and records.

- (a) The operator of an aircraft involved in an accident or incident for which notification must be given is responsible for preserving to the extent possible any aircraft wreckage, cargo, and mail aboard the aircraft, and all records, including all recording mediums of flight, maintenance, and voice recorders, pertaining to the operation and maintenance of the aircraft and to the airmen until the Board takes custody thereof or a release is granted pursuant to §831.12(b) of this chapter.
- (b) Prior to the time the Board or its authorized representative takes custody of aircraft wreckage, mail, or cargo, such wreckage, mail, or cargo may not be disturbed or moved except to the extent necessary:
  - (1) To remove persons injured or trapped;
  - (2) To protect the wreckage from further damage; or
  - (3) To protect the public from injury.
- (c) Where it is necessary to move aircraft wreckage, mail or cargo, sketches, descriptive notes, and photographs shall be made, if possible, of the original positions and condition of the wreckage and any significant impact marks.
- (d) The operator of an aircraft involved in an accident or incident shall retain all records, reports, internal documents, and memoranda dealing with the accident or incident, until authorized by the Board to the contrary.

## Subpart D—Reporting of Aircraft Accidents, Incidents, and Overdue Aircraft

### §830.15 Reports and statements to be filed.

- (e) Reports. The operator of a civil, public (as specified in §830.5), or foreign aircraft shall file a report on Board Form 6120. 1/2 (OMB No. 3147-0001)<sup>2</sup> within 10 days after an accident, or after 7 days if an overdue aircraft is still missing. A report on an incident for which immediate notification is required by §830.5(a) shall be filed only as requested by an authorized representative of the Board.

<sup>2</sup>Forms are available from the Board field offices (see footnote 1), from Board headquarters in Washington, DC, and from the Federal Aviation Administration Flight Standards District Offices.
- (f) Crewmember statement. Each crewmember, if physically able at the time the report is submitted, shall attach a statement setting forth the facts, conditions, and circumstances relating to the accident or incident as they appear to him. If the crewmember is incapacitated, he shall submit the statement as soon as he is physically able.
- (g) Where to file the reports. The operator of an aircraft shall file any report with the field office of the Board nearest the accident or incident.

[53 FR 36982, Sept. 23, 1988, as amended at 60 FR 40113, Aug. 7, 1995]

## Families & Employees

### **8. Overview of the Aviation Disaster Family Assistance Act**

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#### **OVERVIEW OF THE AVIATION DISASTER FAMILY ASSISTANCE ACT**

Efforts by family members who lost loved ones in aviation crashes have led to the development of a coordinated response to assist family members in the aftermath of mass-fatality events. The families approached the NTSB and shared their stories about the way they were treated after losing their loved ones in aviation crashes. The families expressed the need for one agency to lead a coordinated crisis response to reduce the chaos they had experienced.

While every mass-fatality event presents unique challenges, all present the constant challenge of trying to provide for the basic needs of the victims' family members. This challenge is best met through the designation of a single entity responsible for coordinating the myriad efforts brought to bear in the wake of an aviation disaster.

On September 9, 1996, then-President Clinton, in a Memorandum on Assistance to Families Affected by Aviation and Other Transportation Disasters, designated the NTSB as the coordinator of federal services to victims and their families in major transportation disasters. As the designated responsible agency, the NTSB ensures that the following family services will be provided in a sensitive and timely manner: notification of the accident, updates about search and recovery efforts, updates about the investigation, delivery of mental health support and establishment of a place in which victims' families can grieve in private.

Families affected by past aviation disasters became the driving force behind the creation of new legislation called the Aviation Disaster Family Assistance Act of 1996 (49 U.S.C. § 1136). Family members were asked to participate on a task force designed to determine the best methods for treating and better assisting the victims of major aviation accidents and their families. The task force generated over 60 recommendations that were presented to the federal government, the airline industry and other organizations.

Pursuant to the Act, the NTSB created the Office of Family Affairs, known now as the Office of Transportation Disaster Assistance, and assigned it the responsibility for coordinating the provision of federal services to victims and their families after major aviation disasters. The coordination for these services is outlined in the NTSB's Federal Family Assistance Plan for Aviation Disasters. A summary of the victim support tasks performed by various agencies follows.

#### **National Transportation Safety Board**

- Coordinates federal assistance efforts with local and state authorities.
- Coordinates and conducts briefings for victims' families to provide information about resources for recovery, progress of the investigation, and identification of victims and their personal effects and belongings.
- Coordinates with the investigator in charge of the accident and local and state authorities to try to arrange a family visit to the crash site or to an appropriate alternative site.

#### **Airline**

- Notifies the families of passengers in a timely manner that their relatives may have been on the flight.
- Secures a facility to establish a family assistance center in which family members can receive investigative updates, support and protection from the media.
- Supports logistically those family members who want to travel to the accident city and maintains contact with the families who stay at home.

#### **American Red Cross**

- Coordinates the mental health services and emotional care and support for families as designated by NTSB.
- Manages and coordinates volunteer and support services.

- Arranges suitable interfaith memorial services.

#### **U.S. Department of Health and Human Services, supported by U.S. Department of Defense**

- Assists with victim identification, mortuary support and the setup of temporary morgue facilities if the medical examiner or coroner reports insufficient resources to support the operation.
- Provides experienced personnel to collect antemortem information from the victims' next of kin.
- Assists the designated medical examiner or coroner with notifying victims' families of positive identification, providing particular expertise in explaining how identification was made.

#### **U.S. Department of State**

- Assists foreign families and interested parties with translations.
- Aids with collection of antemortem medical and dental radiographs and records from non-U.S. passengers.
- Assists in returning the deceased to their native countries.

#### **Federal Emergency Management Agency**

- Provides communications assets in the event the accident site is in a remote location and there is no way to convey information.
- Provides personnel to assist with disseminating public information.
- Assists in the event of an urban aviation disaster.

#### **U.S. Department of Justice**

- Provides, on request, the FBI Disaster Squad to assist local jurisdictions with fingerprint identification for criminal and noncriminal events.
- Provides information, through the Office for Victims of Crime, to victims of criminal acts and their families about programs to which they are entitled.

Along with assigning responsibilities for various tasks, the Aviation Disaster Family Assistance Act also prohibits unsolicited communication concerning a potential lawsuit. Under the Act, no unsolicited communication concerning a potential action for personal injury or wrongful death may be made by an attorney (including any associate, agent, employee or other representative of an attorney) or any potential party to the litigation to an individual injured in the accident, or to a relative of an individual involved in the accident, before the 45th day following the date of the accident. This provision protects victims and families from unscrupulous operators who might attempt to take advantage of a family member's vulnerable state of mind.

Prior to passage of the Aviation Disaster Family Assistance Act, the families of people killed or injured in a commercial aircraft accident had been primarily assisted by the involved airline. Often local and state agencies, including volunteer organizations, also responded, but oftentimes the effort was uncoordinated. While the airline remains a major participant, the NTSB is now able to apply federal resources to augment local and state efforts and coordinate the overall family assistance support system. The act has resulted in a greatly improved system for aiding the families of disaster victims.

**9. Federal Family Assistance Plan for Aviation Disasters – NTSB 2008**

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[insert Federal Family Assistance Plan for Aviation Disasters]























































































































































## 10. Insurance/Benefit Coverage Levels/Actions

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### INSURANCE & BENEFIT COVERAGE LEVELS & ACTIONS

- **Aircraft Hull – Review policy for**
  - Eligible benefit recipients
  - Personal effects - \$ amount of coverage for:
    - Computer
    - Family heirlooms
    - Jewelry
    - Watches
    - Clothes
    - Etc.
    - Medical expenses and/or funeral, as appropriate
    - Transportation of remains
- **Crisis Response – Review to see if this coverage is secondary to any other applicable coverage for the event**
  - \$ amount aggregate/accident
  - Executive transportation to the scene
  - Funeral expenses
  - Psychological counseling
  - Any pre-approved expense
- **Workers' Compensation – Need to review for applicable state(s)**
  - Review for offsets
  - \$ amount of benefit
  - Disposition of spouse benefit upon remarriage
  - Length of dependent child benefit
  - Transportation of remains - \$ amount maximum
  - Burial expense - \$ amount maximum
- **Social Security**
  - Lump sum death benefit
  - Monthly income benefit for spouse, if applicable, until remarriage
  - Monthly income benefit for dependents, if applicable
- **Business Travel Accident**
  - Lump sum or periodic payment of death benefit to beneficiary
  - \$ amount of coverage
  - Minimum
  - Maximum
  - Determine any other benefit provisions
- **Basic Life Insurance**
  - \$ amount
  - Maximum \$ amount
  - Determine how proceeds are paid (i.e., to draft account, check, etc.)
- **Supplemental Life Insurance**
  - \$ amount
  - Maximum \$ amount
  - Premium waiver may apply, if disabled
  - Determine how proceeds are paid
  - Determine if spouse and dependent coverage end as a result of the employee's death

- **Accidental Death and Dismemberment Insurance**
  - \$ amount
  - Maximum \$ amount
  - Additional situational benefits may apply (i.e., seat belt usage)
  - Determine if benefit includes a pro-rated schedule
  - Some plans offer education and child care benefit for surviving spouse and children
- **Disability (in the event of disability)**
  - Short-Term Disability
  - Long-Term Disability
- **Medical**
  - COBRA coverage begins the first of the month following employee's death
  - Company may pay COBRA for XX months following the employee's death for dependents at the time of the death
- **Dental**
  - COBRA coverage begins the first of the month following employee's death
  - Company may pay COBRA for XX months following the employee's death for dependents at the time of the death
- **Vision**
  - COBRA coverage begins the first of the month following employee's death
  - Company may pay COBRA for XX months following the employee's death for dependents at the time of the death
- **401(k)**
  - Contributions cease immediately, as pay is not going to an eligible employee
  - Account transfers to beneficiary(ies)
- **Pension Plan**
  - Determine the effective date of benefit payout based on plan rules
- **Stock Incentive Plan**
  - Determine payout based on plan rules
- **Employee Discount or other privileges**
  - Determine date of discontinuation
- **Company Car**
  - Determine the process for return of the vehicle
- **Car Allowance**
  - Determine whether the car allowance will be continued

## 11. Response Team Wellness Management

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### RESPONSE TEAM WELLNESS MANAGEMENT PERSONAL WELL-BEING – QUICK REFERENCE

#### What is Well-Being and Why is it Important?

Well-being is a combination of mind, body and spirit that, when healthy and in balance, allows us to live our lives as we choose. It is how we manage our feelings and behaviors, how we make decisions, and how we interact with others.

Well-being is important because it is impacted during times of great stress, such as responding to an airline disaster. The hours you will work and what you do will be different from your normal routine. It will be easy to get “out of balance,” which could negatively impact you, your relationships, and your health.

Having an awareness of the causes and signs of stress, knowing coping strategies, and understanding where to get help during a disaster can help keep you “in-balance.” It won’t make the response easy or stress-free, but it will allow you to cope in a positive and healthy manner.

Why is this important? Statistics show that 60 to 70 percent of people involved in an airline accident that do not get help to deal with the stress leave their aviation career within two years of the event.

What should I do? Use the Coping Strategies Self-Assessment (in the following pages), understand stress and how it can affect you, manage your well-being during an investigation, and continue to monitor your well-being after the investigation is complete.

#### Common Signs of Stress

- Emotional/behavioral signs include:
  - Depression, fear
  - Changes in life routines such as sleeping, eating and exercise
  - Increased use of alcohol, cigarettes or drugs
- Physical signs include:
  - Grinding your teeth
  - Headaches, neck aches
  - Stomach disorders
  - Muscle tension
  - Twitching

#### What You Can Do About It

- Develop positive coping strategies NOW
  - Fill out a Coping Strategies Self-Assessment and set a goal to raise your score
  - Maintain a supportive group of friends to socialize with regularly
  - Pursue a hobby or a sport you enjoy
  - Laugh frequently
  - Limit alcohol, sugar, caffeine tobacco
- During and following a catastrophic response
  - Call home
  - Continue your regular exercise program
  - Try to keep your regular sleep schedule
  - Use Employee Assistance Program, or critical incident response volunteers
  - Do not make big life changes or major decisions during the investigation or for some time after a major event
  - Designate a friend or family member to assist your family when needed
  - If troubling thoughts about the event continue unabated after 30 to 45 days, seek help

## COPING STRATEGIES SELF-ASSESSMENT

Directions: There are many ways to cope with the stress in your life. Some techniques are more effective than others are. The purpose of this checklist is to help you assess how effectively you are currently coping. Upon completing this checklist, you will have identified many of the ways you choose to cope, and, by adding up the numbers, you will see if your method is helping you or hurting you.

Scores are all or nothing (ex. 0 or 10 points). When you have completed and scored all 16 items, tally your final score.

- \_\_\_\_\_ Give yourself 10 points if you feel you have a supportive family.
- \_\_\_\_\_ Give yourself 10 points if you actively pursue a hobby.
- \_\_\_\_\_ Give yourself 10 points if you belong to a group, outside of work, that meets at least once a month (other than your family).
- \_\_\_\_\_ Give yourself 15 points if you are within five pounds of your "ideal" bodyweight, considering your height and bone structure.
- \_\_\_\_\_ Give yourself 15 points if you practice some form of "deep relaxation" at least three times a week. Deep relaxation includes meditation, imagery, yoga, etc.
- \_\_\_\_\_ Give yourself 5 points for each time you exercise 30 minutes or longer during the course of an average week.
- \_\_\_\_\_ Give yourself 5 points for each nutritionally balanced and wholesome meal you consume during the course of an average day.
- \_\_\_\_\_ Give yourself 10 points if you, on average, have no more than one caffeinated drink a day.
- \_\_\_\_\_ Give yourself 10 points if you have some place in your home that you can go to in order to relax and be by yourself.
- \_\_\_\_\_ Give yourself 10 points if you practice time management techniques in your daily life.
- \_\_\_\_\_ Subtract 10 points for each pack of cigarettes you smoke during the course of an average day.
- \_\_\_\_\_ Subtract 10 points for each day during the course of an average week you watch three hours or more of television or spend three or more hours surfing the Internet.
- \_\_\_\_\_ Subtract 10 points for each day during the course of an average week you consume any form of medication or chemical substance (including alcohol) to reduce your anxiety or calm yourself down.
- \_\_\_\_\_ Subtract 10 points for each day during the course of an average week you take any form of medication or Chemical substance (including alcohol) to help you sleep.
- \_\_\_\_\_ Subtract 10 points for each evening during the course of an average week you bring work home; work that was meant to be done at your place of employment.
- \_\_\_\_\_ TOTAL SCORE

### Scores:

<b>100+</b>	<b>Excellent skills for whatever life throws at you</b>
<b>75-100</b>	<b>Strong enough to handle severe stress (personal loss, financial issues, etc.)</b>
<b>50-74</b>	<b>Adequate to handle common stress (rush hour, deadlines, etc.)</b>
<b>Below 50</b>	<b>Danger Zone</b>

## 12. Employee Work-Related Death Response

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### EMPLOYEE WORK-RELATED DEATH RESPONSE

#### Immediate Company Actions

Note: The steps on this first page should be completed within minutes. Families should be contacted before the news breaks, if at all possible.

- Identify victims
- Identify contacts for support functions
  - HR
  - Payroll
  - Benefits
  - Communications
  - Employee Assistance Program (EAP) – Get name for direct contact by victims’ families
- Identify immediate family members of employees from personnel files or database
  - With dependents:
    - Names
    - Address(es)
    - Phone number(s)
    - Social Security number(s)
    - Life insurance beneficiary(ies) – if other than spouse
    - Emergency contact information – if other than spouse
  - Without dependents:
    - Emergency contact information
    - Beneficiary(ies)
    - Name(s)
    - Address(es)
    - Phone number(s)
    - Social Security number(s)
    - Find out if individual had pets and/or rented an apartment
    - If individual rented, find out if he/she had a roommate
- Company representative should notify families in person, if possible. If not, by phone
  - Explain the situation
  - Arrange for visits to employees’ homes
  - Determine and communicate the company’s immediate response for pay and key benefits, such as:
    - Pay continuation for X days
    - Continued medical plan costs
- Contact Benefits Department to identify all benefits applicable to each victim
- Company representative should notify roommate and/or landlord by phone
- Confirm that victims with no one residing with them had no pets needing care
- If they had pets, ask surviving family members or friends about adoption or contact the local humane society to assist with adoption

An HR representative and/or other company representative should meet at the family's home as soon as possible. The following should be communicated and provided to the family in writing or obtained as applicable. (Note: Family will not be able to, and should not be expected to, absorb any of the information provided during this visit.)

- Provide name and number of direct contact at EAP
- Provide name and number of company contact and/or vendor contact for
  - Benefits questions
  - Workers' Compensation
  - Social Security Administration
  - Medical carrier
  - Dental carrier
  - Prescription carrier
  - Disability carrier (if applicable)
  - Life insurance carrier
- Inform who will contact them to review benefits available and that they will be assisted in pursuing all benefits available. (Note: Do not try to review benefits at this time unless they have been double-checked and confirmed.)
- After determining what the company will provide, inform the family of company's decision to pay for other assistance. Examples include:
  - Funeral expenses
  - Transportation of remains, if necessary
  - Transportation of immediate family members, if necessary (e.g., bring parents to be with surviving spouse and children)
  - If necessary, transportation of family member(s) to site of accident
- After determining what the Company will provide for surviving families with children, inform the families. Examples may include:
  - Dependent care will be provided, as necessary, up to X days
  - Housekeeping and yard care will be provided up to X days
  - Need for relocation – if employee had been relocated to current location, will provide relocation back to original location for:
    - Household goods
    - Lease break
    - Sale of house
    - Purchase of new house
- Determine if direct deposit should be stopped for employee. (This would apply if the family did not have a joint checking account or if there are no surviving family members).
- If direct deposit is to be stopped, determine to whom paychecks should be made payable.
- Contact payroll administrator to stop deductions and/or make appropriate changes to pay and benefits.
- Arrange overnight delivery of paycheck(s), if applicable.
- If family members do not have spare keys for victims' cars, contact car dealership to obtain key blank.
- If victim has no surviving family members, determine where car should be deposited and contact car dealership for key blank.
- Contact EAP to arrange work-site briefings as needed and get direct contact names at the EAP for victims' families.
- At work place:
  - Secure employees' work area
  - Allow nothing to be moved until wishes of survivors are determined

- Notify co-workers of situation
- Assess need for on-site debriefings
- Schedule debriefings, as needed
- Debrief supervisors and/or other workers on monitoring co-workers
- Observe co-workers for difficulty coping
- Arrange for memory books for co-workers to sign and/or post pictures, poems, thoughts, etc. (give these to the survivors after 90 days).
- At accident site if family members wish to visit:
  - Flowers for family members (be cognizant of individuals' religious traditions)
  - Car service
  - Hotel, if necessary
  - Meals charged to hotel bill
  - \$X spending money/family for meals and miscellaneous expenses
  - Request no receipts or refund of unspent cash
- Contact local Social Security office to assist families in initiating claims
- Review insurance policies, benefits and company policies that may be applicable:
  - Aircraft Hull
  - Crisis Response
  - General Liability
  - Workers' Compensation
  - Social Security
  - Business Travel Accident
  - Basic Life
  - Supplemental Life
  - Accidental Death and Dismemberment
  - Disability (if applicable)
  - Medical
  - Dental
  - 401(k)
  - Pension Plan
  - Employee Stock Purchase Plan
  - Stock Incentives
  - Employee Discount Programs and other privileges
  - Company Car
  - Car Allowance
  - Financial Planning Assistance
- Provide a summary sheet for each family within a week after the accident. Review in detail after two weeks.
- Find out how remains will be returned and to where.
- Determine what support will be needed when remains are returned (i.e., counselors, family members, etc.).
- Determine need for and offer to provide independent financial planning for survivors, either through EAP or other service.
- Determine appropriateness of prepaid college fund for surviving children and company's willingness to provide.
- Continue weekly contact with families for a period of time, post-incident.
- Set up contact schedule for families for set periods (e.g., three, six and 12 months out as well as birthdays, anniversaries, Christmas and other times important to each specific family).
- Consider extending employee discount or other privileges to family members during specific time frames.

- As soon as personal effects are released, engage an independent third party to clean up the items and determine what belongs to whom, if possible. Items that cannot be tied to an individual should be catalogued for families to identify.
- Additional suggested services/activities for consideration:
  - Set up worksheets of all benefits available for each family. Track progress of benefit payments to ensure timeliness and accuracy.
  - Consider establishing memorial funds
  - Consider establishing distribution formula for contributions to victim memorials that are not specific to an individual
  - Physical memorials
  - Flowers provided for funerals/memorial services
  - Hold memorial service at workplace
  - Consider sending small gifts to those who helped, along with thank you notes
  - Thank you notes to those who assisted — all should be sent to specific individuals within the organization, if possible
    - EAP
    - Car dealership
    - Employees who assisted
    - Rescue Squad
    - Fire Department
    - Red Cross
    - Airlines
    - Hotel
    - Police
    - NTSB contact
    - Landowner
    - BMG – Personal Effects Contractor
- Contributors to memorial funds
- Additional company follow-up action to consider:
  - Memorial service on anniversary of event to provide closure to period of mourning
  - Company participation in events with proceeds going to memorial funds (e.g., 10k runs, having friends get sponsors)

**TITLE 49 – TRANSPORTATION  
SUBTITLE II - OTHER GOVERNMENT AGENCIES  
CHAPTER 11 - NATIONAL TRANSPORTATION SAFETY BOARD  
SUBCHAPTER III – AUTHORITY**

Sec. 1136. Assistance to families of passengers involved in aircraft accidents

- (a) In General. As soon as practicable after being notified of an aircraft accident within the United States involving an air carrier or foreign air carrier and resulting in a major loss of life, the Chairman of the National Transportation Safety Board shall -
- (1) designate and publicize the name and phone number of a director of family support services who shall be an employee of the Board and shall be responsible for acting as a point of contact within the Federal Government for the families of passengers involved in the accident and a liaison between the air carrier or foreign air carrier and the families; and
  - (2) designate an independent nonprofit organization, with experience in disasters and post trauma communication with families, which shall have primary responsibility for coordinating the emotional care and support of the families of passengers involved in the accident.
- (b) Responsibilities of the Board. The Board shall have primary Federal responsibility for facilitating the recovery and identification of fatally-injured passengers involved in an accident described in subsection (a).
- (c) Responsibilities of Designated Organization. – The organization designated for an accident under subsection (a)(2) shall have the following responsibilities with respect to the families of passengers involved in the accident:
- (1) To provide mental health and counseling services, in coordination with the disaster response team of the air carrier or foreign air carrier involved.
  - (2) To take such actions as may be necessary to provide an environment in which the families may grieve in private.
  - (3) To meet with the families who have traveled to the location of the accident, to contact the families unable to travel to such location, and to contact all affected families periodically thereafter until such time as the organization, in consultation with the director of family support services designated for the accident under subsection (a)(1), determines that further assistance is no longer needed.
  - (4) To communicate with the families as to the roles of the organization, government agencies, and the air carrier or foreign air carrier involved with respect to the accident and the post-accident activities.
  - (5) To arrange a suitable memorial service, in consultation with the families.
- (d) Passenger Lists.
- (1) Requests for passenger lists.
    - (A) Requests by director of family support services. – It shall be the responsibility of the director of family support services designated for an accident under subsection (a)(1) to request, as soon as practicable, from the air carrier or foreign air carrier involved in the accident a list, which is based on the best available information at the time of the request, of the names of the passengers that were aboard the aircraft involved in the accident.
    - (B) Requests by designated organization. - The organization designated for an accident under subsection (a)(2) may request from the air carrier or foreign air carrier involved in the accident a list described in subparagraph (A).
  - (2) Use of information. - The director of family support services and the organization may not release to any person information on a list obtained under paragraph (1) but may provide information on the list

about a passenger to the family of the passenger to the extent that the director of family support services or the organization considers appropriate.

- (e) Continuing Responsibilities of the Board. - In the course of its investigation of an accident described in subsection (a), the Board shall, to the maximum extent practicable, ensure that the families of passengers involved in the accident –
  - (1) are briefed, prior to any public briefing, about the accident, its causes, and any other findings from the investigation; and
  - (2) are individually informed of and allowed to attend any public hearings and meetings of the Board about the accident.
- (f) Use of Air Carrier Resources. - To the extent practicable, the organization designated for an accident under subsection(a)(2) shall coordinate its activities with the air carrier or foreign air carrier involved in the accident so that the resources of the carrier can be used to the greatest extent possible to carry out the organization's responsibilities under this section.
- (g) Prohibited Actions. -
  - (1) Actions to impede the board. - No person (including a State or political subdivision) may impede the ability of the Board (including the director of family support services designated for an accident under subsection (a)(1)), or an organization designated for an accident under subsection (a)(2), to carry out its responsibilities under this section or the ability of the families of passengers involved in the accident to have contact with one another.
  - (2) Unsolicited communications. - In the event of an accident involving an air carrier providing interstate or foreign air transportation and in the event of an accident involving a foreign air carrier that occurs within the United States, no unsolicited communication concerning a potential action for personal injury or wrongful death may be made by an attorney (including any associate, agent, employee, or other representative of an attorney) or any potential party to the litigation to an individual injured in the accident, or to a relative of an individual involved in the accident, before the 45th day following the date of the accident.
  - (3) Prohibition on actions to prevent mental health and counseling services. - No State or political subdivision thereof may prevent the employees, agents, or volunteers of an organization designated for an accident under subsection (a)(2) from providing mental health and counseling services under subsection (c)(1) in the 30-day period beginning on the date of the accident. The director of family support services designated for the accident under subsection (a)(1) may extend such period for not to exceed an additional 30 days if the director determines that the extension is necessary to meet the needs of the families and if State and local authorities are notified of the determination.
- (h) Definitions. - In this section, the following definitions apply:
  - (1) Aircraft accident. - The term "aircraft accident" means any aviation disaster regardless of its cause or suspected cause.
  - (2) Passenger. - The term "passenger" includes –
    - (A) an employee of an air carrier or foreign air carrier aboard an aircraft; and
    - (B) any other person aboard the aircraft without regard to whether the person paid for the transportation, occupied a seat, or held a reservation for the flight.
- (i) Statutory Construction. - Nothing in this section may be construed as limiting the actions that an air carrier may take, or the obligations that an air carrier may have, in providing assistance to the families of passengers involved in an aircraft accident.
- (j) Relinquishment of Investigative Priority. -

- (1) General rule. - This section (other than subsection (g)) shall not apply to an aircraft accident if the Board has relinquished investigative priority under section 1131(a)(2)(B) and the Federal agency to which the Board relinquished investigative priority is willing and able to provide assistance to the victims and families of the passengers involved in the accident.
- (2) Board assistance. - If this section does not apply to an aircraft accident because the Board has relinquished investigative priority with respect to the accident, the Board shall assist, to the maximum extent possible, the agency to which the Board has relinquished investigative priority in assisting families with respect to the accident.

(Added Pub. L. 104-264, title VII, Sec. 702(a)(1), Oct. 9, 1996, 110 Stat. 3265; amended Pub. L. 106-181, title IV, Sec. 401(a)(1), (b)-(d), Apr. 5, 2000, 114 Stat. 129; Pub. L. 08-168, Sec. 3(a), Dec. 6, 2003, 117 Stat. 2033.)

#### AMENDMENTS

2003 - Subsec. (j). Pub. L. 108-168 added subsec. (j).

2000 - Subsec. (g)(2). Pub. L. 106-181, Sec. 401(a)(1), substituted "transportation and in the event of an accident involving a foreign air carrier that occurs within the United States," for "transportation," inserted "(including any associate, agent, employee, or other representative of an attorney)" after "attorney", and substituted "45th day" for "30th day".

Subsec. (g)(3). Pub. L. 106-181, Sec. 401(b), added par. (3).

Subsec. (h)(2). Pub. L. 106-181, Sec. 401(c), amended heading and text generally. Prior to amendment, text read as follows: "The term 'passenger' includes an employee of an air carrier aboard an aircraft."

Subsec. (i). Pub. L. 106-181, Sec. 401(d), added subsec. (i).

#### EFFECTIVE DATE OF 2000 AMENDMENT

Amendment by Pub. L. 106-181 applicable only to fiscal years beginning after Sept. 30, 1999, see section 3 of Pub.

L. 106-181, set out as a note under section 106 of this title.

#### EFFECTIVE DATE

Except as otherwise specifically provided, section applicable only to fiscal years beginning after Sept. 30, 1996, and not to be construed as affecting funds made available for a fiscal year ending before Oct. 1, 1996, see section 3 of Pub. L. 104-264, set out as an Effective Date of 1996 Amendment note under section 106 of this title.

## **14. 49 USC §41113: Plans To Address Needs of Families of Passengers Involved in Aircraft Accidents**

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**TITLE 49 – TRANSPORTATION  
SUBTITLE VII - AVIATION PROGRAMS  
PART A - AIR COMMERCE AND SAFETY  
Subpart ii - Economic Regulation  
CHAPTER 411 - AIR CARRIER CERTIFICATES**

Sec. 41113. Plans to address needs of families of passengers involved in aircraft accidents

- (a) Submission of Plans. - Each air carrier holding a certificate of public convenience and necessity under section 41102 of this title shall submit to the Secretary and the Chairman of the National Transportation Safety Board a plan for addressing the needs of the families of passengers involved in any aircraft accident involving an aircraft of the air carrier and resulting in a major loss of life.
- (b) Contents of Plans. - A plan to be submitted by an air carrier under subsection (a) shall include, at a minimum, the following:
- (1) A plan for publicizing a reliable, toll-free telephone number, and for providing staff, to handle calls from the families of the passengers.
  - (2) A process for notifying the families of the passengers, before providing any public notice of the names of the passengers, either by utilizing the services of the organization designated for the accident under section 1136(a)(2) of this title or the services of other suitably trained individuals.
  - (3) An assurance that the notice described in paragraph (2) will be provided to the family of a passenger as soon as the air carrier has verified that the passenger was aboard the aircraft (whether or not the names of all of the passengers have been verified) and, to the extent practicable, in person.
  - (4) An assurance that the air carrier will provide to the director of family support services designated for the accident under section 1136(a)(1) of this title, and to the organization designated for the accident under section 1136(a)(2) of this title, immediately upon request, a list (which is based on the best available information at the time of the request) of the names of the passengers aboard the aircraft (whether or not such names have been verified), and will periodically update the list.
  - (5) An assurance that the family of each passenger will be consulted about the disposition of all remains and personal effects of the passenger within the control of the air carrier.
  - (6) An assurance that if requested by the family of a passenger, any possession of the passenger within the control of the air carrier (regardless of its condition) will be returned to the family unless the possession is needed for the accident investigation or any criminal investigation.
  - (7) An assurance that any unclaimed possession of a passenger within the control of the air carrier will be retained by the air carrier for at least 18 months.
  - (8) An assurance that the family of each passenger will be consulted about construction by the air carrier of any monument to the passengers, including any inscription on the monument.
  - (9) An assurance that the treatment of the families of nonrevenue passengers (and any other victim of the accident) will be the same as the treatment of the families of revenue passengers.
  - (10) An assurance that the air carrier will work with any organization designated under section 1136(a)(2) of this title on an ongoing basis to ensure that families of passengers receive an appropriate level of services and assistance following each accident.
  - (11) An assurance that the air carrier will provide reasonable compensation to any organization designated under section 1136(a)(2) of this title for services provided by the organization.
  - (12) An assurance that the air carrier will assist the family of a passenger in traveling to the location of the accident and provide for the physical care of the family while the family is staying at such location.

- (13) An assurance that the air carrier will commit sufficient resources to carry out the plan.
- (14) An assurance that, upon request of the family of a passenger, the air carrier will inform the family of whether the passenger's name appeared on a preliminary passenger manifest for the flight involved in the accident.
- (15) An assurance that the air carrier will provide adequate training to the employees and agents of the carrier to meet the needs of survivors and family members following an accident.
- (16) An assurance that the air carrier, in the event that the air carrier volunteers assistance to United States citizens within the United States with respect to an aircraft accident outside the United States involving major loss of life, will consult with the Board and the Department of State on the provision of the assistance.
- (17) (A) An assurance that, in the case of an accident that results in significant damage to a manmade structure or other property on the ground that is not government-owned, the air carrier will promptly provide notice, in writing, to the extent practicable, directly to the owner of the structure or other property about liability for any property damage and means for obtaining compensation.
- (B) At a minimum, the written notice shall advise an owner (i) to contact the insurer of the property as the authoritative source for information about coverage and compensation; (ii) to not rely on unofficial information offered by air carrier representatives about compensation by the air carrier for accident-site property damage; and (iii) to obtain photographic or other detailed evidence of property damage as soon as possible after the accident, consistent with restrictions on access to the accident site.
- (18) An assurance that, in the case of an accident in which the National Transportation Safety Board conducts a public hearing or comparable proceeding at a location greater than 80 miles from the accident site, the air carrier will ensure that the proceeding is made available simultaneously by electronic means at a location open to the public at both the origin city and destination city of the air carrier's flight if that city is located in the United States.
- (c) Certificate Requirement. - The Secretary may not approve an application for a certificate of public convenience and under section 41102 of this title unless the applicant has included as part of such application a plan that meets the requirements of subsection (b).
- (d) Limitation on Liability. - An air carrier shall not be liable for damages in any action brought in a Federal or State court arising out of the performance of the air carrier in preparing or providing a passenger list, or in providing information concerning a preliminary passenger manifest, pursuant to a plan submitted by the air carrier under subsection (b), unless such liability was caused by conduct of the air carrier which was grossly negligent or which constituted intentional misconduct.
- (e) Aircraft Accident and Passenger Defined. - In this section, the terms "aircraft accident" and "passenger" have the meanings such terms have in section 1136 of this title.
- (f) Statutory Construction. - Nothing in this section may be construed as limiting the actions that an air carrier may take, or the obligations that an air carrier may have, in providing assistance to the families of passengers involved in an aircraft accident.

(Added Pub. L. 104-264, title VII, Sec. 703(a), Oct. 9, 1996, 110 Stat. 3267; amended Pub. L. 106-181, title IV, Sec. 402(a)(1)-(3), (5)-(c), Apr. 5, 2000, 114 Stat. 129, 130; Pub. L. 108-176, title VIII, Sec. 809(a), Dec. 12, 2003, 117 Stat. 2588.)

#### AMENDMENTS

2003 - Subsec. (b)(16). Pub. L. 108-176, Sec. 809(a)(1), struck out "the air carrier" after "major loss of life,". Subsec. (b)(17), (18). Pub. L. 108-176, Sec. 809(a)(2), added pars. (17) and (18).

2000 - Subsec. (a). Pub. L. 106-181, Sec. 402(a)(5)(A), substituted "Each air carrier" for "Not later than 6 months after the date of the enactment of this section, each air carrier". Subsec. (b)(14) to (16). Pub. L. 106-181, Sec. 402(a)(1)-(3), added pars. (14) to (16). Subsec. (c). Pub. L. 106-181, Sec. 402(a)(5)(B), substituted "The Secretary" for "After the date that is 6 months after the date of the enactment of this section, the Secretary".

Subsec. (d). Pub. L. 106-181, Sec. 402(b), inserted ", or in providing information concerning a preliminary passenger manifest," before "pursuant to a plan". Subsec. (f). Pub. L. 106-181,

Sec. 402(c), added subsec. (f).

#### EFFECTIVE DATE OF 2003 AMENDMENT

Amendment by Pub. L. 108-176 applicable only to fiscal years beginning after Sept. 30, 2003, except as otherwise specifically provided, see section 3 of Pub. L. 108-176, set out as a note under section 106 of this title.

#### EFFECTIVE DATE OF 2000 AMENDMENT

Amendment by section 402(a)(5)(B) to (c) of Pub. L. 106-181 applicable only to fiscal years beginning after Sept. 30, 1999, see section 3 of Pub. L. 106-181, set out as a note under section 106 of this title. Pub. L. 106-181, title IV, Sec. 402(a)(4), Apr. 5, 2000, 114 Stat. 130, provided that: "The amendments made by paragraphs (1), (2), and (3) [amending this section] shall take effect on the 180th day following the date of the enactment of this Act [Apr. 5, 2000]. On or before such 180th day, each air carrier holding a certificate of public convenience and necessity under section 41102 of title 49, United States Code, shall submit to the Secretary [of Transportation] and the Chairman of the National Transportation Safety Board an updated plan under section 41113 of such title that meets the requirements of the amendments made by paragraphs (1), (2), and (3)."

#### EFFECTIVE DATE

Except as otherwise specifically provided, section applicable only to fiscal years beginning after Sept. 30, 1996, and not to be construed as affecting funds made available for a fiscal year ending before Oct. 1, 1996, see section 3 of Pub. L. 104-264, set out as an Effective Date of 1996 Amendment note under section 106 of this title.

#### UPDATE PLANS

Pub. L. 108-176, title VIII, Sec. 809(c), Dec. 12, 2003, 117 Stat. 2589, provided that: "Air carriers and foreign air carriers shall update their plans under sections 41113 and 41313 of title 49, United States Code, respectively, to reflect the amendments made by subsections (a) and (b) of this section [amending this section and section 41313 of this title] not later than 90 days after the date of enactment of this Act [Dec. 12, 2003]."

ESTABLISHMENT OF TASK FORCE -- Section 704 of Pub. L. 104-264 provided that: "(a) Establishment. -- The Secretary of Transportation, in cooperation with the National Transportation Safety Board, the Federal Emergency Management Agency, the American Red Cross, air carriers, and families which have been involved in aircraft accidents shall establish a task force consisting of representatives of such entities and families, representatives of air carrier employees, and representatives of such other entities as the Secretary considers appropriate. "(b) Guidelines and Recommendations. - The task force established pursuant to subsection (a) shall develop - "(1) guidelines to assist air carriers in responding to aircraft accidents; "(2) recommendations on methods to ensure that attorneys and representatives of media organizations do not intrude on the privacy of families of passengers involved in an aircraft accident; "(3) recommendations on methods to ensure that the families of passengers involved in an aircraft accident who are not citizens of the United States receive appropriate assistance; "(4) recommendations on methods to ensure that State mental health licensing laws do not act to prevent out-of-state mental health workers from working at the site of an aircraft accident or other related sites; "(5) recommendations on the extent to which military experts and facilities can be used to aid in the identification of the remains of passengers involved in an aircraft accident; and "(6) recommendations on methods to improve the timeliness of the notification provided by air carriers to the families of passengers involved in an aircraft accident, including - "(A) an analysis of the steps that air carriers would have to take to ensure that an accurate list of passengers on board the aircraft would be available within 1 hour of the accident and an analysis of such steps to ensure that such list would be available within 3 hours of the accident; "(B) an analysis of the added costs to air carriers and travel agents that would result if air carriers were required to take the steps described in subparagraph (A); "(C) an analysis of any inconvenience to passengers, including flight delays, that would result if air carriers were required to take the steps described in subparagraph (A); and "(D) an analysis of the implications for

personal privacy that would result if air carriers were required to take the steps described in subparagraph (A). "(c) Report. - Not later than 1 year after the date of the enactment of this Act [Oct. 9, 1996], the Secretary shall transmit to Congress a report containing the model plan and recommendations developed by the task force under subsection (b)."

LIMITATION ON STATUTORY CONSTRUCTION -- Section 705 of title VII of Pub. L. 104-264 provided that: "Nothing in this title [enacting this section and section 1136 of this title, amending section 1155 of this title, and enacting provisions set out as notes under this section and section 40101 of this title] or any amendment made by this title may be construed as limiting the actions that an air carrier may take, or the obligations.

**15. 49 USC §41313: Plans To Address Needs of Families of Passengers Involved in Foreign Air Carrier Accidents**

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**TITLE 49 – TRANSPORTATION  
SUBTITLE VII - AVIATION PROGRAMS  
PART A - AIR COMMERCE AND SAFETY  
Subpart ii - Economic Regulation  
CHAPTER 413 - FOREIGN AIR TRANSPORTATION**

Sec. 41313. Plans to address needs of families of passengers involved in foreign air carrier accidents

- (a) Definitions. – In this section, the following definitions apply:
- (1) Aircraft accident. – The term "aircraft accident" means any aviation disaster, regardless of its cause or suspected cause, that occurs within the United States; and
  - (2) Passenger. – The term "passenger" has the meaning given such term by section 1136.
- (b) Submission of Plans. – A foreign air carrier providing foreign air transportation under this chapter shall transmit to the Secretary of Transportation and the Chairman of the National Transportation Safety Board a plan for addressing the needs of the families of passengers involved in an aircraft accident that involves an aircraft under the control of the foreign air carrier and results in a major loss of life.
- (c) Contents of Plans. – To the extent permitted by foreign law which was in effect on the date of the enactment of this section, a plan submitted by a foreign air carrier under subsection (b) shall include the following:
- (1) Telephone number. – A plan for publicizing a reliable, toll-free telephone number and staff to take calls to such number from families of passengers involved in an aircraft accident that involves an aircraft under the control of the foreign air carrier and results in a significant loss of life.
  - (2) Notification of families. – A process for notifying, in person to the extent practicable, the families of passengers involved in an aircraft accident that involves an aircraft under the control of the foreign air carrier and results in a significant loss of life before providing any public notice of the names of such passengers. Such notice shall be provided by using the services of -
    - (A) the organization designated for the accident under section 1136(a)(2); or
    - (B) other suitably trained individuals.
  - (3) Notice provided as soon as possible. – An assurance that the notice required by paragraph (2) shall be provided as soon as practicable after the foreign air carrier has verified the identity of a passenger on the foreign aircraft, whether or not the names of all of the passengers have been verified.
  - (4) List of passengers. – An assurance that the foreign air carrier shall provide, immediately upon request, and update a list (based on the best available information at the time of the request) of the names of the passengers aboard the aircraft (whether or not such names have been verified), to -
    - (A) the director of family support services designated for the accident under section 1136(a)(1); and
    - (B) the organization designated for the accident under section 1136(a)(2).
  - (5) Consultation regarding disposition of remains and effects. – An assurance that the family of each passenger will be consulted about the disposition of any remains and personal effects of the passenger that are within the control of the foreign air carrier.
  - (6) Return of possessions. – An assurance that, if requested by the family of a passenger, any possession (regardless of its condition) of that passenger that is within the control of the foreign air carrier will be returned to the family unless the possession is needed for the accident investigation or a criminal investigation.

- (7) Unclaimed possessions retained. – An assurance that any unclaimed possession of a passenger within the control of the foreign air carrier will be retained by the foreign air carrier for not less than 18 months after the date of the accident.
- (8) Monuments. – An assurance that the family of each passenger will be consulted about construction by the foreign air carrier of any monument to the passengers built in the United States, including any inscription on the monument.
- (9) Equal treatment of passengers. – An assurance that the treatment of the families of nonrevenue passengers will be the same as the treatment of the families of revenue passengers.
- (10) Service and assistance to families of passengers. – An assurance that the foreign air carrier will work with any organization designated under section 1136(a)(2) on an ongoing basis to ensure that families of passengers receive an appropriate level of services and assistance following an accident.
- (11) Compensation to service organizations. – An assurance that the foreign air carrier will provide reasonable compensation to any organization designated under section 1136(a)(2) for services and assistance provided by the organization.
- (12) Travel and care expenses. – An assurance that the foreign air carrier will assist the family of any passenger in traveling to the location of the accident and provide for the physical care of the family while the family is staying at such location.
- (13) Resources for plan. – An assurance that the foreign air carrier will commit sufficient resources to carry out the plan.
- (14) Substitute measures. – If a foreign air carrier does not wish to comply with paragraph (10), (11), or (12), a description of proposed adequate substitute measures for the requirements of each paragraph with which the foreign air carrier does not wish to comply.
- (15) Training of employees and agents. – An assurance that the foreign air carrier will provide adequate training to the employees and agents of the carrier to meet the needs of survivors and family members following an accident.
- (16) Consultation on carrier response not covered by plan. – An assurance that the foreign air carrier, in the event that the foreign air carrier volunteers assistance to United States citizens within the United States with respect to an aircraft accident outside the United States involving major loss of life, the foreign air carrier (11) will consult with the Board and the Department of State on the provision of the assistance.
- (17) Notice concerning liability for manmade structures. -
  - (A) In general. – An assurance that, in the case of an accident that results in significant damage to a manmade structure or other property on the ground that is not government-owned, the foreign air carrier will promptly provide notice, in writing, to the extent practicable, directly to the owner of the structure or other property about liability for any property damage and means for obtaining compensation.
  - (B) Minimum contents. – At a minimum, the written notice shall advise an owner (i) to contact the insurer of the property as the authoritative source for information about coverage and compensation; (ii) to not rely on unofficial information offered by foreign air carrier representatives about compensation by the foreign air carrier for accident-site property damage; and (iii) to obtain photographic or other detailed evidence of property damage as soon as possible after the accident, consistent with restrictions on access to the accident site.
- (18) Simultaneous electronic transmission of NTSB hearing. – An assurance that, in the case of an accident in which the National Transportation Safety Board conducts a public hearing or comparable proceeding at a location greater than 80 miles from the accident site, the foreign air carrier will ensure that the proceeding is made available simultaneously by electronic means at a location open to the

public at both the origin city and destination city of the foreign air carrier's flight if that city is located in the United States.

- (d) Permit and Exemption Requirement. – The Secretary shall not approve an application for a permit under section 41302 unless the applicant has included as part of the application or request for exemption a plan that meets the requirements of subsection (c).
- (e) Limitation on Liability. – A foreign air carrier shall not be liable for damages in any action brought in a Federal or State court arising out of the performance of the foreign air carrier in preparing or providing a passenger list pursuant to a plan submitted by the foreign air carrier under subsection (c), unless the liability was caused by conduct of the foreign air carrier which was grossly negligent or which constituted intentional misconduct.

(Added Pub. L. 105-148, Sec. 1(a), Dec. 16, 1997, 111 Stat. 2681; amended Pub. L. 106-181, title IV, Sec. 403(a)- (c)(1), Apr. 5, 2000, 114 Stat. 130; Pub. L. 108-176, title VIII, Sec. 809(b), Dec. 12, 2003, 117 Stat. 2589.)

#### REFERENCES IN TEXT

The date of the enactment of this section, referred to in subsec. (c), is the date of enactment of Pub. L. 105-148, which was approved Dec. 16, 1997.

#### AMENDMENTS

2003 - Subsec. (c)(17), (18). Pub. L. 108-176 added pars. (17) and (18). 2000 - Subsec. (a)(2). Pub. L. 106-181, Sec. 403(a), amended heading and text of par. (2) generally. Prior to amendment, text read as follows: "The term 'passenger' includes an employee of a foreign air carrier or air carrier aboard an aircraft." Subsec. (b). Pub. L. 106-181, Sec. 403(b), substituted "major" for "significant". Subsec. (c)(15), (16). Pub. L. 106-181, Sec. 403(c)(1), added pars. (15) and (16).

#### EFFECTIVE DATE OF 2003 AMENDMENT

Amendment by Pub. L. 108-176 applicable only to fiscal years beginning after Sept. 30, 2003, except as otherwise specifically provided, see section 3 of Pub. L. 108-176, set out as a note under section 106 of this title.

#### EFFECTIVE DATE OF 2000 AMENDMENT

Amendment by section 403(a) and (b) of Pub. L. 106-181 applicable only to fiscal years beginning after Sept. 30, 1999, see section 3 of Pub. L. 106-181, set out as a note under section 106 of this title. Pub. L. 106-181, title IV, Sec. 403(c)(2), Apr. 5, 2000, 114 Stat. 131, provided that: "The amendment made by paragraph (1) [amending this section] shall take effect on the 180th day following the date of the enactment of this Act [Apr. 5, 2000]. On or before such 180th day, each foreign air carrier providing foreign air transportation under chapter 413 of title 49, United States Code, shall submit to the Secretary [of Transportation] and the Chairman of the National Transportation Safety Board an updated plan under section 41313 of such title that meets the requirements of the amendment made by paragraph (1)."

#### EFFECTIVE DATE

Pub. L. 105-148, Sec. 1(c), Dec. 16, 1997, 111 Stat. 2683, provided that: "The amendments made by this section [enacting this section] shall take effect on the 180th day following the date of the enactment of this Act [Dec. 16, 1997]."

## NTSB Investigation

### 16. Your Participation in the NTSB Accident Investigation

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#### YOUR PARTICIPATION IN THE NTSB ACCIDENT INVESTIGATION

##### I. GENERAL CONSIDERATIONS

- A. **Our foremost concern is safety and determining the cause of this accident.** We expect you to cooperate with the NTSB and assist them to the best of your abilities. We expect you to participate in all investigative activities conducted by your groups, including all teleconferences.
- B. We must also keep in mind, however, that other participants in this investigation may ultimately be our adversaries in litigation arising from this accident. Therefore, you should be very careful about what you say and do, as well as the implications of your comments and actions.
- C. **Be aware that there is no legal privilege or protection for communications you have with the NTSB, the FAA or other parties to this investigation. Everything you say to the NTSB, the FAA or any other party and everything you do in their presence may be the subject of testimony in a court of law.**
- D. Other parties to the investigation may have agendas that are motivated by litigation or business interests. You must be vigilant and challenge or call to the attention of your Party Coordinator anything that does not seem accurate or is peculiar in a way that suggests bias. That goes for draft reports, correspondence, notes, other documents and even comments made during meetings with participants in the investigation.

##### II. PROVIDING MATERIALS TO THE NTSB AND FAA

- A. **All requests from the NTSB or FAA for records and other materials should be reported immediately to the Legal Department or outside counsel and to your Party Coordinator.**
- B. **Only the Party Coordinator has authority to send records and other materials concerning this accident to the NTSB or the FAA.**
- C. No documents, data or other material should be given to anyone, including the NTSB and FAA, before that material is reviewed by counsel and the Party Coordinator.
- D. If you believe information that has been requested is proprietary or may reveal business secrets, you should label it as such and bring it to the attention of your Party Coordinator before it is produced. **As a general principle, all company records are proprietary and should be stamped "CONFIDENTIAL" before being turned over to the NTSB or the FAA.**
- E. Retain all original records in a safe, secure location **as only copies of documents should be produced in the investigation.** The NTSB and FAA are not entitled to our original records and we cannot risk losing them.
- F. Keep an accurate record of everything you provide for the NTSB and FAA. All materials produced should be accompanied by a cover letter signed by your Party Coordinator that lists specifically what is being provided.
- G. You should keep a separate file for materials relating to this accident investigation/litigation, with a separate folder containing copies of all materials and letters sent to the NTSB and FAA.

##### III. REVIEWING AND HANDLING NTSB DOCUMENTS AND MATERIALS

- A. **All materials received from the NTSB should be immediately forwarded to your Party Coordinator,** who will provide copies to counsel.
- B. All draft reports, field notes and other materials circulated by the NTSB for review or comment should be provided to and discussed with counsel and your Party Coordinator before any comments are made.
- C. **You should not sign any reports, documents, etc. without first discussing them with counsel.**

#### IV. CREATION OF DOCUMENTS RELATING TO THE ACCIDENT

- A. **In view of the anticipated litigation, all documents created from this point forward concerning the accident (including correspondence and internal memoranda) must be approved by the legal department or outside counsel before being finalized and signed or sent.**
- B. You should avoid writing unnecessary documents.
- C. If it is necessary to write a document, stick to factual observations and do not include your personal opinions or speculations.
- D. Be aware that all documents, including your scribbled notes, diary entries, phone messages, emails, letters, etc. will almost certainly be turned over to attorneys who are suing the company. Please take time to think about the implications of what you are writing and how it might be misconstrued in litigation.
- E. If it is necessary to prepare a document relating to the accident, especially those that deal with possible causes of the accident, responsibility, liability or recommended preventive measures, it must be reviewed by counsel in preliminary draft form. All such materials should be clearly marked "preliminary draft" and should follow the form provided in the attachment to this memorandum. **It is imperative that all personnel use the attached format when preparing documents that relate in any way to the accident.** Using this format is imperative to preserve privileges that protect the candid discussion of legal issues within the company and between the company and its attorneys. Failure to use this format may waive that privilege and result in confidential communications being disclosed to adversaries in litigation. You should prepare direct requests for such approval to your Party Coordinator unless you are dealing directly with the legal department or outside counsel.
- F. Documents that would otherwise be privileged, but pass through too many hands, may lose their privileged status even if they are only circulated within the company. You should therefore distribute documents only through your Party Coordinator.
- G. Again, keep a separate file for all documents created that relate to this investigation.

#### V. RETENTION OF RECORDS RELATING TO THE ACCIDENT

- A. **Do not destroy any documents that existed as of the date of the accident that you believe may refer to any matter relating to this accident.** We need to "freeze" two copies of all relevant manuals, and other relevant materials that are periodically updated, to preserve them as they existed on the day of the accident.
- B. You must also preserve documents created after the accident, if you believe they refer to any matter relating to this accident.

#### VI. RETURN OF AIRCRAFT COMPONENTS BY THE NTSB

- A. At some point, the NTSB may want to take possession of aircraft parts and then return them to the company. **Do not accept any parts of the accident aircraft without prior permission of counsel.**
- B. If aircraft parts are returned to the company, proper chain of custody documents must be prepared to show who had custody of the given part and to whom, when and where the part was given. Both the person giving the parts and the person accepting the parts must sign the chain of custody receipt.

PLEASE DISTRIBUTE THIS MEMORANDUM  
TO OTHER COMPANY PERSONNEL  
WHO ARE WORKING WITH YOU ON THE INVESTIGATION

Attachment

CONFIDENTIAL COMMUNICATION TO COUNSEL

To: Fox Rothschild LLP  
Attn: \_\_\_\_\_

Legal Department  
Attn: \_\_\_\_\_

From: [Employee Name]

Date:

Re: Preparation for Litigation, [describe specific topic]

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\* \* \* [body of proposed communication] \* \* \*

cc: [Only as directed by counsel]

[On Company Letterhead]

[Date]

**To:** Distribution List

**From:** [Legal Department Contact]

**Subject:** NTSB Investigation of \_\_\_\_\_ and Related Litigation.

The National Transportation Safety Board (NTSB) is conducting an investigation into this accident. The Company is a party to that investigation and is cooperating fully with the NTSB to determine the cause of this accident. While the NTSB investigation is supposed to proceed without regard to the possible consequences for the participants in court, both the information uncovered in the NTSB investigation and the recommendations and conclusions reached by the NTSB may have a substantial impact on the outcome of litigation against the Company as well as our business interests. This fact is not lost on other parties to this investigation, so we must be mindful of it as well.

For these reasons, we have retained the law firm of Fox Rothschild LLP, to assist us during the NTSB investigation. They will work closely with us to protect our interests. Our primary contact is \_\_\_\_\_. His phone numbers are: office: \_\_\_\_\_, cell: \_\_\_\_\_. The Company Legal Department contacts are \_\_\_\_\_.

Any questions about this memorandum or the legal implications of any matter relating to this accident should be directed to these contacts. In addition, we have designated \_\_\_\_\_ as our Party Coordinator to the NTSB investigation. \_\_\_\_\_ will be our primary contact with the NTSB and should be aware of all actions you take in this investigation.

Following the instructions, guidelines and tips will assist you in participating effectively in the NTSB investigation while protecting the interests of the Company.

## 17. Overview of the NTSB Accident Investigation Process

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### OVERVIEW OF NTSB ACCIDENT INVESTIGATION PROCESS

The NTSB has been granted statutory authority to investigate accidents occurring in a number of transportation modes, including aviation, highway, railroad, pipeline and marine accidents. The Safety Board's structure and authority to investigate aircraft accidents is found at 49 U.S.C. §§ 1111, 1131 et seq.

As part of any accident investigation, the NTSB may order a Public Hearing if it finds that such a hearing is in the public interest. There are normally three meetings associated with a major accident investigation: the prehearing conference, the Public Hearing and the so-called Sunshine meeting.

#### 1. Prehearing Conference

The prehearing conference is an informal gathering for the purposes of: (a) outlining the procedures to be used at the formal hearing, (b) identifying issues to be investigated and exhibits to be referenced at the hearing, and (c) discussing any matters that the parties may wish to raise.

At the conference, the members of the Board of Inquiry and the Technical Panel will be introduced. The parties will be provided with a list of witnesses to be called at the formal hearing, the areas on which the witnesses will be examined, and the exhibits that will be offered into evidence. 49 CFR part 845, subpart A. It is the obligation of the parties to advise the Chairman of the Board of Inquiry, at the prehearing conference, of any additional witnesses or exhibits which they desire to offer. If they fail to do so, they risk preclusion of the offered witness(es) or exhibit(s). 49 CFR § 845.9 (c).

#### 2. Hearing

The active participants at an NTSB hearing are basically divided into three categories: the members of the Board of Inquiry, the members of the Technical Panel, and the parties (with their representatives).

The Board of Inquiry is composed of high-ranking officials from the NTSB, at least one of whom is a member of the NTSB Board itself. The NTSB Board member presides over the hearing as the hearing Chairman. Although generally Board members have a fixed order of rotation in which they preside over hearings, the Chairman of the NTSB, should he/she so desire, may schedule the hearings of other accidents in such a manner that a particular hearing falls to him/her.

The other members of the Board of Inquiry, typically four to five in number, are usually Directors, Deputy Directors or Section Chiefs of the NTSB, each having expertise in a specialized field. By way of example, in the Pittsburgh hearing involving the crash of a Boeing 737, on September 8, 1994, Chairman James Hall served as a Board of Inquiry member, with the remaining members being the Deputy Director of the Office of Aviation Safety, the Chief of the Major Investigations Division and the Chief of the Office of Research and Engineering.

Members of the Technical Panel, typically five to 10 in number, are also employees of the NTSB and, while being recognized experts in particular specialties, are generally lower in rank than the members of the Board of Inquiry.

The type of expertise utilized on the Technical Panel is dictated by the circumstances of the crash. Again, by way of example, in the Pittsburgh crash, the panel was composed of investigators in the following areas: Operations, Air Traffic Control, Meteorology, Survival Factors, Structures, Power Plant, Systems, Flight Data Recorder, Maintenance Records, Cockpit Voice Recorder, Aircraft Performance, Human Performance and Airports/ARFF.

The parties themselves constitute the final category of active participants in the Board's inquiry. The Chairman of the Board of Inquiry is empowered to designate as parties to the hearing those persons, agencies, companies and

associations whose participation in the hearing “is deemed necessary in the public interest and whose special knowledge will contribute to the development of pertinent evidence.” 49 CFR § 845.6 (a). Parties must be represented by qualified technical employees, or other employees or spokespersons associated with the entity who do not occupy legal positions. No party may be associated with or represented by any person who also represents claimants or insurers. 49 CFR § 845.6 (b). Although no attorneys may represent the parties, counsel and other individuals of the parties’ choosing may sit at the party tables and advise the party spokesperson throughout the hearing.

The hearing is not conducted as a trial. Generally the questioning of a witness is started by a single member from the Technical Panel, followed by one or more rounds of questioning by the Board of Inquiry and the party spokespersons.

Although witnesses may have counsel present and may consult counsel (49 CFR § 845.10.), objections are not entertained as in the traditional courtroom setting. If an attorney for a witness feels that the questioning is going too far afield, he may let his concerns be known and the presiding Board Member will determine the effect of those concerns. 49 CFR § 845.11 (b). The testimony of the witness, however, may have a significant effect on the subsequent litigation. A verbatim record is made of all testimony at the hearing and copies of the transcript are made available to the public. 49 CFR § 845.14. These transcripts may be, and are, used at subsequent depositions and at trial.

The order of witnesses is roughly in accordance with the following outline: (a) the NTSB Investigator in charge of the accident will outline what has been learned and accomplished in the course of the litigation, (b) eyewitnesses to the accident, such as passengers on the aircraft, flight attendants, ground crew and “passers by” will then be called upon to recount what they witnessed, and finally (c) the remaining technical witnesses will be called upon to testify as to general practices adhered to by the company or entity and to discuss any specific facts relevant to the accident.

Once the hearing has been completed, each party to the investigation may make a submission to the NTSB setting forth proposed findings, a proposed probable cause, and proposed safety recommendations. 49 CFR § 845.13. It is always advisable to take this additional step to insure that a party’s point of view is understood.

### **3. Sunshine Meeting**

This is the public meeting at which the members of the Board formally receive the draft accident report from the NTSB technical staff and vote on the findings, conclusions, probable cause and safety recommendations. It is called a “Sunshine” meeting because it is open to the public. However, only NTSB personnel may participate in the Sunshine hearing. The public, including the parties to the investigation, and accident victims and family members, may attend, but may not participate in any way. The participants are generally specialists from the NTSB technical staff, NTSB management and the entire NTSB Board.

## 18. Summary of Applicable Regulations, Laws and Treaties

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### SUMMARY OF APPLICABLE REGULATIONS, LAWS AND TREATIES

#### Accident Within the United States

Regulations and statutes play a role in every phase of accident notification and investigation. An accident scene is first a rescue and recovery scene. Although it is the responsibility of the carrier to control the site, the appropriate fire and rescue departments, the coroner/medical examiner and local law enforcement will likely be the first responders to an accident. The NTSB assumes control upon arrival at the scene.

#### NTSB Role and Regulations

The NTSB investigates air carrier accidents.<sup>1</sup> 49 CFR § 831.20. Although the NTSB has investigative authority over all other federal agencies, in 2000, the U.S. Code was amended to allow the transfer of investigative control to the FBI should the Attorney General and Director of the NTSB conclude the accident may have been caused by a criminal act. In this case, the NTSB will likely assume a role in support of the Department of Justice/FBI.<sup>2</sup>

Additionally, the NTSB will use the resources of other government agencies based on 49 U.S.C. § 1113(b)(1)(C)<sup>3</sup>. The following are the most applicable NTSB regulations governing the accident notification and investigation.

Accident Notification: NTSB Regulation 49 CFR part 830 defines aircraft accident and initial notification requirements.

- 830.1 Applicability
- 830.2 Definitions
- 830.5 Immediate Notification
- 830.6 Information to be given in notification
- 830.10 Preservation of aircraft wreckage, mail, cargo, and records
- 830.15 Reports and statements to be filed.

NTSB Regulation 49 CFR part 831 covers the accident investigation process and procedures:

#### Subpart A – General

- 831.1 Applicability of part.
- 831.2 Responsibility of Board.
- 831.3 Authority of Directors.
- 831.4 Nature of investigation.
- 831.5 Priority of Board investigations.
- 831.6 Request to withhold information.
- 831.7 Right to representation.
- 831.8 Investigator-in-charge.
- 831.9 Authority of Board representatives.
- 831.10 Autopsies.
- 831.11 Parties to the investigation.
- 831.12 Access to and release of wreckage, records, mail, and cargo.
- 831.13 Flow and dissemination of accident or incident information.
- 831.14 Proposed findings.

#### Subpart B – Aviation

- 831.20 Authority of NTSB in aviation investigations.
- 831.21 Other Government agencies and NTSB Aviation investigations.

#### Subpart C – Highway Investigations

- 831.30 Authority of NTSB in highway investigations.

#### Subpart D – Railroad, Pipeline, and Hazardous Materials Investigations

- 831.40 Authority of NTSB in railroad, pipeline, and hazardous materials investigations.

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<sup>1</sup> 49 U.S.C. 1132(a)(1)(A) This enabling statute for the NTSB states: “The National Transportation Safety Board shall investigate each accident involving civil aircraft.”

<sup>2</sup> 49 U.S.C. 1131(a)(2)(B) “If the Attorney General, in consultation with the Chairman of the Board, determines and notifies the Board that circumstances reasonably indicate that the accident may have been caused by an intentional criminal act, the Board shall relinquish investigative priority to the Federal Bureau of Investigation. The relinquishment of investigative priority by the Board shall not otherwise affect the authority of the Board to continue its investigation under this section.”

<sup>3</sup> For example, the NTSB has a Memorandum of Understanding with the Department of State to use that agency’s resources in furtherance of the Aviation Disaster Family Assistance Act of 1996.

## **Corporate Role in the NTSB Investigation**

The following is reproduced from the NTSB Accident Investigators Manual – Major Team Investigations, App. F.

### **1. Role of Parties to the Investigation**

The primary purpose of inviting organizations to participate in an accident investigation is to assist the Board in developing a complete and accurate factual record of the accident. It also helps responsible safety officials to have immediate access to facts regarding the accident/incident that may facilitate prompt preventive and/or corrective action. Participation as a party, however, is a privilege—not a right—and conveys no right to information or participation. You will participate initially in the field (on-scene) phase of the investigation as a Party Coordinator or as a representative of a party to the investigation. Later, your organization may be designated as a party to any public hearing on the accident the Board may hold, provided it meets the Board's requirements. Participation in the investigation does not automatically guarantee party status at a Safety Board public hearing. Conversely, participation in the investigation is not a prerequisite to participation in a public hearing.

All persons participating in the Safety Board's investigation must have qualifications that relate to specific factual information or skills that would not otherwise be available to the Board. Also, no participating organization will be permitted representation by a person who has interests beyond the safety objective of the investigation. The Board's rules specifically prohibit any party from being represented by a person who represents claimants or insurers. No persons occupying legal positions may participate as parties. Participants in the investigation shall be responsive to the direction of Safety Board personnel and may be expelled from the investigation if they do not perform their assigned duties or if they conduct themselves in a manner prejudicial to the investigation. If you are a party coordinator for your organization, you will also be required to sign a statement to ensure your complete understanding of 49 Code of Federal Regulations (CFR §831.11 related to parties to the field investigation. At all phases of the investigation, party coordinators are responsible for the behavior of their employees or representatives.

### **Drug and Alcohol Testing regulations**

- Drug testing – post accident 14 CFR §120.109
- Testing required “if that employee’s performance either contributed to an accident or cannot be completely discounted as a contributing factor to the accident.” Testing should be done as soon as possible but not later than 32 hours after the accident.
- Alcohol Testing – post accident 14 CFR §120.217
- Alcohol testing standard same as drug testing. Testing should be accomplished within two hours. Should testing not be completed within eight hours, company must provide explanatory report to the FAA.
- The NTSB has authority to receive the results of these tests, 49 U.S.C. §1114(e).

### **Law Enforcement and Criminal Concerns**

- Accidents resulting in death may result in criminal charges and liability for personnel, corporate officers, and the corporation.

## Other Laws and Their Applicability

- Health Insurance Portability and Accountability Act of 1996 – HIPAA protects private medical information. Generally, a person must sign a waiver to disclose personal medical information. HIPAA includes certain exceptions to getting a waiver. A disaster with mass casualties is one such exception. Under this exception, a public health authority may seek and obtain private medical information without getting a personal waiver.
- The NTSB is considered a public health authority for this purpose under 45 CFR §164.512.
- The FAA has pursued public health authority status and will likely be entitled to receive such private health information without a signed waiver.
- Occupational Safety and Health Administration regulations also play a role in aviation accidents.<sup>4</sup> The OSHA Act covers workplace related injuries and fatalities. 29 CFR part 1910. Pertinent concerns include:
  - OSHA training required for blood borne pathogen hazards
  - Immunizations for rescue workers
  - Protective equipment against blood borne pathogen hazards

<sup>4</sup> 29 U.S.C. §654 (a)(1) "Each employer shall comply with occupational safety and health standards promulgated under this section."

- Exposure control plan 29 CFR §1910.1030(c)(1)
- Aviation Disaster Family Assistance Act of 1996 Public Law 104-264 110 Statute 3214 Section 703.
- This plan details the actions and duties of the NTSB, other agencies, and the airlines during the crash investigation.
- Under a 1999 agreement between the NTSB and the Air Transport Association (now Airlines for America (AFA)), airlines have agreed to pay both logistical and transportation expenses for families wishing to travel to accident site and extraordinary expenses for crash victim recovery and identification and emergency response.
- Other government agency regulations may be pertinent depending on the aircraft manifest
- Postal Service notification required for loss of US mail
- Department of Defense notification required when military personnel are onboard
- Hazardous cargo may involve:
  - Center for Disease Control
  - U.S. Energy Research and Development Administration

## Accident outside the United States

International Civil Aviation Organization (ICAO) Annex 13 sets the ground rules for investigations of aviation accidents involving more than one country. The NTSB will likely be a party to the investigation.

## ICAO Annex 13 Filed Differences

The United States investigation protocol follows ICAO standards with the following filed differences to ICAO Annex 13 – Aircraft Accident and Incident Investigation.

- Section 5.12
  - The United States laws provide some protection against dissemination of some medical or private information.
  - US laws also prohibits disclosure of the cockpit voice recorder information not pertinent to the investigation.
- Section 5.25(h)
  - Deliberations related to analysis, probable causes and safety recommendations are limited to investigative authority and staff. Other participation is through written submissions.

- Section 5.26(b)
  - The standard used in the US for public access to information does not consider the consent of the state conducting the investigation.
- Section 6.2
  - The U.S. laws on public right to access of government-held information may not protect the dissemination of a draft report.

**Treaties applicable to accidents and investigations:**

Which treaty applies depends on accident location and origin country of parties involved.

- Warsaw Convention of 1929
  - The Warsaw Convention established liability limits for loss in an aviation accident. A fixed and undisputed payout was established unless willful misconduct on the part of the carrier could be proven.
- The Hague Protocol
  - This protocol increased the amount of compensation for each loss or injury under the Warsaw Convention.
- The Montreal Convention
  - This convention was held for the purpose of modernizing the Warsaw Convention and incorporating other related documents. The convention supercedes the previous international air carriage agreements – the Warsaw Convention and the Hague Protocol. It became effective after 30 nations adopted the convention in 2003.
  - This convention eliminates passenger liability limits of the Warsaw Convention/Hague Protocol, leaving a court to decide if there is liability.
  - Article 33 of this convention allows jurisdiction over suits to be brought in the domicile of a code share partner. This is generally considered a way of accessing U.S. courts for higher damage awards.

**Local Laws**

The local laws of the territory of the crash will also play an important role. Some countries consider an accident investigation a criminal matter. Should an accident occur outside the United States, consider seeking advice of the general counsel or outside counsel. The investigative organizations of territories surrounding the United States are:

- Aruba – Regulatory and investigative body is Director of Civil Aviation
- Bahamas – Regulatory and investigative body is Director of Civil Aviation
- Bermuda - Regulatory body is Bermuda Department of Civil Aviation, investigative agency is the Director of Civil Aviation
- Canada – Regulatory body is Transport Canada, investigative agency is Transportation Safety Board Canada (TSBC)
- Cayman Islands – Regulatory body is Civil Aviation Authority, investigative agency is Director of Civil Aviation
- Mexico – Regulatory and investigative authority is Dirección General de Aeronáutica Civil Evidence handling and protection

NTSB approval is required before moving any item from an accident scene. Some accidents may be investigated as a criminal matter by the FBI. These investigations may have established evidence handling protocols.

However, any accident investigation can lead to litigation. See the ASTM Standard Practice for Examining And Preparing Items That Are Or May Become Involved In Criminal or Civil Litigation (ASTM E860-07). Adherence to these guidelines is appropriate from the beginning of the accident investigation.

**NTSB STATUTORY AUTHORITY AND RELATED SECTIONS 49 U.S.C. §1101 – 1155**  
**§1101 Definitions**

In this chapter, the term “accident” includes damage to or destruction of vehicles in surface or air transportation or pipelines, regardless of whether the initiating event is accidental or otherwise.

**§1112 Special Boards of Inquiry on air transportation safety**

- (a) **Establishment.**— If an accident involves a substantial question about public safety in air transportation, the National Transportation Safety Board may establish a special board of inquiry composed of—
- (1) one member of the Board acting as chairman; and
  - (2) 2 members representing the public, appointed by the President on notification of the establishment of the special board of inquiry.
- (b) **Qualifications and Conflicts of Interest.**— The public members of a special board of inquiry must be qualified by training and experience to participate in the inquiry and may not have a pecuniary interest in an aviation enterprise involved in the accident to be investigated.
- (c) **Authority.**— A special board of inquiry has the same authority that the Board has under this chapter.

**§1114 Disclosure, availability, and use of information**

(a) **General.**—

- (1) Except as provided in subsections (b), (c), (d), and (f) of this section, a copy of a record, information, or investigation submitted or received by the National Transportation Safety Board, or a member or employee of the Board, shall be made available to the public on identifiable request and at reasonable cost. This subsection does not require the release of information described by section 552 (b) of title 5 or protected from disclosure by another law of the United States.
- (2) The Board shall deposit in the Treasury amounts received under paragraph (1) to be credited to the appropriation of the Board as offsetting collections.

(b) **Trade Secrets.**—

- (1) The Board may disclose information related to a trade secret referred to in section 1905 of title 18 only—
  - (A) to another department, agency, or instrumentality of the United States Government when requested for official use;
  - (B) to a committee of Congress having jurisdiction over the subject matter to which the information is related, when requested by that committee;
  - (C) in a judicial proceeding under a court order that preserves the confidentiality of the information without impairing the proceeding; and
  - (D) to the public to protect health and safety after giving notice to any interested person to whom the information is related and an opportunity for that person to comment in writing, or orally in closed session, on the proposed disclosure, if the delay resulting from notice and opportunity for comment would not be detrimental to health and safety.
- (2) Information disclosed under paragraph (1) of this subsection may be disclosed only in a way designed to preserve its confidentiality.
- (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.

**(c) Cockpit Recordings and Transcripts.—**

- (1) The Board may not disclose publicly any part of a cockpit voice or video recorder recording or transcript of oral communications by and between flight crew members and ground stations related to an accident or incident investigated by the Board. However, the Board shall make public any part of a transcript or any written depiction of visual information the Board decides is relevant to the accident or incident—
  - (A) if the Board holds a public hearing on the accident or incident, at the time of the hearing; or
  - (B) if the Board does not hold a public hearing, at the time a majority of the other factual reports on the accident or incident are placed in the public docket.
- (2) This subsection does not prevent the Board from referring at any time to cockpit voice or video recorder information in making safety recommendations.

**(d) Surface Vehicle Recordings and Transcripts.—** (omitted – applicable to non-aviation events)

**(e) Drug Tests.—**

- (1) Law 100–71, 101 Stat. 471), the Secretary of Transportation shall provide the following information to the Board when requested in writing by the Board:
  - (A) any report of a confirmed positive toxicological test, verified as positive by a medical review officer, conducted on an officer or employee of the Department of Transportation under post-accident, unsafe practice, or reasonable suspicion toxicological testing requirements of the Department, when the officer or employee is reasonably associated with the circumstances of an accident or incident under the investigative jurisdiction of the Board.
  - (B) any laboratory record documenting that the test is confirmed positive.
- (2) Except as provided by paragraph (3) of this subsection, the Board shall maintain the confidentiality of, and exempt from disclosure under section 552 (b)(3) of title 5—
  - (A) a laboratory record provided the Board under paragraph (1) of this subsection that reveals medical use of a drug allowed under applicable regulations; and
  - (B) medical information provided by the tested officer or employee related to the test or a review of the test.
- (3) The Board may use a laboratory record made available under paragraph (1) of this subsection to develop an evidentiary record in an investigation of an accident or incident if—
  - (A) the fitness of the tested officer or employee is at issue in the investigation; and
  - (B) the use of that record is necessary to develop the evidentiary record.

**(f) Foreign Investigations.—**

- (1) In general.— Notwithstanding any other provision of law, neither the Board, nor any agency receiving information from the Board, shall disclose records or information relating to its participation in foreign aircraft accident investigations; except that—
  - (A) the Board shall release records pertaining to such an investigation when the country conducting the investigation issues its final report or 2 years following the date of the accident, whichever occurs first; and
  - (B) the Board may disclose records and information when authorized to do so by the country conducting the investigation.

- (2) Safety recommendations.— Nothing in this subsection shall restrict the Board at any time from referring to foreign accident investigation information in making safety recommendations.

### §1131 General Authority

#### (a) General.—

- (1) The National Transportation Safety Board shall investigate or have investigated (in detail the Board prescribes) and establish the facts, circumstances, and cause or probable cause of—
- (A) an aircraft accident the Board has authority to investigate under section 1132 of this title or an aircraft accident involving a public aircraft as defined by section 40102 (a)(37) of this title other than an aircraft operated by the Armed Forces or by an intelligence agency of the United States;
  - (B) a highway accident, including a railroad grade crossing accident, the Board selects in cooperation with a State;
  - (C) a railroad accident in which there is a fatality or substantial property damage, or that involves a passenger train;
  - (D) a pipeline accident in which there is a fatality, substantial property damage, or significant injury to the environment;
  - (E) a major marine casualty (except a casualty involving only public vessels) occurring on the navigable waters or territorial sea of the United States, or involving a vessel of the United States, under regulations prescribed jointly by the Board and the head of the department in which the Coast Guard is operating; and
  - (F) any other accident related to the transportation of individuals or property when the Board decides—
    - (i) the accident is catastrophic;
    - (ii) the accident involves problems of a recurring character; or
    - (iii) the investigation of the accident would carry out this chapter.
- (2)
- (A) Subject to the requirements of this paragraph, an investigation by the Board under paragraph (1)(A)–(D) or (F) of this subsection has priority over any investigation by another department, agency, or instrumentality of the United States Government. The Board shall provide for appropriate participation by other departments, agencies, or instrumentalities in the investigation. However, those departments, agencies, or instrumentalities may not participate in the decision of the Board about the probable cause of the accident.
  - (B) If the Attorney General, in consultation with the Chairman of the Board, determines and notifies the Board that circumstances reasonably indicate that the accident may have been caused by an intentional criminal act, the Board shall relinquish investigative priority to the Federal Bureau of Investigation. The relinquishment of investigative priority by the Board shall not otherwise affect the authority of the Board to continue its investigation under this section.
  - (C) If a Federal law enforcement agency suspects and notifies the Board that an accident being investigated by the Board under subparagraph (A), (B), (C), or (D) of paragraph (1) may have been caused by an intentional criminal act, the Board, in consultation with the law enforcement agency, shall take necessary actions to ensure that evidence of the criminal act is preserved.

- (3) This section and sections 1113, 1116 (b), 1133, and 1134 (a) and (c)–(e) of this title do not affect the authority of another department, agency, or instrumentality of the Government to investigate an accident under applicable law or to obtain information directly from the parties and witnesses to, the accident. The Board and other departments, agencies, and instrumentalities shall ensure that appropriate information developed about the accident is exchanged in a timely manner.

**(b) Accidents Involving Public Vessels.—**

- (1) The Board or the head of the department in which the Coast Guard is operating shall investigate and establish the facts, circumstances, and cause or probable cause of a marine accident involving a public vessel and any other vessel. The results of the investigation shall be made available to the public.
- (2) Paragraph (1) of this subsection and subsection (a)(1)(E) of this section do not affect the responsibility, under another law of the United States, of the head of the department in which the Coast Guard is operating.

**(c) Accidents Not Involving Government Misfeasance or Nonfeasance.—**

- (1) When asked by the Board, the Secretary of Transportation may—
- (A) investigate an accident described under subsection (a) or (b) of this section in which misfeasance or nonfeasance by the Government has not been alleged; and
  - (B) report the facts and circumstances of the accident to the Board.
- (2) The Board shall use the report in establishing cause or probable cause of an accident described under subsection (a) or (b) of this section.

**(d) Accidents Involving Public Aircraft.—** The Board, in furtherance of its investigative duties with respect to public aircraft accidents under subsection (a)(1)(A) of this section, shall have the same duties and powers as are specified for civil aircraft accidents under sections 1132 (a), 1132 (b), and 1134 (a), (b), (d), and (f) of this title.

**(e) Accident Reports.—** The Board shall report on the facts and circumstances of each accident investigated by it under subsection (a) or (b) of this section. The Board shall make each report available to the public at reasonable cost.

### **§1132 Civil Aircraft Accident Investigations**

**(a) General Authority.—**

- (1) The National Transportation Safety Board shall investigate—
- (A) each accident involving civil aircraft; and
  - (B) with the participation of appropriate military authorities, each accident involving both military and civil aircraft.
- (2) A person employed under section 1113 (b)(1) of this title that is conducting an investigation or hearing about an aircraft accident has the same authority to conduct the investigation or hearing as the Board.

**(b) Notification and Reporting.—** The Board shall prescribe regulations governing the notification and reporting of accidents involving civil aircraft.

**(c) Participation of Secretary.—** The Board shall provide for the participation of the Secretary of Transportation in the investigation of an aircraft accident under this chapter when participation is necessary to carry out the duties and powers of the Secretary. However, the Secretary may not participate in establishing probable cause.

**(d) Accidents Involving Only Military Aircraft.—** If an accident involves only military aircraft and a duty of the Secretary is or may be involved, the military authorities shall provide for the participation of the Secretary. In any other accident involving only military aircraft, the military authorities shall give the Board or Secretary information the military authorities decide would contribute to the promotion of air safety.

### §1134 Inspections and Autopsies

- (a) **Entry and Inspection.**— An officer or employee of the National Transportation Safety Board—
- (1) on display of appropriate credentials and written notice of inspection authority, may enter property where a transportation accident has occurred or wreckage from the accident is located and do anything necessary to conduct an investigation; and
  - (2) during reasonable hours, may inspect any record, process, control, or facility related to an accident investigation under this chapter.
- (b) **Inspection, Testing, Preservation, and Moving of Aircraft and Parts.**—
- (1) In investigating an aircraft accident under this chapter, the Board may inspect and test, to the extent necessary, any civil aircraft, aircraft engine, propeller, appliance, or property on an aircraft involved in an accident in air commerce.
  - (2) Any civil aircraft, aircraft engine, propeller, appliance, or property on an aircraft involved in an accident in air commerce shall be preserved, and may be moved, only as provided by regulations of the Board.
- (c) **Avoiding Unnecessary Interference and Preserving Evidence.**— In carrying out subsection (a)(1) of this section, an officer or employee may examine or test any vehicle, vessel, rolling stock, track, or pipeline component. The examination or test shall be conducted in a way that—
- (1) does not interfere unnecessarily with transportation services provided by the owner or operator of the vehicle, vessel, rolling stock, track, or pipeline component; and
  - (2) to the maximum extent feasible, preserves evidence related to the accident, consistent with the needs of the investigation and with the cooperation of that owner or operator.
- (d) **Exclusive Authority of Board.**— Only the Board has the authority to decide on the way in which testing under this section will be conducted, including decisions on the person that will conduct the test, the type of test that will be conducted, and any individual who will witness the test. Those decisions are committed to the discretion of the Board. The Board shall make any of those decisions based on the needs of the investigation being conducted and, when applicable, subsections (a), (c), and (e) of this section.
- (e) **Promptness of Tests and Availability of Results.**— An inspection, examination, or test under subsection (a) or (c) of this section shall be started and completed promptly, and the results shall be made available.
- (f) **Autopsies.**—
- (1) The Board may order an autopsy to be performed and have other tests made when necessary to investigate an accident under this chapter. However, local law protecting religious beliefs related to autopsies shall be observed to the extent consistent with the needs of the accident investigation.
  - (2) With or without reimbursement, the Board may obtain a copy of an autopsy report performed by a State or local official on an individual who died because of a transportation accident investigated by the Board under this chapter.

### §1136 Assistance to families of passengers involved in aircraft accidents

- (a) **In General.**— As soon as practicable after being notified of an aircraft accident within the United States involving an air carrier or foreign air carrier and resulting in a major loss of life, the Chairman of the National Transportation Safety Board shall—
- (1) designate and publicize the name and phone number of a director of family support services who shall be an employee of the Board and shall be responsible for acting as a point of contact within the Federal Government for the families of passengers involved in the accident and a liaison between the air carrier or foreign air carrier and the families; and

- (2) designate an independent nonprofit organization, with experience in disasters and post trauma communication with families, which shall have primary responsibility for coordinating the emotional care and support of the families of passengers involved in the accident.
- (b) Responsibilities of the Board.**— The Board shall have primary Federal responsibility for facilitating the recovery and identification of fatally-injured passengers involved in an accident described in subsection (a).
- (c) Responsibilities of Designated Organization.**— The organization designated for an accident under subsection (a)(2) shall have the following responsibilities with respect to the families of passengers involved in the accident:
- (1) To provide mental health and counseling services, in coordination with the disaster response team of the air carrier or foreign air carrier involved.
  - (2) To take such actions as may be necessary to provide an environment in which the families may grieve in private.
  - (3) To meet with the families who have traveled to the location of the accident, to contact the families unable to travel to such location, and to contact all affected families periodically thereafter until such time as the organization, in consultation with the director of family support services designated for the accident under subsection (a)(1), determines that further assistance is no longer needed.
  - (4) To communicate with the families as to the roles of the organization, government agencies, and the air carrier or foreign air carrier involved with respect to the accident and the post-accident activities.
  - (5) To arrange a suitable memorial service, in consultation with the families.
- (d) Passenger Lists.**—
- (1) Requests for passenger lists.**—
    - (A) Requests by director of family support services.**— It shall be the responsibility of the director of family support services designated for an accident under subsection (a)(1) to request, as soon as practicable, from the air carrier or foreign air carrier involved in the accident a list, which is based on the best available information at the time of the request, of the names of the passengers that were aboard the aircraft involved in the accident.
    - (B) Requests by designated organization.**— The organization designated for an accident under subsection (a)(2) may request from the air carrier or foreign air carrier involved in the accident a list described in subparagraph (A).
  - (2) Use of information.**— The director of family support services and the organization may not release to any person information on a list obtained under paragraph (1) but may provide information on the list about a passenger to the family of the passenger to the extent that the director of family support services or the organization considers appropriate.
- (e) Continuing Responsibilities of the Board.**— In the course of its investigation of an accident described in subsection (a), the Board shall, to the maximum extent practicable, ensure that the families of passengers involved in the accident—
- (1) are briefed, prior to any public briefing, about the accident, its causes, and any other findings from the investigation; and
  - (2) are individually informed of and allowed to attend any public hearings and meetings of the Board about the accident.
- (f) Use of Air Carrier Resources.**— To the extent practicable, the organization designated for an accident under subsection (a)(2) shall coordinate its activities with the air carrier or foreign air carrier involved in the accident so that the resources of the carrier can be used to the greatest extent possible to carry out the organization’s responsibilities under this section.

**(g) Prohibited Actions.—**

- (1) **Actions to impede the board.**— No person (including a State or political subdivision) may impede the ability of the Board (including the director of family support services designated for an accident under subsection (a)(1)), or an organization designated for an accident under subsection (a)(2), to carry out its responsibilities under this section or the ability of the families of passengers involved in the accident to have contact with one another.
- (2) **Unsolicited communications.**— In the event of an accident involving an air carrier providing interstate or foreign air transportation and in the event of an accident involving a foreign air carrier that occurs within the United States, no unsolicited communication concerning a potential action for personal injury or wrongful death may be made by an attorney (including any associate, agent, employee, or other representative of an attorney) or any potential party to the litigation to an individual injured in the accident, or to a relative of an individual involved in the accident, before the 45th day following the date of the accident.
- (3) **Prohibition on actions to prevent mental health and counseling services.**— No State or political subdivision thereof may prevent the employees, agents, or volunteers of an organization designated for an accident under subsection (a)(2) from providing mental health and counseling services under subsection (c)(1) in the 30-day period beginning on the date of the accident. The director of family support services designated for the accident under subsection (a)(1) may extend such period for not to exceed an additional 30 days if the director determines that the extension is necessary to meet the needs of the families and if State and local authorities are notified of the determination.

**(h) Definitions.**— In this section, the following definitions apply:

- (1) **Aircraft accident.**— The term “aircraft accident” means any aviation disaster regardless of its cause or suspected cause.
- (2) **Passenger.**— The term “passenger” includes—
  - (A) an employee of an air carrier or foreign air carrier aboard an aircraft; and
  - (B) any other person aboard the aircraft without regard to whether the person paid for the transportation, occupied a seat, or held a reservation for the flight.
- (i) **Statutory Construction.**— Nothing in this section may be construed as limiting the actions that an air carrier may take, or the obligations that an air carrier may have, in providing assistance to the families of passengers involved in an aircraft accident.
- (j) **Relinquishment of Investigative Priority –**
  - (1) **General Rule.** — This section (other than subsection (g)) shall not apply to an aircraft accident if the Board has relinquished investigative priority under section 1131(a)(2)(b) and the Federal agency to which the Board relinquished investigative priority is willing and able to provide assistance to the victims and families of the passengers involved in the accident.
  - (2) **Board assistance.** — If this section does not apply to an aircraft accident because the Board has relinquished investigative priority with respect to the accident, the Board shall assist, to the maximum extent possible, the agency to which the Board has relinquished investigative priority in assisting families with respect to the accident.

**§1151 Aviation Enforcement**

- (a) **Civil Actions by Board.**— The National Transportation Safety Board may bring a civil action in a district court of the United States against a person to enforce section 1132, 1134 (b) or (f)(1) (related to an aircraft accident), 1136(g)(2), or 1155(a) of this title or a regulation prescribed or order issued under any of those sections. An action under this subsection may be brought in the judicial district in which the person does business or the violation occurred.

- (b) Civil Actions by Attorney General.**— On request of the Board, the Attorney General may bring a civil action in an appropriate court—
- (1) to enforce section 1132, 1134 (b) or (f)(1) (related to an aircraft accident), 1136(g)(2), or 1155(a) of this title or a regulation prescribed or order issued under any of those sections; and
  - (2) to prosecute a person violating those sections or a regulation prescribed or order issued under any of those sections.
- (c) Participation of Board.**— On request of the Attorney General, the Board may participate in a civil action to enforce section 1132, 1134 (b) or (f)(1) (related to an aircraft accident), 1136(g)(2), or 1155(a) of this title.

### **§1152 Joinder and intervention in aviation proceedings**

A person interested in or affected by a matter under consideration in a proceeding or a civil action to enforce section 1132, 1134 (b) or (f)(1) (related to an aircraft accident), or 1155(a) of this title, or a regulation prescribed or order issued under any of those sections, may be joined as a party or permitted to intervene in the proceeding or civil action.

### **§1153 Judicial Review**

- (a) General.**— The appropriate court of appeals of the United States or the United States Court of Appeals for the District of Columbia Circuit may review a final order of the National Transportation Safety Board under this chapter. A person disclosing a substantial interest in the order may apply for review by filing a petition not later than 60 days after the order of the Board is issued.
- (b) Persons Seeking Judicial Review of Aviation Matters.**—
- (1) A person disclosing a substantial interest in an order related to an aviation matter issued by the Board under this chapter may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60 days only if there was a reasonable ground for not filing within that 60-day period.
  - (2) When a petition is filed under paragraph (1) of this subsection, the clerk of the court immediately shall send a copy of the petition to the Board. The Board shall file with the court a record of the proceeding in which the order was issued.
  - (3) When the petition is sent to the Board, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Board to conduct further proceedings. After reasonable notice to the Board, the court may grant interim relief by staying the order or taking other appropriate action when cause for its action exists. Findings of fact by the Board, if supported by substantial evidence, are conclusive.
  - (4) In reviewing an order under this subsection, the court may consider an objection to an order of the Board only if the objection was made in the proceeding conducted by the Board or if there was a reasonable ground for not making the objection in the proceeding.
  - (5) A decision by a court under this subsection may be reviewed only by the Supreme Court under section 1254 of title 28.
- (c) Administrator Seeking Judicial Review of Aviation Matters.**— When the Administrator of the Federal Aviation Administration decides that an order of the Board under section 44709 or 46301 (d)(5) of this title will have a significant adverse impact on carrying out this chapter related to an aviation matter, the Administrator may obtain judicial review of the order under section 46110 of this title. The Administrator shall be made a party to the judicial review proceedings. Findings of fact of the Board are conclusive if supported by substantial evidence.

- (d) Commandant Seeking Judicial Review of Maritime Matters.** — If the Commandant of the Coast Guard decides that an order of the Board issued pursuant to a review of a Coast Guard action under section 1133 of this title will have an adverse impact on maritime safety or security, the Commandant may obtain judicial review of the order under subsection (a). The Commandant, in the official capacity of the Commandant, shall be a party to the judicial review proceedings.

**§1154 Discovery and use of cockpit and surface vehicle recordings and transcripts**

**(a) Transcripts and Recordings.—**

- (1) Except as provided by this subsection, a party in a judicial proceeding may not use discovery to obtain—
  - (A) any part of a cockpit or surface vehicle recorder transcript that the National Transportation Safety Board has not made available to the public under section 1114 (c) or 1114 (d) of this title; and
  - (B) a cockpit or surface vehicle recorder recording.
- (2)
  - (A) Except as provided in paragraph (4)(A) of this subsection, a court may allow discovery by a party of a cockpit or surface vehicle recorder transcript if, after an in camera review of the transcript, the court decides that—
    - (i) the part of the transcript made available to the public under section 1114 (c) or 1114 (d) of this title does not provide the party with sufficient information for the party to receive a fair trial; and
    - (ii) discovery of additional parts of the transcript is necessary to provide the party with sufficient information for the party to receive a fair trial.
  - (B) A court may allow discovery, or require production for an in camera review, of a cockpit or surface vehicle recorder transcript that the Board has not made available under section 1114 (c) or 1114 (d) of this title only if the cockpit or surface vehicle recorder recording is not available.
- (3) Except as provided in paragraph (4)(A) of this subsection, a court may allow discovery by a party of a cockpit or surface vehicle recorder recording if, after an in camera review of the recording, the court decides that—
  - (A) the parts of the transcript made available to the public under section 1114 (c) or 1114 (d) of this title and to the party through discovery under paragraph (2) of this subsection do not provide the party with sufficient information for the party to receive a fair trial; and (B) discovery of the cockpit or surface vehicle recorder recording is necessary to provide the party with sufficient information for the party to receive a fair trial.
- (4)
  - (A) When a court allows discovery in a judicial proceeding of a part of a cockpit or surface vehicle recorder transcript not made available to the public under section 1114 (c) or 1114 (d) of this title or a cockpit or surface vehicle recorder recording, the court shall issue a protective order—
    - (i) to limit the use of the part of the transcript or the recording to the judicial proceeding; and
    - (ii) to prohibit dissemination of the part of the transcript or the recording to any person that does not need access to the part of the transcript or the recording for the proceeding.

- (B) A court may allow a part of a cockpit or surface vehicle recorder transcript not made available to the public under section 1114 (c) or 1114 (d) of this title or a cockpit or surface vehicle recorder recording to be admitted into evidence in a judicial proceeding, only if the court places the part of the transcript or the recording under seal to prevent the use of the part of the transcript or the recording for purposes other than for the proceeding.
  - (5) This subsection does not prevent the Board from referring at any time to cockpit or surface vehicle recorder information in making safety recommendations.
  - (6) In this subsection:
    - (A) **Recorder.**— The term “recorder” means a voice or video recorder.
    - (B) **Transcript.**— The term “transcript” includes any written depiction of visual information obtained from a video recorder.
- (b) Reports.**— No part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

### §1155 Aviation penalties

**(a) Civil Penalty.**—

- (1) A person violating section 1132, section 1134(b), section 1134 (f)(1), or section 1136 (g) (related to an aircraft accident) of this title or a regulation prescribed or order issued under any of those sections is liable to the United States Government for a civil penalty of not more than \$1,000. A separate violation occurs for each day a violation continues.
  - (2) This subsection does not apply to a member of the armed forces of the United States or an employee of the Department of Defense subject to the Uniform Code of Military Justice when the member or employee is performing official duties. The appropriate military authorities are responsible for taking necessary disciplinary action and submitting to the National Transportation Safety Board a timely report on action taken.
  - (3) The Board may compromise the amount of a civil penalty imposed under this subsection.
  - (4) The Government may deduct the amount of a civil penalty imposed or compromised under this subsection from amounts it owes the person liable for the penalty.
  - (5) A civil penalty under this subsection may be collected by bringing a civil action against the person liable for the penalty. The action shall conform as nearly as practicable to a civil action in admiralty.
- (b) Criminal Penalty.**— A person that knowingly and without authority removes, conceals, or withholds a part of a civil aircraft involved in an accident, or property on the aircraft at the time of the accident, shall be fined under title 18, imprisoned for not more than 10 years, or both.

**TITLE 49—TRANSPORTATION  
CHAPTER VIII—NATIONAL TRANSPORTATION SAFETY BOARD  
PART 831 Investigation Procedures**

**Subpart A—GeneralSec.**

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- 831.2 Responsibility of the NTSB.
- 831.3 Authority of Directors.
- 831.4 Nature of investigation.
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- 831.64 Proposed findings.

**Authority:** 49 U.S.C. 1113(f).

**Source:** 82 FR 29685, June 29, 2017, unless otherwise noted.

**Subpart A—General**

**§ 831.1 Applicability of this subpart.**

- (a) Except as provided in Subpart E of this part regarding marine casualties, and unless specified by the National Transportation Safety Board (NTSB), the provisions of this subpart apply to all NTSB investigations conducted under its statutory authority.

- (b) Consistent with its statutory authority, the NTSB conducts investigations of transportation accidents that include, but are not limited to: accidents, collisions, crashes, derailments, explosions, incidents, mishaps, ruptures, or other similar accidents. Use of the term “accident” throughout this part includes all such occurrences.
- (c) Throughout this part, the term “IIC” means the NTSB investigator-in-charge

### **§ 831.2 Responsibility of the NTSB.**

The NTSB is required to investigate—

- (a) Aviation accidents as described in subpart B of this part;
- (b) Highway accidents as described in subpart C of this part;
- (c) Railroad, pipeline, and hazardous materials accidents as described in subpart D of this part; and
- (d) Any accident that occurs in connection with the transportation of people or property that, in the judgment of the NTSB, is catastrophic, involves problems of a recurring nature or would otherwise carry out the intent of its authorizing statutes. This authority includes selected events involving the transportation of hazardous materials, including their release

### **§ 831.3 Authority of Directors.**

Subject to the provisions of § 831.2 of this part and part 800 of this chapter, the Directors of the Office of Aviation Safety, Office of Highway Safety, or Office of Railroad, Pipeline and Hazardous Materials Investigations, may order an investigation into any transportation accident.

### **§ 831.4 Nature of investigation.**

- (a) General. The NTSB conducts investigations, or has them conducted, to determine the facts, conditions, and circumstances relating to an accident. The NTSB uses these results to determine one or more probable causes of an accident, and to issue safety recommendations to prevent or mitigate the effects of a similar accident. The NTSB is required to report on the facts and circumstances of accidents it investigates. The NTSB begins an investigation by monitoring the situation and assessing available facts to determine the appropriate investigative response. Following an initial assessment, the NTSB notifies persons and organizations it anticipates will be affected as to the extent of its expected investigative response.
- (b) NTSB products. An investigation may result in a report or brief of the NTSB's conclusions or other products designed to improve transportation safety. Other products may include factual records, safety recommendations, and other safety information.
- (c) NTSB investigations are fact-finding proceedings with no adverse parties. The investigative proceedings are not subject to the Administrative Procedure Act (5 U.S.C. 551 et seq.), and are not conducted for the purpose of determining the rights, liabilities, or blame of any person or entity, as they are not adjudicatory proceedings.

### **§ 831.5 Priority of NTSB investigations.**

- (a) *Relationships with other agencies.*
  - (1) Except as provided in 49 U.S.C. 1131(a)(2)(B) and (C) regarding suspected criminal actions, an investigation conducted under the authority of the NTSB has priority over any investigation conducted by another Federal agency.
  - (2) The NTSB will provide for appropriate participation by other Federal agencies in any NTSB investigation. Such agencies may not participate in the NTSB's probable cause determination.
  - (3) The NTSB has first right to access wreckage, information, and resources, and to interview witnesses the NTSB deems pertinent to its investigation.
  - (4) As indicated in § 831.9(c) of this part, the NTSB has exclusive authority to decide when and how the testing and examination of evidence will occur.

- (5) The NTSB and other Federal agencies will exchange information obtained or developed about the accident in the course of their investigations in a timely manner. Nothing in this section prohibits the NTSB from sharing factual information with other agencies.
- (6) *Incident command system.* The NTSB recognizes the role of incident command systems to address emergencies. The NTSB does not assume the role of a first responder agency.
  - (i) The NTSB IIC or his designee will participate in the incident command system to identify and coordinate investigative needs related to the preservation and collection of information and evidence.
  - (ii) The NTSB may collect information and evidence from the incident command in a timely and reasonable manner so as not to interfere with its operations.

(b) *Investigations by other Federal agencies.*

- (1) Nothing in this section limits the authority of any Federal agency to conduct an investigation of an accident or incident under applicable provisions of law or to obtain information directly from parties involved in, and witnesses to, a transportation accident. Other agencies are expected to coordinate with the NTSB IIC to avoid interference with, and duplication of, the NTSB's investigative efforts. These agencies will not participate in the NTSB's probable cause determination.
- (2) The NTSB recognizes that state and local agencies may conduct activities related to an accident under investigation by the NTSB. These agencies will not participate in the NTSB's probable cause determination.
- (3) Except as described in § 831.30 of this part regarding highway investigations, the NTSB may request that a Federal agency provide to the NTSB the results of that agency's investigation of an accident when such investigation is intended to result in safety improvements or remedial action. The NTSB will not routinely request regulatory enforcement records or investigation results.

**§ 831.6 Request to withhold information.**

(a) *Applicability.*

This section applies to information the NTSB receives from any source that may be subject to the Trade Secrets Act (18 U.S.C. 1905) or the Freedom of Information Act (FOIA, 5 U.S.C. 552).

(b) *Disclosure.*

The NTSB is authorized by 49 U.S.C. 1114(b) to disclose, under certain circumstances, confidential commercial information that would otherwise be subject to penalties for disclosure under the Trade Secrets Act, or excepted from disclosure under FOIA. The NTSB may exercise this authority when disclosure is necessary to support a key finding, a safety recommendation, or the NTSB's statement of probable cause of an accident.

(c) *Disclosure procedures.*

Information submitted to the NTSB that the submitter believes qualifies as a trade secret or as confidential commercial information subject either to the Trade Secrets Act or Exemption 4 of FOIA must be so identified by the submitter on each page that contains such information. In accordance with 49 U.S.C. 1114(b), the NTSB will provide the submitter of identified information (or information the NTSB has reason to believe qualifies as subject to the Trade Secrets Act or Exemption 4 of FOIA) the opportunity to comment on any disclosure contemplated by the NTSB. In all instances in which the NTSB decides to disclose such information pursuant to 49 U.S.C. 1114(b) or 5 U.S.C. 552, the NTSB will provide at least 10 days' advance notice to the submitter.

(d) *Voluntarily provided safety information.*

- (1) 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.
- (2) The NTSB will review voluntarily provided safety information for confidential content, and will de-identify or anonymize any confidential content referenced in its products.

- (e) *Other.* Any person may make written objection to the public disclosure of any other information, such as interview summaries or transcripts, contained in any report or document filed, or otherwise obtained by the NTSB, stating the grounds for such objection. The NTSB on its own initiative or if such objection is made, may order such information withheld from public disclosure, when, in its judgment, the information may be withheld under the provisions of an exemption to the FOIA (see part 801 of this chapter), and its release is found not to be in the public interest.

**§ 831.7 Representation during an interview.**

- (a) Any person interviewed in any manner by the NTSB has the right to be accompanied during the interview by no more than one representative of the witness's choosing. The representative—
  - (1) May be an attorney;
  - (2) May provide support and counsel to the witness;
  - (3) May not supplement the witness's testimony; and
  - (4) May not advocate for the interests of a witness's other affiliations (e.g., the witness's employer).
- (b) An investigator conducting the interview may take any necessary action (including removal of the representative from the interview) to ensure a witness's representative acts in accordance with the provisions of paragraph (a) of this section during the interview, and to prevent conduct that may be disruptive to the interview.

**§ 831.8 Investigator-in-charge.**

In addition to the subpoena and deposition authority delegated to investigative officers under this chapter, a person designated as IIC for an investigation is authorized to—

- (a) Organize, conduct, control, and manage the field phase of an investigation, even when a Board Member is present;
- (b) Coordinate all resources and supervise all persons (including persons not employed by the NTSB) involved in an on-site investigation; and
- (c) Continue his or her organizational and management responsibilities through all phases of the investigation, including consideration and adoption of a report or brief determining one or more probable causes of an accident

**§ 831.9 Authority during investigations.**

- (a) General authority of investigators. To carry out the statutory responsibilities of the agency, an NTSB investigator may—
  - (1) Conduct hearings;
  - (2) Administer oaths;
  - (3) Require, by subpoena or otherwise, the production of evidence and witnesses;
  - (4) Enter any property where an accident subject to the NTSB's jurisdiction has occurred, or wreckage from any such accident is located, and take all actions necessary to conduct a complete investigation of the accident;
  - (5) Inspect, photograph, or copy any records or information (including medical records pursuant to paragraph (b)(2) of this section), and correspondence regardless of the date of their creation or modification, for the purpose of investigating an accident;
  - (6) Take possession of wreckage, records or other information if it determines such possession is necessary for an investigation; and
  - (7) Question any person having knowledge relevant to a transportation accident.

- (b) Subpoenas. The NTSB may issue a subpoena, enforceable in Federal District Court, to obtain testimony or evidence related to an accident, including but not limited to personal electronic devices.
  - (1) The NTSB's authority to issue subpoenas includes access to medical records and specimens.
  - (2) For purposes of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, and the regulations promulgated by the DHHS, 45 CFR 164.501 et seq., the NTSB is a “public health authority” to which protected health information may be disclosed by a HIPAA “covered entity” without the prior written authorization of the subject of the records. In addition, the NTSB may issue a subpoena to gain access to such information
- (c) Examination of evidence. In accordance with 49 U.S.C. 1134
- (d) the NTSB has exclusive authority to decide timing, manner and method of testing and examination of evidence, and extraction of data.

**§ 831.10 Autopsies and postmortem testing.**

When a person dies as a result of having been involved in a transportation accident within the jurisdiction of the NTSB—

- (a) The NTSB is authorized to obtain, with or without reimbursement, a copy of a report of autopsy performed by a State or local authority on such person.
- (b) The NTSB may order an autopsy or other postmortem tests of any person as may be related to its investigation of a transportation accident. The IIC may direct that an autopsy or other test be performed if necessary for an investigation. Provisions of local law protecting religious beliefs with respect to autopsies shall be observed to the extent they are consistent with the needs of the investigation.

**§ 831.11 Parties to the investigation.**

- (a) *Participants.*
  - (1) The IIC may designate one or more entities to serve as parties in an investigation. Party status is limited to those persons, Federal, state, or local government agencies and organizations whose employees, functions, activities, or products were involved in the accident and that can provide suitable qualified technical personnel to actively assist in an investigation. To the extent practicable, a representative proposed by party organizations to participate in the investigation may not be a person who had direct involvement in the accident under investigation.
  - (2) Except for the FAA, no entity has a right to participate in an NTSB investigation as a party.
  - (3) The participation of the Administrator of the FAA and other Federal entities in aviation accident investigations is addressed in § 831.21 of this part.
  - (4) Participants in an investigation (e.g., party representatives, party coordinators, and/or the larger party organization) must follow all directions and instructions from NTSB representatives. Party status may be revoked or suspended if a party fails to comply with assigned duties and instructions, withholds information, or otherwise acts in a manner prejudicial or disruptive to an investigation.
- (b) *Prohibitions on serving as party representatives.*
  - (1) In accordance with § 845.6 of this chapter, no party representative may occupy a legal position or be a person who also represents claimants or insurers.
  - (2) Failure to comply with these provisions may result in sanctions, including loss of party status.
- (c) *Disclosures.*
  - (1) The name of a party and its representative may be disclosed in documents the NTSB places in the public docket for the investigation.

- (2) The NTSB may share information considered proprietary or confidential by one party with other parties during the course of an investigation, but will preserve the confidentiality of the information to the greatest extent possible.
  - (3) Section 831.6(d) of this part describes how the NTSB will handle voluntarily submitted safety information, and the NTSB's determination whether to share any such information. The NTSB will de-identify the source of such information when deciding to share it.
- (d) **Party agreement.** Except for representatives of other Federal agencies, all party representatives must sign the "Statement of Party Representatives to NTSB Investigation" (Statement) upon acceptance of party status. Failure to timely sign the statement may result in sanctions, including loss of party status. Representatives of other Federal agencies, while not required to sign the Statement, will be provided notice of and must comply with the responsibilities and limitations set forth in the agreement.
- (e) **Internal review by a party.**
- (1) To assure coordination of concurrent efforts, a party to an investigation that conducts or authorizes a review of its own processes and procedures as a result of an accident the NTSB is investigating, by signing the party agreement, agrees to, in a timely manner—(i) Inform the IIC of the nature of the review; and(ii) Provide the IIC with the findings from the review.
  - (2) If the findings from a review contain privileged information—,(i) The submitting party must inform the IIC that the review contains privileged information;(ii) The submitting party must identify the privileged content at the time of submission to the IIC; and(iii) The NTSB must, if informed that such information is being submitted, review the information for relevancy to the investigation, and determine whether public disclosure of the information is necessary for the investigation.
  - (3) The NTSB may use the protections described in § 831.6 of this part, as applicable, to protect certain findings from public disclosure.
  - (4) Investigations performed by other Federal agencies during an NTSB investigation are addressed in § 831.5 of this part.

**§ 831.12 Access to and release of wreckage, records, mail, and cargo.**

- (a) Only persons authorized by the NTSB IIC may be permitted access to wreckage, records, mail, or cargo.
- (b) Wreckage, records, mail, and cargo in the NTSB's custody will be released when the NTSB determines it has no further need for such items. Recipients of released wreckage must sign an acknowledgement of release provided by the NTSB.

**§ 831.13 Provision and dissemination of investigative information.**

- (a) *Applicability.* This section applies to:
  - (1) Information related to the accident or incident;
  - (2) Any information collected or compiled by the NTSB as part of its investigation, such as photographs, visual representations of factual data, physical evidence from the scene of the accident, interview statements, wreckage documentation, flight data and cockpit voice recorder information, and surveillance video; and
  - (3) Any information regarding the status of an investigation, or activities conducted as part of the investigation
- (b) *Provision of information.* All information described in paragraph (a) of this section and obtained by any person or organization participating in the investigation must be promptly provided to the NTSB, except where the NTSB authorizes the party to retain the information.
- (c) *Release of information.* Parties are prohibited from releasing information obtained during an investigation at any time prior to the NTSB's public release of information unless the release is consistent with the following criteria:

- (1) Information released at the scene of an accident—(i) Is limited to factual information concerning the accident and the investigation released in coordination with the IIC; and(ii) Will be made by the Board Member present at the scene as the official spokesperson for the NTSB. Additionally, the IIC or representatives from the NTSB's Office of Safety Recommendations and Communications may release information to media representatives, family members, and elected officials as deemed appropriate.
- (2) The release of information described in paragraph (a)(1) of this section by the NTSB at the scene of an accident does not authorize any party to the investigation to comment publicly on the information during the course of the investigation. Any dissemination of factual information by a party may be made only as provided in this section.
- (3) A party may disseminate information related to an investigation to those individuals within its organization who have a need to know for the purpose of addressing a safety issue including preventive or remedial actions. If such internal release of information results in a planned safety improvement, the party must inform the IIC of such planned improvement in a timely manner before it is implemented.
- (4) Any other release of factual information related to the investigation must be approved by the IIC prior to release, including:(i) Dissemination within a party organization, for a purpose not described in paragraph (b)(3) of this section;(ii) Documents that provide information concerning the investigation, such as written directives or informational updates for release to employees or customers of a party;(iii) Information related to the investigation released to an organization or person that is not a party to the investigation;(d) The release of recordings or transcripts from certain recorders may be made only in accordance with the statutory limitations of 49 U.S.C. 1114(c) and (d).

#### **§ 831.14 Proposed findings.**

- (a) *General.* Any party to the investigation designated under § 831.11 may submit to the NTSB written proposed findings to be drawn from the evidence produced during the course of the investigation, a proposed probable cause, and/or proposed safety recommendation(s) designed to prevent future accidents.
- (b) *Timing of submissions.* The IIC will inform parties when submissions are due. All written submissions must be received by the IIC by the due date. If there is a Board meeting, the due date will be set prior to the date the matter is published in the **Federal Register**.

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- 1) The authority of a representative of the FAA during such investigations is the same as that of a board investigator under this part.
  - 2) Part 850 also governs the conduct of certain investigations in which the Board and the Coast Guard participate jointly.

#### **Subpart B—Aviation Investigations**

#### **§ 831.20 Authority of NTSB in aviation accident investigations.**

- (a) *Scope.* The NTSB is authorized to investigate—
  - (1) Each accident involving a civil aircraft in the United States, and any civil aircraft registered in the United States when an accident occurs in international waters;
  - (2) Each accident involving a public aircraft as defined in 49 U.S.C. 40102(a)(41), except for aircraft operated by the U.S. Armed Forces or by an intelligence agency of the United States;
  - (3) With the participation of appropriate military authorities, each accident involving a military aircraft and—
    - (i) a civil aircraft; or
    - (ii) certain public aircraft as described in paragraph (a)(2) of this section.

- (b) *Authority to examine or test.* Pursuant to § 831.9 of this part, a credentialed employee of the NTSB is authorized to examine or test any civil or certain public aircraft, aircraft engine, propeller, appliance, or property aboard such aircraft involved in an accident or incident subject to the NTSB's authority.

**§ 831.21 Other Government agencies and NTSB aviation investigations.**

- (a) Pursuant to 49 U.S.C. 1132(c) and 106(g)(1)(A), the NTSB will provide for the participation of the Administrator of the FAA in the investigation of an aircraft accident when participation is necessary to carry out the duties and powers of the FAA Administrator.
- (b) Title 49 U.S.C. 1131(a)(2) provides for the appropriate participation by other departments, agencies, or instrumentalities of the United States Government in the investigation of an aircraft accident by the NTSB.
- (c) Rights and duties of other Federal agencies.
  - (1) The FAA and other Federal agencies named as parties to an aircraft accident investigation will be accorded the same rights and privileges, and are subject to the same limitations, as other parties. Participation in an investigation includes the duty to timely share with the NTSB any information that has been developed by the FAA or other Federal agency in the exercise of that agency's investigative authority.
  - (2) In exercising its authority, the FAA or other Federal agency may obtain information directly from a party to an accident or incident under investigation by the NTSB.
  - (3) Information obtained by another Federal agency must be timely shared with the NTSB.
  - (4) Investigative activities by another Federal agency must be coordinated to ensure that they do not interfere with the NTSB's investigation.
  - (5) Under no circumstances may an NTSB aviation accident investigation for which the FAA or any other Federal agency has conducted fact-finding be considered a joint investigation with shared responsibility. Decisions about what information to include in the public docket will be made by the NTSB.
  - (6) Notwithstanding the rights and duties described in paragraphs (c)(1) through (5) of this section, determining the probable cause of an accident is exclusively the right and duty of the NTSB.
- (d) An FAA employee designated to act by the NTSB IIC has the same authority as an NTSB investigator when conducting activities under this part. The investigation remains that of the NTSB.
- (e) Nothing in this section may be construed as inhibiting the FAA from proceeding with activities intended to fulfill a statutory requirement or objective, including the collection of data for safety management or enforcement purposes. Section 831.5 of this part also applies to the investigation of aviation accidents.

**§ 831.22 International aviation investigations.**

- (a) *General.*
  - (1) Annex 13 to the Convention on International Civil Aviation, Aircraft Accident and Incident Investigation (Annex 13) contains standards and recommended practices for the notification, investigation, and reporting of certain accidents involving international civil aviation.
  - (2) Annex 13 provides that the state of occurrence of an accident or incident is responsible for the investigation when the state is a signatory to the Convention.
- (b) The NTSB—
  - (1) Is the U.S. agency that fulfills the obligations of the United States under Annex 13, in coordination with and consistent with the requirements of the United States Department of State.
  - (2) Participates in the investigation as the accredited representative to an international investigation when the accident involves a civil aircraft—

- (i) of a U.S. operator;
  - (ii) of U.S. registry;
  - (iii) of U.S. manufacture; or
  - (iv) when the U.S. is the state of design or manufacture of the aircraft or parts thereof.
- (c) *Technical advisers.* Once designated the accredited representative in an international investigation, the NTSB may elect to receive assistance by appointing one or more advisers to serve under the NTSB's direction. Such technical advisers—
- (1) Work at the direction and under the supervision of the NTSB accredited representative.
  - (2) Are subject to the provisions of § 831.13 of this part while working under the supervision of the NTSB accredited representative.
- (d) If an accident occurs in a foreign state that is not a signatory to the Convention, or if an accident or incident involves an aircraft that is not a civil aircraft, the NTSB will participate in the investigation in accordance with any agreement between the United States and the foreign state that addresses such occurrences.
- (e) The NTSB's disclosure of records of a foreign investigation is limited by statute (49 U.S.C 1114(f)) and by § 831.6 of this part.

### **Subpart C—Highway Investigations**

#### **§ 831.30 Authority of NTSB in highway investigations.**

- (a) *Scope.* The NTSB is responsible for the investigation of selected highway accidents (e.g., collisions, crashes and explosions), including at railroad grade-crossing accidents. Such investigations will be conducted in cooperation with the designated authorities of the state or local jurisdiction in which the accident occurred.
- (b) *Authority to examine or test.* Pursuant to § 831.9 of this part, a credentialed employee of the NTSB is authorized to examine or test any item, including any vehicle, part of a vehicle, equipment, or contents of any vehicle or equipment involved in an accident subject to the NTSB's authority. Examination or testing will be conducted—
- (1) To the extent practicable, so as to not interfere with or obstruct the transportation services provided by the owner or operator of a vehicle or equipment; and
  - (2) In a manner that preserves evidence relating to the transportation accident, in cooperation with the owner or operator of the vehicle or equipment, and consistent with the needs of the investigation.
- (c) Any Federal, state, or local agency that conducts an investigation of the same highway accident the NTSB is investigating shall provide the results of its investigation to the NTSB.

### **Subpart D—Railroad, Pipeline, and Hazardous Materials Investigations**

#### **§ 831.40 Authority of NTSB in railroad, pipeline, and hazardous materials investigations.**

- (a) *Scope.*
- (1) *Railroads.* Consistent with its statutory authority, the NTSB is responsible for the investigation of railroad accidents, collisions, crashes, derailments, explosions, incidents, and releases in which there is a fatality, substantial property damage, or which involve a passenger train, as described in part 840 of this chapter.
  - (2) *Pipelines.* The NTSB is responsible for the investigation of pipeline accidents, explosions, incidents, and ruptures in which there is a fatality, significant injury to the environment, or substantial property damage. This excludes accidents involving pipelines only carrying water or sewage.
  - (3) *Hazardous Materials.* The NTSB is responsible for evaluating the adequacy of safeguards and procedures for the transportation of hazardous materials, and the performance of other entities of the Federal government responsible for the safe transportation of hazardous materials. Such evaluations

may take place as part of the investigation of a transportation accident subject to the NTSB's authority and include applicable regulations in other subparts of this part.

- (b) *Authority to examine or test.* Pursuant to § 831.9 of this part, during an investigation, a credentialed employee of the NTSB is authorized to examine or test any rolling stock, track, or pipeline component, or any part of any such item (or contents therein) when such examination or testing is determined to be required for purposes of such investigation. Examination or testing will be conducted—
  - (1) To the extent practicable, so as to not interfere with or obstruct the transportation services provided by the owner or operator of such rolling stock, track, signal, rail shop, property, or pipeline component; and
  - (2) In a manner that preserves evidence relating to the transportation accident consistent with the needs of the investigation.

#### **Subpart E—Marine Investigations**

**Authority:** 49 U.S.C. 1113(f), 1116, 1131, 1134, unless otherwise noted.

**Source:** 82 FR 29694, June 29, 2017, unless otherwise noted.

#### **§ 831.50 Applicability of this subpart.**

- (a) The regulations in this subpart apply when the NTSB is leading a marine or major marine casualty investigation.
- (b) In a marine or major marine casualty investigation led by the United States Coast Guard (USCG), this subpart applies if:
  - (1) Upon USCG's request for assistance, the NTSB is leading an associated investigative activity; or
  - (2) Upon coordination with the USCG, the NTSB elects to collect, test or analyze additional evidence beyond the scope of the USCG's investigation.

#### **§ 831.51 Definitions.**

The following definitions apply throughout this subpart.

*IIC* means the NTSB investigator-in-charge.

*Investigative activity* means an activity performed by or under the direction of the NTSB during a casualty investigation led by the USCG.

*Major marine casualty* is defined in joint regulations of the NTSB and USCG at 49 CFR 850.5(e) and 46 CFR 4.40-5(d), respectively.

*Marine casualty* means—

- (1) Any casualty, accident or event described in 46 CFR 4.03-1
- (2) An occurrence that results in an abandonment of a vessel
- (3) Other marine occurrences that the NTSB or USCG, or both, determine require investigation.

#### **§ 831.52 Responsibility of NTSB in marine investigations.**

- (a) The NTSB may conduct an investigation of a major marine casualty or a marine casualty of a vessel (including, but not limited to, allisions, abandonments, and accidents) alone or jointly with the USCG pursuant to the joint regulations in part 850 of this chapter.
- (b) Nothing in this part may be construed to conflict with the regulations in part 850 of this chapter, which were prescribed jointly by the NTSB and USCG under the authority of 49 U.S.C. 1131(a)(1)(E).
- (c) In an investigation led by the USCG, the NTSB may perform separate activities in furtherance of its own analysis or at the request of the USCG. The NTSB and USCG will coordinate to ensure the agencies do not duplicate work or hinder the progress of the investigation.

- (d) Pursuant to 49 U.S.C. 1131(a)(1)(F), the NTSB is responsible for the investigation of other accidents that may include marine and boating accidents not covered by part 850 of this chapter, and certain accidents involving transportation and/or release of hazardous materials.

#### **§ 831.53 Authority of Director, Office of Marine Safety.**

The Director, Office of Marine Safety, subject to the provisions of § 831.52 of this part and part 800 of this chapter, may order an investigation into any major marine casualty or marine casualty.

#### **§ 831.54 Nature of investigation.**

- (a) *General.* The NTSB conducts investigations, or has them conducted, to determine the facts, conditions, and circumstances relating to a major marine casualty or a marine casualty. The NTSB uses these results to determine one or more probable causes of a major marine casualty or a marine casualty, and to issue safety recommendations to prevent or mitigate the effects of a similar major marine casualty or a marine casualty. The NTSB is required to report on the facts and circumstances of major marine casualties or marine casualties it investigates. The NTSB begins an investigation by monitoring casualty situations and assessing available facts to determine the appropriate investigative response. Following an initial assessment, the NTSB notifies persons and organizations it anticipates will be affected as to the extent of its expected investigative response.
- (b) *NTSB products.* An investigation may result in a report or brief of the NTSB's conclusions and other products designed to improve transportation safety. Other products may include factual records, safety recommendations, and other safety information.
- (c) NTSB investigations are fact-finding proceedings with no adverse parties. The investigative proceedings are not subject to the Administrative Procedure Act (5 U.S.C. 551 et seq.), and are not conducted for the purpose of determining the rights, liabilities, or blame of any person or entity, as they are not adjudicatory proceedings.

#### **§ 831.55 Relationships with other agencies.**

- (a) *Relationship with the USCG.*
  - (1) The NTSB conducts marine casualty and major marine casualty investigations, in accordance with 49 U.S.C. 1131(a)(1)(E) and (F), and part 850 of this chapter. The NTSB and USCG work together to collect evidence related to marine casualties and major marine casualties.
  - (2) The NTSB and USCG coordinate to avoid duplicative efforts to the maximum extent practicable.
  - (3) The NTSB independently analyzes the evidence and determines the probable cause of marine casualties and major marine casualties.
- (b) *Relationships with other Federal agencies.*
  - (1) Except as provided in 49 U.S.C. 1131(a)(2)(B) and (C) regarding suspected criminal actions, an investigation conducted under the authority of the NTSB has priority over any investigation conducted by another Federal agency.
  - (2) The NTSB will provide for appropriate participation by other Federal agencies in any NTSB investigation. Such agencies may not participate in the NTSB's probable cause determination.
  - (3) The NTSB has first right to access wreckage, information, and resources, and to interview witnesses the NTSB deems pertinent to its investigation.
  - (4) The NTSB and other Federal agencies will exchange information obtained or developed in the course of their investigations in a timely manner. Nothing in this section prohibits the NTSB from sharing factual information with other agencies.
- (c) As indicated in § 831.59(c) of this part, the NTSB has exclusive authority to determine when and how the testing and examination of evidence will occur.

- (d) The NTSB may take possession of records, wreckage, or information if it determines such possession is necessary for an investigation.
- (e) *Investigations by Federal agencies.*
  - (1) Nothing in this section impairs the authority of any other Federal agency to conduct an investigation of a marine casualty or major marine casualty.
- (f) *Incident command system.*
  - (1) The NTSB recognizes the role of incident command systems to address emergencies. The NTSB does not assume the role of a first responder agency.
  - (2) The NTSB IIC or his designee will participate in the incident command system to identify and coordinate investigative needs as it relates to the preservation and collection of information and evidence.
  - (3) The NTSB IIC or his designee will coordinate with the Coast Guard Investigation Officer to identify and coordinate investigative needs as it relates to the preservation and collection of information and evidence.
  - (4) The NTSB may collect information and evidence from an incident command in a timely and reasonable manner so as not to interfere with its operations.

#### **§ 831.56 Request to withhold information.**

- (a) *Applicability.* This section applies to information the NTSB receives from any source that may be subject to the Trade Secrets Act (18 U.S.C. 1905) or the Freedom of Information Act (FOIA, 5 U.S.C. 552).
- (b) *Disclosure.* The NTSB is authorized by 49 U.S.C. 1114(b) to disclose, under certain circumstances, confidential commercial information that would otherwise be subject to penalties for disclosure under the Trade Secrets Act, or excepted from disclosure under FOIA. The NTSB may exercise this authority when disclosure is necessary to support a key finding, a safety recommendation, or the NTSB's statement of probable cause of a major marine casualty or a marine casualty.
- (c) *Disclosure procedures.* Information submitted to the NTSB that the submitter believes qualifies as a trade secret or as confidential commercial information subject either to the Trade Secrets Act or Exemption 4 of FOIA must be so identified by the submitter on each page that contains such information. In accordance with 48 U.S.C. 1114(b), the NTSB will provide the submitter of identified information (or information the NTSB has reason to believe qualifies as subject to the Trade Secrets Act or Exemption 4 of FOIA) the opportunity to comment on any disclosure contemplated by the NTSB. In all instances in which the NTSB decides to disclose such information pursuant to 49 U.S.C. 1114(b) or 5 U.S.C. 552, the NTSB will provide at least 10 days' notice to the submitter.
- (d) *Voluntarily provided safety information.*
  - (1) 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.
  - (2) The NTSB will review voluntarily provided safety information for confidential content, and will de-identify or anonymize any confidential content referenced in its products.
- (e) *Other.* Any person may make written objection to the public disclosure of any other information, such as interview summaries or transcripts, contained in any report or document filed, or otherwise obtained by the Board, stating the grounds for such objection. The Board, on its own initiative or if such objection is made, may order such information withheld from public disclosure when, in its judgment, the information may be withheld under the provisions of an exemption to the Freedom of Information Act (5 U.S.C. 552, see part 801 of this chapter), and its release is found not to be in the public interest.

#### **§ 831.57 Representation during an interview.**

- (a) Any person interviewed in any manner by the NTSB has the right to be accompanied during the interview by no more than one representative of the witness's choosing. The representative—
  - (1) May be an attorney;
  - (2) May provide support and counsel to the witness;
  - (3) May not supplement the witness's testimony; and
  - (4) May not advocate for the interests of a witness's other affiliations.
- (b) An investigator conducting the interview may take any necessary action (including removal of the representative from the interview) to ensure a witness's representative acts in accordance with the provisions of paragraph (a) of this section during the interview, and to prevent conduct that may be disruptive to the interview.

**§ 831.58 Investigator-in-charge.**

- (a) In addition to the subpoena and deposition authority delegated to investigative officers under this chapter, a person designated as IIC for an investigation is authorized to—
  - (1) Organize, conduct, control, and manage the field phase of an investigation, even when a Board Member is present.
  - (2) Coordinate all resources and provide direction to all persons (including persons not employed by the NTSB) involved in an on-site investigation.
  - (3) Work with other Federal agencies in the investigation of a marine casualty or major marine casualty when other agencies are participating, to ensure all agencies will obtain the information, evidence, and resources needed for the investigation(s) or investigative activities.
  - (4) Work with the USCG to ensure the agencies do not duplicate work to the maximum extent practicable.
  - (5) Continue his or her organizational and management responsibilities through all phases of the investigation, including consideration and adoption of a report or brief determining one or more probable causes of a marine casualty or major marine casualty.

**§ 831.59 Authority during investigations.**

- (a) *General authority of investigators.* To carry out the statutory responsibilities of the agency, an NTSB investigator may—
  - (1) Conduct hearings;
  - (2) Administer oaths;
  - (3) Require, by subpoena or other means, the production of evidence and witnesses;
  - (4) Enter any property where a major marine casualty or marine casualty subject to the NTSB's jurisdiction has occurred, or wreckage from any such major marine casualty or marine casualty is located, and take all actions necessary to conduct a complete investigation;
  - (5) Inspect, photograph, or copy any records or information (including medical records pursuant to paragraph (b)(2) of this section), and correspondence regardless of the date of its creation or modification, for the purpose of investigating an accident;
  - (6) Question any person having knowledge relevant to a marine casualty or major marine casualty.
- (b) *Subpoenas.* The NTSB may issue a subpoena, enforceable in Federal District Court, to obtain testimony or evidence related to its investigation of a marine casualty or major marine casualty, including but not limited to personal electronic devices.
  - (1) The NTSB's authority to issue subpoenas includes access to medical records and specimens.

- (2) For purposes of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, and the regulations promulgated by the Department of Health and Human Services, 45 CFR 164.501 et seq., the NTSB is a “public health authority” to which protected health information may be disclosed by a HIPAA “covered entity” without the prior written authorization of the subject of the records. In addition, the NTSB may issue a subpoena to gain access to such information.
- (c) *Examination of evidence.* In accordance with 49 U.S.C. 1134(d), the NTSB has exclusive authority to decide when, and in what manner, testing, extraction of data, and examination of evidence will occur.

**§ 831.60 Autopsies and postmortem testing.**

When a person dies as a result of having been involved in a marine casualty or major marine casualty within the jurisdiction of the NTSB—

- (a) The NTSB is authorized to obtain, with or without reimbursement, a copy of a report of autopsy performed by a State or local authority on such person.
- (b) The NTSB may order an autopsy or other postmortem tests of any person as may be related to its investigation of a marine casualty or major marine casualty. The IIC may direct that an autopsy or other test be performed if necessary for an investigation. Provisions of local law protecting religious beliefs with respect to autopsies shall be observed to the extent they are consistent with the needs of the investigation.

**§ 831.61 Parties to the investigation.**

(a) *Participants.*

- (1) The IIC may designate one or more entities to serve as parties in an investigation. The NTSB will provide to the USCG the opportunity to participate in all NTSB investigations and investigative activities the NTSB conducts under this subpart. For all other organizations, party status is limited to those persons, government agencies (Federal, state, or local), companies, and organizations whose employees, functions, activities, or products were involved in the marine casualty or major marine casualty and that can provide suitable qualified technical personnel actively to assist in an investigation. To the extent practicable, a representative proposed by party organizations to participate in the investigation may not be a person who had direct involvement in the major marine casualty or marine casualty under investigation.
- (2) Except the USCG, no entity has a right to participate in an NTSB marine investigation as a party.
- (3) Participants in an investigation (e.g., party representatives, party coordinators, and the larger party organization) must respond to direction from NTSB representatives.
- (4) No party representative may—
  - (i) Occupy a legal position; or
  - (ii) Be a person who also represents claimants or insurers.
- (5) Party status may be revoked or suspended if a party fails to comply with either paragraph (a)(3) or (a)(4) of this section. Sanctions may also be imposed if a party withholds information or acts in a manner prejudicial or disruptive to an investigation.

(b) *Disclosures.*

- (1) The name of a party or its representative may be disclosed in documents the NTSB places in the public docket for the investigation.
- (2) The NTSB may share information considered proprietary or confidential by one party with other parties during the course of an investigation, but will preserve the confidentiality of the information to the greatest extent possible.

- (3) Section 831.6(c) of this part describes how the NTSB will handle voluntarily submitted safety information, and the NTSB's determination whether to share any such information. The NTSB will identify the source of such information when deciding to share it.
- (c) *Party agreement.* All party representatives must sign the "Statement of Party Representatives to NTSB Investigation" (Statement) upon acceptance of party status. Failure to timely sign the Statement may result in sanctions, including loss of party status. Representatives of Federal agencies are not required to sign the Statement, but must comply with the responsibilities and limitations set forth in the agreement.
- (d) *Internal review by a party.*
- (1) To assure coordination of concurrent efforts, a party to an investigation that conducts or authorizes a review of its own processes and procedures as a result of a major marine casualty or a marine casualty the NTSB is investigating must inform the IIC in a timely manner of the nature of its review. A party performing such review must provide the IIC with the findings from this review.
  - (2) If the findings from a review contain privileged information—
    - (i) The submitting party must inform the IIC that the review contains privileged information;
    - (ii) The submitting party must identify the privileged content at the time of submission to the IIC;
    - (iii) The NTSB must, when informed that such information is being submitted, review the information for relevancy to the investigation, and determine whether the information is needed for the investigation or may be excluded from the party's response.
  - (3) The NTSB may use the protections described in § 831.56 of this part, as applicable, to protect certain findings from public disclosure.
  - (4) Investigations performed by other Federal agencies during an NTSB investigation are addressed in § 831.55 of this part.

#### **§ 831.62 Access to and release of wreckage, records, mail, and cargo.**

- (a) Only persons authorized by the NTSB to participate in any particular investigation, examination or testing may be permitted access to wreckage, records, mail, or cargo.
- (b) Wreckage, records, mail, and cargo in the NTSB's custody will be released when the NTSB determines it has no further need for such items. Prior to release, the NTSB will inform the USCG of the upcoming release of wreckage or evidence. Recipients of released wreckage must sign an acknowledgement of release provided by the NTSB.

#### **§ 831.63 Provision and dissemination of investigative information.**

- (a) *Applicability.* This section applies to:
  - (1) Any information related to a marine casualty or major marine casualty;
  - (2) Any information collected or compiled by the NTSB as part of its investigation, such as photographs, visual representations of factual data, physical evidence from the scene of the major marine casualty or the marine casualty, interview statements, wreckage documentation, voyage data recorder information, and surveillance video;
  - (3) Any information regarding the status of an investigation, or activities conducted as part of the investigation.
- (b) *Provision of information.* All information described in paragraph (a) of this section and obtained by any person or organization participating in the investigation must be provided to the NTSB, except for information the NTSB authorizes the party to retain.
- (c) *Release of information.* Parties are prohibited from releasing information obtained during an investigation at any time prior to the NTSB's public release of information unless the release is consistent with the following criteria:

- (1) Information released at the scene of a marine casualty or major marine casualty:
    - (i) Is limited to factual developments concerning the accident and the investigation released in coordination with the IIC; and
    - (ii) Will be made by the Board Member present at the scene as the official spokesperson for the NTSB. If no Board Member is present, information will be released by a representative of the NTSB's Office of Media Relations or the IIC. To the maximum extent practicable, the NTSB will inform the USCG of its planned releases of information before the release occurs.
  - (2) The release of information described in paragraph (a)(1) of this section by the NTSB at the scene of a marine casualty or major marine casualty does not authorize any party to the investigation to comment publicly on the information during the course of the investigation. Any dissemination of factual information by a party may be made only as provided in this section.
  - (3) A party may disseminate information related to an investigation to those individuals within its organization who have a need to know for the purpose of addressing a safety issue, including preventive or remedial actions. If such internal release of information results in a planned safety improvement, the party must inform the IIC of such planned improvement in a timely manner before it is implemented.
  - (4) Any other release of factual information related to the investigation must be approved by the IIC prior to release, including:
    - (i) Dissemination within a party organization, for a purpose not described in paragraph (b)(3) of this section;
    - (ii) Documents that provide information concerning the investigation, such as written directives or informational updates for release to employees or customers of a party; and
    - (iii) Information related to the investigation released to an organization or person that is not a party to the investigation.
- (d) The release of recordings or transcripts from certain recorders may be made only in accordance with the statutory limitations of 49 U.S.C. 1114(c), 1114(d), and 1154(a).

**§ 831.64 Proposed findings.**

- (a) *General.* Any party to an investigation designated under § 831.61 may submit to the NTSB written proposed findings to be drawn from the evidence produced during the course of the investigation, a proposed probable cause, and/or proposed safety recommendation(s) designed to prevent future major marine casualties and marine casualties.
- (b) *Timing of submissions.* The IIC will inform parties when submissions are due. All written submissions must be received by the due date. If there is a Board meeting, the due date will be set prior to the date the matter is published in the Federal Register.

**TITLE 49 – TRANSPORTATION  
SUBTITLE B -- OTHER REGULATIONS RELATING TO TRANSPORTATION CONTINUED)  
CHAPTER VIII -- NATIONAL TRANSPORTATION SAFETY BOARD  
PART 845 -- RULES OF PRACTICE IN TRANSPORTATION: INVESTIGATIVE HEARINGS; MEETINGS,  
REPORTS, AND PETITIONS FOR RECONSIDERATION**

**Sec.845.1 Applicability.**

**Subpart A—Investigative Hearings**

- 845.2 Investigative hearings.
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- 845.4 Determination to hold hearing.
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**Subpart B—Meetings**

- 845.20 Meetings.
- 845.21 Symposiums, forums, and conferences.

**Subpart C—Miscellaneous Provisions**

- 845.30 Board products.
- 845.31 Public docket.
- 845.32 Petitions for reconsideration or modification of report.
- 845.33 Investigation to remain open.

**Authority:** Sec. 515, Pub. L. 106-554, App. C, 114 Stat. 2763, 2763A-153 (44 U.S.C. 3516 note); 49 U.S.C. 1112, 1113(f), 1116, 1131, unless otherwise noted.

**Source:** 80 FR 80287, Dec. 24, 2015, unless otherwise noted.

**§ 845.1 Applicability.**

Unless otherwise specifically ordered by the National Transportation Safety Board (NTSB), the provisions of this part shall govern all NTSB proceedings conducted under the authority of 49 U.S.C. 1113 and 1131, and reports issued by the Board.

**Subpart A—Investigative Hearings**

**§ 845.2 Investigative hearings.**

Investigative hearings are convened to assist the NTSB in further developing the facts, conditions, and circumstances of the transportation accident or incident, which will ultimately assist the Board in determining the cause or probable cause of the accident or incident, and in ascertaining measures that will tend to prevent such accidents or incidents and promote transportation safety. Investigative hearings are fact-finding proceedings with no adverse parties. They are not

subject to the provisions of the Administrative Procedure Act (5 U.S.C. 554) and are not conducted for the purpose of determining the rights, liabilities, or blame of any person or entity.

**§ 845.3 Sessions open to the public.**

- (a) All investigative hearings shall normally be open to the public. However, no person shall be allowed at any time to interfere with the proper and orderly functioning of the hearing.
- (b) Sessions shall not be open to the public when evidence of a classified nature or which affects national security is to be received.

**§ 845.4 Determination to hold hearing.**

- (a) The Board may order an investigative hearing as part of an investigation whenever a hearing is deemed necessary in the public interest.
- (b) If a quorum of the Board is not immediately available in the event of a catastrophic accident, the determination to hold an investigative hearing may be made by the Chairman of the Board.

**§ 845.5 Board of inquiry.**

- (a) *Composition of board of inquiry.* The board of inquiry shall consist of a chairman of the board of inquiry, as specified in paragraph (c) of this section, and other members in accordance with Board policy.
- (b) *Duties of board of inquiry.* The board of inquiry shall examine witnesses and secure, in the form of a public record, facts pertaining to the accident or incident under investigation and surrounding circumstances and conditions from which the Board may determine probable cause and may formulate recommendations and/or other documents for corrective or preventative action.
- (c) *Chairman of board of inquiry.* The chairman of the board of inquiry, or his or her designee, shall have the following powers:
  - (1) To designate parties to the investigative hearing and revoke such designations;
  - (2) To open, continue, or adjourn the investigative hearing;
  - (3) To determine the admissibility of and to receive evidence and to regulate the course of the investigative hearing;
  - (4) To dispose of procedural requests or similar matters; and
  - (5) To take any other appropriate action to ensure the orderly conduct of the investigative hearing.

**§ 845.6 Designation of parties.**

- (a) The chairman of the board of inquiry shall designate as parties to the investigative hearing those persons and organizations whose participation in the hearing is deemed necessary in the public interest and whose special knowledge will contribute to the development of pertinent evidence. Parties to the investigative hearing shall be represented by suitable representatives who do not occupy legal positions.
- (b) No party to the investigation and/or investigative hearing shall be represented by any person who also represents claimants or insurers. Failure to comply with this provision shall result in loss of status as a party to the investigative hearing.

**§ 845.7 Hearing officer.**

The investigative hearing officer, upon designation by the NTSB Chairman or a Board Member designated by the Chairman, shall have the following powers:

- (a) To give notice concerning the time and place of investigative hearing;
- (b) To administer oaths and affirmations to witnesses; and

- (c) To issue subpoenas requiring the attendance and testimony of witnesses and production of documents. The investigative hearing officer may, in consultation with the chairman of the board of inquiry and the NTSB Managing Director, add witnesses until the time of the prehearing conference.

#### **§ 845.8 Technical panel.**

The appropriate office director(s) and/or the hearing officer, in consultation with the NTSB Managing Director, shall determine if a technical panel is needed and, if so, shall designate members of the NTSB technical staff to participate in the investigative hearing. Members of the technical panel may conduct pre-screening of witnesses through interviews, and may take other actions to prepare for the hearing. At the hearing, the technical panel will initially examine the witnesses through questioning. The technical panel shall examine witnesses and secure, in the form of a public record, facts pertaining to the accident or incident under investigation and surrounding circumstances and conditions.

#### **§ 845.9 Prehearing conference.**

- (a) Except as provided in paragraph (d) of this section, the chairman of the board of inquiry, or his/her designee, shall hold a prehearing conference with the parties to the investigative hearing at a convenient time and place prior to the hearing. At the prehearing conference, the parties shall be advised of the witnesses to be called at the investigative hearing, the topics about which they will be examined, and the exhibits that will be offered in evidence.
- (b) At the prehearing conference, parties to the investigative hearing shall submit copies of any additional documentary exhibits they desire to offer for admission at the hearing.
- (c) A party to the investigative hearing who, at the time of the prehearing conference, fails to advise the chairman of the board of inquiry of additional exhibits he or she intends to submit, or additional witnesses he or she desires to examine, shall be prohibited from introducing such evidence unless the chairman of the board of inquiry determines for good cause shown that such evidence should be admitted.
- (d) The board of inquiry may hold an investigative hearing on an expedited schedule. The chairman of the board of inquiry may hold a prehearing conference for an expedited investigative hearing. When an expedited investigative hearing is held, the chairman of the board of inquiry may waive the requirements in paragraphs (b) and (c) of this section concerning the identification of witnesses, exhibits or other evidence.

#### **§ 845.10 Right of representation.**

Any person who appears to testify at an investigative hearing has the right to be accompanied, represented, or advised by counsel or by any other representative.

#### **§ 845.11 Examination of witnesses.**

- (a) *Examination.* In general, the technical panel shall initially examine witnesses. Following such examination, parties to the investigative hearing shall be given the opportunity to examine such witnesses. The board of inquiry shall then conclude the examination following the parties' questions.
- (b) *Objections.* (1) Materiality, relevancy, and competency of witness testimony, exhibits, or physical evidence shall not be the subject of objections in the legal sense by a party to the investigative hearing or any other person.
- (c) Such matters shall be controlled by rulings of the chairman of the board of inquiry on his or her own motion. If the examination of a witness by a party to the investigative hearing is interrupted by a ruling of the chairman of the board of inquiry, the party shall have the opportunity to show materiality, relevancy, or competency of the testimony or evidence sought to be elicited from the witness.

#### **§ 845.12 Evidence.**

In accordance with § 845.2, the chairman of the board of inquiry shall receive all testimony and evidence that may be of aid in determining the probable cause of the transportation accident or incident. He or she may exclude any testimony or exhibits that are not pertinent to the investigation or are merely cumulative.

### **§ 845.13 Proposed findings.**

Following the investigative hearing, any party to the hearing may submit proposed findings to be drawn from the testimony and exhibits, a proposed probable cause, and proposed safety recommendations designed to prevent future accidents or incidents. The proposals shall be submitted within the time specified by the investigative hearing officer at the close of the hearing, and shall be made a part of the public docket. Parties to the investigative hearing shall serve copies of their proposals on all other parties to the hearing.

### **§ 845.14 Transcript.**

A verbatim report of the investigative hearing shall be taken. Any interested person may obtain copies of the transcript from the NTSB or from the court reporting firm preparing the transcript upon payment of the fees fixed therefor. (See part 801, subpart G, Fee schedule.)

### **§ 845.15 Payment of witnesses.**

Any witness subpoenaed to attend the investigative hearing under this part shall be paid such fees for travel and attendance for which the hearing officer shall certify.

## **Subpart B—Meetings**

### **§ 845.20 Meetings.**

The Board may hold a meeting concerning an investigation or Board product, as described in § 804.3 of this chapter or any other circumstance, when the Board determines holding a meeting is in the public interest.

### **§ 845.21 Symposiums, forums, and conferences**

(a)

(1) *Definitions.*

- (i) A symposium is a public proceeding focused on a specific topic, where invited participants provide presentations of their research, views or expertise on the topic and are available for questions.
- (ii) A forum is a public proceeding generally organized in a question-and-answer format with various invited participants who may make presentation and are available for questioning by the Board or designated NTSB staff as individuals in a panel format.
- (iii) A conference is a large, organized proceeding where individuals present materials, and a moderator or chairperson facilitates group discussions.

(2) These proceedings are related to transportation safety matters and will be convened for the purpose of focusing attention, raising awareness, encouraging dialogue, educating the NTSB, or generally advancing or developing safety recommendations. The goals of the proceeding will be clearly articulated and outlined, and will be consistent with the mission of the NTSB.

(b) A quorum of Board Members is not required to attend a forum, symposium, or conference. All three types of proceedings described in paragraph (a) of this section may have a relationship to previous or ongoing investigative activities; however, their purpose is not to obtain evidence for a specific investigation.

(c) Symposiums, forums, and conferences are voluntary for all invited participants.

## **Subpart C—Miscellaneous Provisions**

### **§ 845.30 Board products.**

(a) *Reports of investigations.*

- (1) The Board will adopt a report on the investigation. The report will set forth the relevant facts, conditions, and circumstances relating to the accident or incident and the probable cause thereof, along with any appropriate safety recommendations and/or safety alerts formulated on the basis of

the investigation. The scope and format of the report will be determined in accordance with Board procedures.

- (2) The probable cause and facts, conditions, and circumstances of other accidents or incidents will be reported in a manner and form prescribed by the Board. The NTSB allows the appropriate office director, under his or her delegated authority as described in § 800.25 of this chapter, to issue a “brief,” which includes the probable cause and relevant facts, conditions, and circumstances concerning the accident or incident. Such briefs do not include recommendations. In particular circumstances, the Board in its discretion may choose to approve a brief.

(b) *Studies and reports*—

- (1) NTSB studies and reports. The NTSB may issue reports describing investigations of more than one accident or incident that share commonalities. Such reports are similar to accident or incident investigation reports, as described in paragraph (a)(1) of this section. Such reports often include safety recommendations and/or safety alerts, which the Board adopts.
- (2) Safety studies and reports. The NTSB issues safety studies and reports, which usually examine safety concerns that require the investigation of a number of related accidents or incidents to determine the extent and severity of the safety issues. Such studies and reports often include safety recommendations and/or safety alerts, which the Board adopts.

- (c) *Safety recommendations.* The Board may adopt and issue safety recommendations, either as part of a Board report or as a stand-alone Board product.

**§ 845.31 Public docket.**

(a) *Investigations.*

- (1) As described in § 801.3 of this chapter, the public docket shall include factual information concerning the accident or incident. Proposed findings submitted pursuant to § 831.14 or § 845.13 and petitions for reconsideration and modification submitted pursuant to § 845.32, comments thereon by other parties, and the Board's rulings on proposed findings and petitions shall also be placed in the public docket.
- (2) The NTSB shall establish the public docket following the accident or incident, and material shall be added thereto as it becomes available. Where an investigative hearing is held, the exhibits will be introduced into the record at the hearing and will be included in the public docket.

- (b) *Other Board reports and documents.* The NTSB may elect to open and place materials in a public docket concerning a safety study or report, special investigation report, or other agency product. The NTSB will establish the public docket following its issuance of the study or report.

- (c) *Availability.* The public docket shall be made available to any person for review, as described in § 801.30 of this chapter. Records within the public docket are available at [www.nts.gov](http://www.nts.gov).

**§ 845.32 Petitions for reconsideration or modification of report.**

(a) *Requirements.*

- (1) The Board 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.
- (2) Petitions must be in writing and addressed to the NTSB Chairman. Please send your petition via email to [correspondence@nts.gov](mailto:correspondence@nts.gov). In the alternative, you may send your petition via postal mail to: NTSB Headquarters at 490 L'Enfant Plaza SW., Washington, DC 20594.
- (3) Petitions must be based on the discovery of new evidence or on a showing that the Board's findings are erroneous.

- (i) 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 Board's adoption of its findings.
  - (ii) Petitions based on a claim of erroneous findings shall set forth in detail the grounds upon which the claim is based.
- (b) *Acceptance of petitions.* The Board will not consider petitions that are repetitious of proposed findings submitted pursuant to § 845.13, or of positions previously advanced.
- (c) *Proof of service.*
- (1) When a petition for reconsideration or modification is filed with the Board, copies of the petition and any supporting documentation shall be served on all other parties to the investigation or investigative hearing and proof of service shall be attached to the petition.
  - (2) Any party served with a copy of the petition may file comments no later than 90 days after service of the petition.
- (d) *Oral presentation.* Oral presentation normally will not form a part of proceedings under this section. However, oral presentation may be permitted 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.

**§ 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.

## 22. OSHA Regulations Relevant to Crash Site

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### SECTIONS OF OSHA REGULATIONS RELEVANT TO ACCIDENT SITE

Personal Protective Equipment 29 U.S.C. 1910.1030 (c):

(3) Personal protective equipment--

- (i) Provision. When there is occupational exposure, the employer shall provide, at no cost to the employee, appropriate personal protective equipment such as, but not limited to, gloves, gowns, laboratory coats, face shields or masks and eye protection, and mouthpieces, resuscitation bags, pocket masks, or other ventilation devices. Personal protective equipment will be considered "appropriate" only if it does not permit blood or other potentially infectious materials to pass through to or reach the employee's work clothes, street clothes, undergarments, skin, eyes, mouth, or other mucous membranes under normal conditions of use and for the duration of time which the protective equipment will be used.

Blood borne pathogens §1910.1030.

- (a) Scope and Application. This section applies to all occupational exposure to blood or other potentially infectious materials as defined by paragraph (b) of this section.
- (b) Definitions. For purposes of this section, the following shall apply:  
"Blood borne Pathogens" means pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV) and human immunodeficiency virus (HIV).

An exposure control plan is required:

(c) Exposure control--

(1) Exposure Control Plan.

- (i) Each employer having an employee(s) with occupational exposure as defined by paragraph (b) of this section shall establish a written Exposure Control Plan designed to eliminate or minimize employee exposure.
- (ii) The Exposure Control Plan shall contain at least the following elements:
  - (A) The exposure determination required by paragraph(c)(2),
  - (B) The schedule and method of implementation for paragraphs (d) Methods of Compliance, (e) HIV and HBV Research Laboratories and Production Facilities, (f) Hepatitis B Vaccination and Post-Exposure Evaluation and Follow-up, (g) Communication of Hazards to Employees, and (h) Recordkeeping, of this standard, and
  - (C) The procedure for the evaluation of circumstances surrounding exposure incidents as required by paragraph (f)(3)(i) of this standard.
- (iii) Each employer shall ensure that a copy of the Exposure Control Plan is accessible to employees in accordance with 29 CFR 1910.20(e):
- (iv) The Exposure Control Plan shall be reviewed and updated at least annually and whenever necessary to reflect new or modified tasks and procedures which affect occupational exposure and to reflect new or revised employee positions with occupational exposure.

Employee training is required for those that may face exposure § 1910.1030 (g)(2):

- (ii) Training shall be provided as follows:
  - (A) At the time of initial assignment to tasks where occupational exposure may take place;
  - (B) At least annually thereafter.

- (iii) [Reserved]
- (iv) Annual training for all employees shall be provided within one year of their previous training.
- (v) Employers shall provide additional training when changes such as modification of tasks or procedures or institution of new tasks or procedures affect the employee's occupational exposure. The additional training may be limited to addressing the new exposures created.

**23. MOU between ATA and NTSB on Cost of Recovery and Identification of Victims**

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**49 USC Section 1155  
Aviation Penalties**

(a) Civil Penalty. - (1) A person violating section 1132, section 1134(b), section 1134(f)(1), or section 1136(g) (related to an aircraft accident) of this title or a regulation prescribed or order issued under any of those sections is liable to the United States Government for a civil penalty of not more than \$1,000. A separate violation occurs for each day a violation continues. (2) This subsection does not apply to a member of the armed forces of the United States or an employee of the Department of Defense subject to the Uniform Code of Military Justice when the member or employee is performing official duties.

The appropriate military authorities are responsible for taking necessary disciplinary action and submitting to the National Transportation Safety Board a timely report on action taken. (3) The Board may compromise the amount of a civil penalty imposed under this subsection. (4) The Government may deduct the amount of a civil penalty imposed or compromised under this subsection from amounts it owes the person liable for the penalty. (5) A civil penalty under this subsection may be collected by bringing a civil action against the person liable for the penalty. The action shall conform as nearly as practicable to a civil action in admiralty. (b) Criminal Penalty. - A person that knowingly and without authority removes, conceals, or withholds a part of a civil aircraft involved in an accident, or property on the aircraft at the time of the accident, shall be fined under title 18, imprisoned for not more than 10 years, or both.

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**Historical And Revision Notes**

Revised Source (U.S. Code) Source (Statutes at Large) Section 1155(a)(1), 49 App.:1471(a)(1) Aug. 23, 1958, Pub. L. (2) (related to 85-726, Sec. 901(a)(1) subchapter VII). (related to title VII), 72 Stat. 783; restated July 10, 1962, Pub. L. 87-528, Sec. 12, 76 Stat. 149; Aug. 5, 1974, Pub. L. 93-366, Sec. 107, 88 Stat. 414; Jan. 3, 1975, Pub. L. 93-633, Sec. 113(b), 88 Stat. 2162. 49 App.:1655(d) Oct. 15, 1966, Pub. L. (1st sentence). 89- 670, Sec. 6(d) (1<sup>st</sup> sentence), 80 Stat. 938. 49 Jan. 3, 1975, Pub. L. App.:1903(a)(1)(A). 93-633, Sec. 304(a)(1)(A), 88 Stat. 2168. 1155(a)(3), 49 App.:1471(a)(2) Aug. 23, 1958, Pub. L. (4) (related to 85-726, Sec. 901(a)(2) subchapter VII). (related to title VII), 72 Stat. 784; July 10, 1962, Pub. L. 87-528, Sec. 12, 76 Stat. 150; restated Oct. 24, 1978, Pub. L. 95-504, Sec. 35(b), 92 Stat. 1740. 49 App.:1655(d) (1st sentence). 49 App.:1903(a)(1)(A). 1155(a)(5) 49 App.:1473(b)(1). Aug. 23, 1958, Pub. L. 85-726, Sec. 903(b)(1), 72 Stat. 786; Oct. 24, 1978, Pub. L. 95-504, Sec. 36, 92 Stat. 1741. 49 App.:1473(b)(4). Aug. 23, 1958, Pub. L. 85-726, Sec. 903(b)(4), 72 Stat. 787. 49 App.:1655(d) (1st sentence). 49 App.:1903(a)(1)(A). 1155(b) 49 App.:1472(p). Aug. 23, 1958, Pub. L. 85-726, 72 Stat. 731, Sec. 902(p); added Oct. 15, 1962, Pub. L. 87-810, Sec. 4, 76 Stat. 921; Aug. 5, 1974, Pub. L. 93-366, Sec. 103(b), 88 Stat. 410; Dec. 30, 1987, Pub. L. 100-223, Sec. 204(e), 101 Stat. 1520.

In subsection (a)(1), the words "section 1132 or 1134(b) or (f)(1) (related to an aircraft accident) of this title" are substituted for "any provision of subchapter . . . VII . . . of this chapter" in 49 App.:1471(a)(1) because those sections restate the relevant source provisions of 49 App.:ch. 20 carried out by the Board.

The words "regulation prescribed or order issued under either of those sections" are substituted for "rule, regulation, or order issued thereunder" for clarity and consistency in the revised title and with other titles of the United States Code and because "rule" and "regulation" are synonymous.

The words "liable to the United States Government" are substituted for "subject to" for clarity.

The words "for each such violation" are omitted as unnecessary because of 18:1. In subsection (a)(2), the word "civilian" is omitted as unnecessary.

The words "with respect thereto" are omitted as surplus.

In subsection (a)(4), the words "imposed or compromised" are substituted for "finally determined or fixed by order of the Board, or the amount agreed upon in compromise" in 49 App.:1471(a)(2) for consistency and to eliminate unnecessary words.

In subsection (a)(5), the words "imposed or assessed" are omitted as surplus.

The words "civil action against the person" are substituted for "proceedings in personam against the person" in 49 App.:1473(b)(1) for consistency with rule 2 of the Federal Rules of Civil Procedure (28 App. U.S.C.) and to eliminate unnecessary words.

The text of 49 App.:1473(b)(1) (1st sentence words after 1st comma and last sentence) is omitted as unnecessary because penalties imposed by the National Transportation Safety Board do not involve liens on aircraft.

The text of 49 App.:1473(b)(4) is omitted as unnecessary because of 28:ch. 131.

#### **References In Text**

The Uniform Code of Military Justice, referred to in subsec. (a)(2), is classified generally to chapter 47 (Sec. 801 et seq.) of Title 10, Armed Forces.

#### **Prior Provisions**

Prior chapter 31 (Secs. 3101-3104) of subtitle II redesignated and restated as chapter 315 (Secs. 31501-31504) of subtitle VI of this title by Pub. L. 103-272, Sec. 1(c), (e). AMENDMENTS 1996 - Subsec. (a)(1). Pub. L. 104-264 substituted ", section 1134(b), section 1134(f)(1), or section 1136(g)" for "or 1134(b) or (f)(1)" and "any of" for "either of".

#### *EFFECTIVE DATE OF 1996 AMENDMENT*

Except as otherwise specifically provided, amendment by Pub. L. 104-264 applicable only to fiscal years beginning after Sept. 30, 1996, and not to be construed as affecting funds made available for a fiscal year ending before Oct. 1, 1996, see section 3 of Pub. L. 104-264, set out as a note under section 106 of this title.

#### **Section Referred To In Other Sections**

This section is referred to in sections 1151, 1152 of this title.

## Civil Litigation

### 25. Attorney Client & Work Product Privileges

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#### **ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES**

This memorandum sets forth the basic requirements for establishing attorney-client and work product privileges. It is important for parties to a lawsuit to understand these privileges and comply with the strict rules that govern them. Failure to understand and follow these rules can result in the disclosure of otherwise privileged documents. Parties should also be aware that different jurisdictions apply different rules, and that reasonable judges can disagree on whether a document is privileged. Thus, no matter how carefully documents are prepared, there is always a chance that they will ultimately be disclosed in litigation. For this reason, parties should be very careful about what is said in such documents. If there is a sensitive issue that needs to be discussed with counsel, it should probably be dealt with in a meeting or a teleconference.

In many instances both the attorney-client and work product privileges will apply to a document. If in doubt, indicate the document is both attorney-client and work product privileged and abide by the rules for both privileges.

#### **ATTORNEY-CLIENT PRIVILEGE**

The attorney-client privilege generally attaches to two main types of communications. The first is a communication made in confidence between a client and an attorney for the purpose of seeking or providing legal advice. These communications are privileged because a client and an attorney should be able to speak freely in seeking or providing legal advice.

The second type is a communication from a client to an attorney containing factual information intended to keep the attorney apprised of continuing developments in a legal matter. This type of communication is privileged because an attorney must be provided with relevant facts in order to give sound and informed advice. In fact, the first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye toward the legally relevant.

Any communication with an attorney that does not fall within one of these two groups is at risk of being disclosed in litigation. Thus, parties should include language in their communications with counsel that confirms the purpose of the communication and states an understanding that the matter is privileged.

For corporations, an additional rule may apply. In some jurisdictions, the attorney-client privilege attaches only to communications made by a member of the corporation's "control group." The control group is essentially "top management" of a corporation, generally those with the authority to make final decisions regarding legal representation. Some jurisdictions expand the control group to include employees who advise top management in areas relevant to the litigation. Generally, if a decision would not normally be made on a given topic without the advice or opinion of a certain employee, that employee is considered part of the control group for issues within his or her areas of responsibility or expertise.

In some jurisdictions, the attorney-client privilege is waived if an otherwise privileged document is created by or disclosed to a person who is not in the "control group" of a corporation. In all jurisdictions, the privilege is waived if shown to someone outside the company, with limited exceptions for litigation consultants.

The major points to remember are:

- Mark documents "ATTORNEY-CLIENT PRIVILEGED"
- Documents must be directed to an attorney
- Documents must be created by top management (the "control group")
- Documents must not be disclosed outside the control group
- Communications should reference a request for legal advice
- Communications should state that factual information is relevant to legal issues and provided for use by counsel, at counsel's request, as appropriate

- Assume the document will be disclosed: say nothing in writing that would be damaging if revealed to the public or opponents

#### **WORK PRODUCT PRIVILEGE**

The work product privilege protects from disclosure documents and tangible things “prepared in anticipation of litigation or for trial” by or for a party or its representative. The rule for this privilege varies by jurisdiction, but it generally protects documents prepared or obtained because of the litigation. The privilege protects materials that would reveal the theories, mental impressions or litigation plans of a party’s attorney. The privilege may also extend to non-attorneys who create trial preparation materials on behalf of the party or the party’s attorney, including consultants and investigators.

There is no control group test, but the privilege can be waived if documents are disclosed to persons outside the company. Nevertheless, work product materials should only be disclosed to those who are involved in handling the litigation and have a need to know.

The major points to remember are:

- Mark document “WORK PRODUCT PRIVILEGED”
- Indicate document was prepared “in anticipation of litigation”
- Indicate document was prepared at the request of counsel, if appropriate
- Documents can be created by an attorney, a client or a consultant
- Documents must not be disclosed outside the company, preferably only to those involved in litigation with a need to know
- Assume the document will be disclosed: say nothing in writing that would be damaging if revealed to the public or opponents

**26. Sample Internal Memo re: Work Product**

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**SAMPLE INTERNAL MEMO RE: WORK PRODUCT**

Date: <Month> XX, 202X

*Interoffice Correspondence*

To: Distribution

Subject: \_\_\_\_\_ Accident Involving [COMPANY] Flight XXXX Litigation and NTSB Investigation

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION ATTORNEY WORK PRODUCT IN ANTICIPATION OF LITIGATION

We [anticipate][have already received] court actions against [COMPANY] as a result of the accident involving Flight \_\_\_\_\_. In addition, the National Transportation Safety Board (NTSB) is conducting an investigation into the probable cause of the accident. [COMPANY] is a party to the NTSB investigation which is supposed to proceed without regard to the possible consequences for the participants in the courts.

However, both the information uncovered in the NTSB investigation and the conclusions and recommendations that the Board will eventually reach as a result of this investigation may have a substantial effect on the outcome of litigation against [COMPANY]. We have, therefore, asked [Law Firm] to assist [COMPANY] during the NTSB investigation and to work closely with us to defend [COMPANY]'s interests.

The [COMPANY] Legal Department contacts are Attorneys \_\_\_\_\_, and Paralegal \_\_\_\_\_. All requests from the NTSB for access to [COMPANY]'s records should be reported to the Legal Department or outside counsel as soon as they are received. NO MATERIAL SHOULD BE SENT TO ANYONE (INCLUDING THE NTSB AND THE FAA) BEFORE THAT MATERIAL IS REVIEWED BY COUNSEL.

IN ADDITION, IN VIEW OF THE PENDING LITIGATION, ALL DOCUMENTS CREATED FROM THIS POINT FORWARD (INCLUDING CORRESPONDENCE AND INTERNAL MEMORANDA) MUST BE APPROVED BY THE LEGAL DEPARTMENT OR OUTSIDE COUNSEL BEFORE BEING FINALIZED AND SIGNED. \_\_\_\_\_ will be acting as [COMPANY]'s accident investigation coordinator and is working with the NTSB at the direction of [COMPANY]'s Legal Department and outside counsel. Please funnel all requests for approval of such documents through Captain Sharp.

General observations, guidelines and tips to help you get ready for these legal proceedings include the following:

**CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION  
ATTORNEY WORK PRODUCT IN ANTICIPATION OF LITIGATION**

1. NTSB INVESTIGATION. The NTSB investigation is important because it will generate new information affecting [COMPANY]'s defense and will focus on issues that may become important in the litigation.
  - a. All drafts circulated by the NTSB will be reviewed by counsel.
  - b. Challenge anything you think is peculiar in an NTSB draft. It may be the basis for an adverse collateral finding later on, or an attempt by another party to improperly lay blame on [COMPANY]. Use the disclaimer language attached to this memo when signing drafts (after review by counsel).
  - c. Keep a copy of everything you give to the NTSB and keep a file with these documents.
  - d. Counsel will prepare all witnesses for the NTSB Hearing and will advise the Company spokesperson before, during and after the Hearing.
  - e. Retain all original records in a safe, secure location. The NTSB and FAA are not entitled to our original records and we might not get them back. Use a cover letter, with a copy to \_\_\_\_\_, to record precisely which documents are being provided to the NTSB or FAA. When the NTSB releases the aircraft, be sure to retain all parts that might be at issue in the investigations and litigation. Document the chain of custody for all aircraft parts with a receipt showing who had the part and to whom, when and where the part was given. Both the person giving and accepting the part should sign the receipt. Parts for which a receipt is signed should be kept under lock and key.

BE SURE xxxxxxxxxxxxxxxxxxxx IS INFORMED BEFOREHAND OF YOUR INTENDED ACTIONS.

2. DOCUMENTS. Documents, including memos, notes and computer printouts, existing prior to the accident, as well as those created from the date forward, may have serious implication for anticipated litigation against [COMPANY]. Therefore, please adhere to the following guidelines:
  - a. Do not destroy any documents that existed prior to \_\_\_\_\_ that you believe may refer to any matters relating to the accident. We will "freeze" two copies of all relevant manuals as of the accident.
  - b. Avoid writing any unnecessary documents, since they may need to be provided to lawyers representing people suing [COMPANY]. If it is necessary to write a document, stick to facts and avoid opinions and speculation. You should be aware that all documents, including your scribbled notes, diary entries and comments on memos written by someone else, may eventually be reviewed by lawyers suing [COMPANY]. Please take the time to think carefully about the implications of that which you put on paper.
  - c. If it is necessary to prepare a document relating to Flight XXXX, especially those that refer to possible causes of the accident, responsibility, liability or recommended preventative measures, those documents must be reviewed with counsel in preliminary form. Mark the review copy of "preliminary draft" to preserve your routine practice of discarding superseded materials. Attached to this memo is a format to be followed for all such documents. It is imperative that all Personnel use this format when preparing documents that are in any way related to the Flight XXXX accident. The reason for this format is that, although documents relating to Flight XXXX may be subject to inspection and copying by counsel for parties suing [COMPANY], an exception to this rule may apply to "privileged documents." Privileged documents are those considered confidential communications to our counsel in preparation for litigation. That includes documents the Legal Department, outside counsel or other [COMPANY] representative have asked you to prepare to assist in [COMPANY]'s defense. Use of this format will help us preserve that privilege. Failure to do so may waive [COMPANY]'s privilege.
  - d. We will need to account for all documents relating to Flight XXXX, including documents generated after the accident. Please keep a separate file of materials relating to this accident. Please keep a separate folder within your accident file for communications with counsel. That file should be labeled "Confidential Litigation File."

- e. Documents that might otherwise be privileged but that pass through too many hands prior to receipt by counsel may also waive [COMPANY]'s privilege. Therefore, distribution of all privileged documents must be conducted by counsel through [Party Coordinator or legal counsel]. Please do not routinely or otherwise send copies of privileged documents to anyone other than legal counsel (again, through Party Coordinator). Please do not prepare any documents at the request of non[COMPANY] personnel unless you have first discussed the matter with counsel. The best practice is to check with counsel if you have any questions or concerns prior to preparing any documents or communicating with any outside personnel.
3. DEPOSITIONS. Any [COMPANY] employee may be deposed. Counsel will brief all [COMPANY] personnel to be deposed. Depositions and investigations may inquire into prior oral as well as written statements. Therefore, don't give interviews, statements or opinions regarding Flight XXXX to ANYONE. Casual remarks about sensitive material can be the subject of extensive witness examination.
4. PROPRIETARY INFORMATION. If you think you have been asked for any [COMPANY] business secret or proprietary material, label it as such so that it will receive special attention by counsel.

Please distribute copies of this memo to others who are working with you on the litigation and NTSB investigation.

**CONFIDENTIAL COMMUNICATION TO COUNSEL**

**M E M O R A N D U M**

PRELIMINARY DRAFT (if appropriate)

TO: [Outside Counsel]  
Legal Department

FROM: (Employee)

DATE:

Re: Litigation Preparation Involving [COMPANY] Flight XXXX (specific subject)

The purpose of this memorandum is to transmit confidential information to counsel in preparation for anticipated litigation involving [COMPANY] Flight XXXX/Month X, 202X. These matters include the following:

## **27. Discovery of Electronically Stored Information (ESI)**

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### **DISCOVERY OF ELECTRONICALLY STORED INFORMATION**

#### **(ESI) Production of Documents, Electronically Stored Information (ESI) – Rule 34**

- A party may request production of any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained.

#### **Limitations on ESI Discovery – Rule 26(b)(2)**

- Party must provide ESI that is “reasonably accessible”.
  - ESI that is not used in regular ongoing activities may also need to be provided should the computer systems make the ESI readily accessible, e.g., some archived materials.
- Party need not provide discovery of ESI from sources party identifies as “not reasonably accessible because of undue burden or cost.” Rule 26(b)(2)(B).
  - Burden on producing party to show ESI is not reasonably accessible because of undue burden or cost.
  - Court may order discovery if requesting party shows good cause. Cost of discovery may be shifted in whole or in part to requesting party.
- Generally, do not have to produce backed-up data, deleted information, information on systems no longer in use, etc., unless readily accessible. However, sources of information not searched must be identified.
- Must search all active servers, PCs, laptops, PDAs, telephones, peripheral equipments such as printers, etc. unless a claim can be made that it is unduly burdensome and costly due to the amount or type of hardware involved and/or lack of qualified personnel to conduct the searches.

#### **ESI Preservation**

- Common law and statutory duties to preserve evidence are unchanged by new rules.
  - ESI that may ultimately be found to be not reasonably accessible must be preserved pending a ruling that it may too burdensome and/or costly to preserve.
- May necessitate deactivation of auto-delete or over-write programs.
- Document Retention Policy must address ESI to avoid claims of spoliation of evidence.
  - Use of auto-delete programs, etc. as part of a standardized Company retention and deletion program is permissible.
  - Notice of claims or litigation may require cessation of standard destruction policies, including auto-delete programs.

## 28. Retention and Preservation of Electronically Stored Information (ESI)

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Retention and Preservation of Electronically Stored Information (ESI) When litigation is anticipated:

1. \_\_\_ Determine whether a duty to take affirmative steps to retain potentially discoverable information has arisen. [See End Note No.1, below]  
\_\_\_ Has a claim or suit been made or filed?  
\_\_\_ Is a claim or suit probable?
2. \_\_\_ Identify main issues on which a claim may be based.
3. \_\_\_ Identify company individual who will be responsible for coordinating all discovery, including ESI.
4. \_\_\_ Coordinate with key personnel:
  - (a) Company's duty to preserve potentially discoverable information [Failure to preserve information may lead to additional suits for spoliation and/or summary granting of plaintiff's claims]
  - (b) Main issues raised by claim
  - (c) Identify all personnel who may have discoverable information.
5. \_\_\_ Coordinate with individual(s) responsible for electronic/computer equipment to suspend all automatic deletion, overwrite and/or destruction programs.
  - Identify any such programs that it is not possible or practicable to suspend
  - Identify alternative retention methods where suspension of deletion programs is not practicable, e.g., archiving of materials relevant to known claim issues before auto-deletion or preservation of a hard copy.
6. \_\_\_ Distribute retention memorandum to all individuals who may have potentially discoverable information:
  - (a) \_\_\_ Do not destroy potentially discoverable information, whatever its form, that relates to: [Identify Issues raised by the claim and time period]
  - (d) \_\_\_ Identify sources of potentially discoverable information, both hard copy and digitally based:
    - \_\_\_ Traditional hardcopy files
    - \_\_\_ Servers
    - \_\_\_ PCs
    - \_\_\_ Laptops
    - \_\_\_ PDAs
    - \_\_\_ Back-up tapes, disks, etc.
    - \_\_\_ external storage such as flash drives
    - \_\_\_ Disks (floppy/CD/DVD)
    - \_\_\_ Telephones
    - \_\_\_ Cell phones
    - \_\_\_ Peripheral equipment: fax machines, printers
    - \_\_\_ [Other]
  - (c) \_\_\_ Identify types of data and materials to be retained:
    - \_\_\_ Hard copies of documents
    - \_\_\_ Electronically created or stored versions of documents
    - \_\_\_ Email
    - \_\_\_ IM messages
    - \_\_\_ Voice mail
    - \_\_\_ Draft copies of documents
  - (d) \_\_\_ Suspend normal and/or automatic destruction procedures. Identify alternative retention procedures where needed.

7. \_\_\_ Identify all no longer utilized hardware, such as old PCs, laptops, cell phones, PDAs, etc., that may contain discoverable information, and retain the hardware in a centralized location.
  - Retain all software, applications, etc. that are necessary to retrieve information from obsolete or unused hardware.
8. \_\_\_ Identify all sources of discoverable information that is held by third-parties, e.g., off-site servers for Company computer systems, email or telephones.  
\_\_\_ Coordinate with third-party computer service providers to retain potentially discoverable information and/or suspend automatic deletion programs

#### END NOTES

1. The question of whether litigation is “probable,” in the context of when a duty to preserve material arises, is a factual one. There is no bright line that can be drawn. Some guidance can be taken from the ABA’s Civil Discovery Standards that states “[w]hen a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents ...” American Bar Association, Section of Litigation, Civil Discovery Standards, Standard 10 (2004). Further guidance comes from the Federal Court in New York where the court stated that the obligation to preserve arises “where a party is on notice that litigation is likely to be commenced.” *Anderson v. Sotheby’s Inc. Severance Plan*, 2005 WL2583715 at \*3 (S.D.N.Y. Oct. 11, 2005).

The ABA has defined “probable” in the context of auditor’s letters to mean “[t]he chance of the future event or events are likely to occur.” American Bar Association, Auditor’s Letter Handbook, at 15.

A similar standard has been applied in defining “in anticipation of litigation” within the work product doctrine. For example, the Fourth Circuit stated that a party could reasonably anticipate litigation “following an actual event or series of events that reasonably could result in litigation.” *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992).

Experience shows that in the context of tort litigation following an accident, whether litigation is probable against a given party seems likely driven by (1) the extent to which the actions or product of the party is apparently related to the cause of the accident, and (2) whether death, serious injury or substantial property damage occurred.

### Ten Tips on Avoiding Document Retention Disasters

#### "LexisNexis - Applied Discovery White Paper"

1. Practice competent pre-litigation planning - develop a policy and enforce it. Know what is being stored, and how long the company must keep it to comply with applicable statutes and court rulings in the subject jurisdiction. Be sure to include electronic data in the policy.
2. Involve the company's technology department in decisions regarding the policy's parameters and methods for enforcement. Remember that the IS or IT department is usually charged with a duty to keep the system from losing any data, and those departments may not realize the implications of keeping too much data for too long.
3. Establish clear accountability for the enforcement of the policy. While an executive-level technology employee may be responsible for overall enforcement, be sure the staff handling daily procedures is educated about the importance of the policy and held accountable for following the guidelines in place. Know in advance who may be called upon to testify about the company's document retention procedures and educate that person in advance of the crisis.
4. Educate all of the company's computer users about the pitfalls of electronic communications. Here is a good rule of thumb for email-before hitting "send," consider whether you would want your employer, your mother, or a jury to read the message. If the answer is no, the message should not be sent. Employees should have no false expectations of the privacy in any information on the company's computer system.
5. Teach employees how to manage their electronic data. As a routine matter, decide which business documents must be kept and which can be discarded on a regular basis. Educate employees about these decisions. Advise them about the legal ramifications of deleting information once the company is on notice of a law suit or other legal document request.
6. If the policy states that certain unnecessary records will be purged at regular intervals – whether electronic or paper- be sure the policy is consistently followed.
7. Consider segregating business email and personal email applying different retention standards. A company may even wish to set standards for automatic deletion of emails unless the author or recipient makes a conscious decision to store the message as a business record.
8. Immediately reconsider and be prepared to suspend regular retention and destruction procedures when litigation or a legal document request is pending or imminent. Have a plan in place for quickly notifying all necessary staff when this action must be taken.
9. Involve the technology department again when litigation or any form of document request is imminent. Make informed decisions about how best to alter the company's usual retention policy, if necessary.
10. Periodically conduct an internal audit of the company's retention policy. It will be easier to argue the policy is reasonable if it is reexamined and any necessary adjustments are made on a regular basis.

While no document retention policy can provide a fail-safe plan for avoiding liability at the hands of electronic data, an educated, methodical approach to retention and destruction of electronic documents will fare well in the eyes of most courts.

#### FEDERAL RULE OF EVIDENCE 407

##### Rule 407. Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

#### NOTES TO RULE 407

##### HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1932.)

##### Notes of Advisory Committee on Rules

The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." *Hart v. Lancashire & Yorkshire Ry. Co.*, 21 L.T.R. N.S. 261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rules is broad enough to encompass all of them. See Falknor, *Extrinsic Policies Affecting Admissibility*, 10 Rutgers L.Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., 64 A.L.R.2d 1296. Two recent federal cases are illustrative. *Boeing Airplane Co. v. Brown*, 291 F.2d 310 (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And *Powers v. J. B. Michael & Co.*, 329 F.2d 674 (6th Cir. 1964), an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant's control. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue is present and allows the opposing party to lay the groundwork for exclusion by making an admission.

Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403.

For comparable rules, see Uniform Rule 51; California Evidence Code § 1151; Kansas Code of Civil Procedure § 60-451; New Jersey Evidence Rule 51.

##### Notes of Advisory Committee on Rules - 1997 Amendment

The amendment to Rule 407 makes two changes in the rule. First, the words "an injury or harm allegedly caused by" were added to clarify that the rule applies only to changes made after the occurrence that produced the

damages giving rise to the action. Evidence of measures taken by the defendant prior to the “event” causing “injury or harm” do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. See *Chase v. General Motors Corp.*, 856 F.2d 17, 21-22 (4th Cir. 1988). Second, Rule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove “a defect in a product or its design, or that a warning or instruction should have accompanied a product.” This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions. See *Raymond v. Raymond Corp.*, 938 F.2d 1518, 1522 (1st Cir. 1991); *In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong World Industries, Inc.*, 995 F.2d 343 (2d Cir. 1993); *Cann v. Ford Motor Co.*, 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, 456 U.S. 960 (1982); *Kelly v. Crown Equipment Co.*, 970 F.2d 1273, 1275 (3d Cir. 1992); *Werner v. Upjohn, Inc.*, 628 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981); *Grenada Steel Industries, Inc. v. Alabama Oxygen Co., Inc.*, 695 F.2d 883 (5th Cir. 1983); *Bauman v. Volkswagenwerk Aktiengesellschaft*, 621 F.2d 230, 232 (6th Cir. 1980); *Flaminio v. Honda Motor Company, Ltd.*, 733 F.2d 463, 469 (7th Cir. 1984); *Gauthier v. AMF, Inc.*, 788 F.2d 634, 636-37 (9th Cir. 1986).

Although this amendment adopts a uniform federal rule, it should be noted that evidence of subsequent remedial measures may be admissible pursuant to the second sentence of Rule 407. Evidence of subsequent measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.

#### **GAP Report on Rule 407**

The words “injury or harm” were substituted for the word “event” in line 3. The stylization changes in the second sentence of the rule were eliminated. The words “causing ‘injury or harm’ “ were added to the Committee Note.

## Criminal Investigations

### 31. Criminal Issues Arising From Aircraft Accidents

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#### Potential Criminal Issues Related to an Aircraft Accident

##### I. Airline Accidents Result in Criminal Charges

Since 2008, there have been an average of 17 major passenger jet accidents worldwide each year. More than 24 criminal investigations have been initiated against airline companies and officials in the last decade alone—with several notable prosecutions in the last few years—for criminal conduct allegedly arising from these accidents. Although such prosecutions are rare in the US, they occur frequently overseas, as we note in just a few examples.

- In the wake of the Air France Flight 4590 (Concorde) accident more than a decade ago, a French court in 2010 convicted Continental Airlines and one of its mechanics of manslaughter, although these convictions were overturned in November of 2012.
- As a result of the Helios Airways Boeing 737-300 accident in Greece, three airline executives were prosecuted in a Cypriot court in 2011. Although the executives were ultimately acquitted, the same three executives, and a British engineer, were convicted in April of 2012 of manslaughter and negligence in an Athens court and sentenced to ten years in prison.
- In the wake of the mid-air collision between the Embraer Legacy 600 and the Gol Boeing 737-800, two American pilots were convicted in a Brazilian court in May of 2011 of failing to notice that the airplane's collision avoidance system had been inhibited.

Although their conviction was upheld on appeal, the Brazilian court reduced their sentence in October of 2012 and allowed the men to avoid prison time.

Airline accidents, especially those occurring abroad, give rise to a number of criminal law issues. First, it appears that, in some foreign countries, mere negligence resulting in injury—which would not be treated criminally in the US—is subject to criminal sanctions overseas. Second, prosecutors—particularly foreign ones—exercise their discretion to bring criminal charges whenever there is a major accident resulting in death or injury. Recently, airlines and international flight authorities have urged prosecuting authorities to exercise restraint in bringing criminal prosecutions—both in the US and overseas. However, despite the prevalence of campaigns aimed at decriminalizing aviation accidents, airline companies and officials still face a significant risk of prosecution in the event of an aviation accident, particularly overseas.

##### II. Jurisdiction Over Aircraft Accidents

The United States may assert its jurisdiction over aircraft accidents under either 18 U.S.C. § 7 or 49 U.S.C. § 46501. Pursuant to § 7, the US has jurisdiction over accidents involving US or foreign carriers when the accidents occur over US airspace and territorial waters. In addition, the US may use 49 U.S.C. § 46501 to assert jurisdiction over airplane accidents that occur overseas when the aircraft's "destination or last place of departure" is the US. Several other factors may also convey US jurisdiction, such as the aircraft's ownership.

Foreign countries may also assert jurisdiction over aviation accidents. The same factors that give rise to US jurisdiction—such as the place of the accident or the ownership of the aircraft—often provide a basis for foreign jurisdiction as well. Therefore, when the accident occurs in a foreign country, the country will likely have jurisdiction to bring criminal charges against the airline company, executives, and employees.

##### III. Substantive Bases of US Criminal Liability

###### A. Involuntary Manslaughter

The US federal government can impose criminal liability on both individuals and corporations for aircraft accidents. Thus, when an airplane accident results in fatalities, manslaughter charges may be brought against the airline and the airline's employees. Charges of voluntary manslaughter are unlikely because voluntary manslaughter requires

the specific intent to harm, see 18 U.S.C. § 1112(a), which is usually not present in aviation accidents. However, charges of involuntary manslaughter may be appropriate. Although there are two types of involuntary manslaughter, the one most applicable in the context of an airline accident is the type colloquially referred to as “gross negligence” or “criminal negligence.” Under federal law, this type of involuntary manslaughter occurs where an individual causes “the unlawful killing of a human being without malice” while “[i]n the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.” *Id.*

An example of this type of involuntary manslaughter can be found in the federal indictment recently issued against two employees of BP for their role in the 2010 Gulf oil spill. Well Site Leaders Robert Kaluza and Donald Vidrine were indicted by a federal grand jury for involuntary manslaughter for failing to adequately supervise several key safety tests that were performed on the Deepwater Horizon drilling rig. See Indictment at 5-6, *United States v. Kaluza & Vidrine*, No. 2:12-cr-00265-SRD-ALC (filed Nov. 14, 2012), available at <http://www.justice.gov/iso/opa/resources/2520121115143638743323.pdf> (noting that, despite “significant indications that the well was not secure, defendants . . . failed to phone engineers onshore at that time to alert them to the problems”). According to the indictment, the defendants’ conduct amounted to gross negligence. *Id.* at 6.

#### B. Other Federal Statutes

A number of other federal statutes are applicable to criminal conduct resulting from aviation accidents. First, under 18 U.S.C. § 1001(a), an individual may be held criminally liable if he: “(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.” Although prosecutions under 18 U.S.C. § 1001(a) may target statements made during the course of a criminal investigation, the false statements statute also applies to written or oral statements made prior to the onset of an investigation. This typically involves “pencil whipping”—when airline officials or employees falsify airline records to indicate that they performed certain maintenance checks. For example, following the 1996 ValuJet Flight 592 airplane accident, SabreTech, its vice president for maintenance, and two mechanics were indicted, but not convicted, of false statements under § 1001(a).

Second, when a company or individual falsifies documents pertaining to an investigation or persuades witnesses not to cooperate—with the specific intent to impede the investigation—charges of obstruction of justice are possible under 18 U.S.C. §§ 1510-1520. Last, where two or more individuals agree to commit obstruction of justice or to violate the false statements statute, they also subject themselves to liability under 18 U.S.C. § 371, the federal conspiracy statute.

#### IV. Substantive Bases of Foreign Criminal Liability

While criminal prosecution arising from airplane accidents is certainly a possibility in the US, the risk is significantly greater in foreign countries due to the lack of prosecutorial discretion and the marked differences between US and foreign criminal laws. Most significantly, the willfulness and intent elements that are the hallmark of most US criminal prosecutions may be absent overseas. For example, in 2012, an Athens court convicted airline executives based on negligent acts of their employees that caused the 2005 Helios Airways Boeing 737-300 accident in Greece. Although a Cypriot court had previously acquitted the men of the same charges, the Athens court convicted them of manslaughter and negligence for the reckless, dangerous, and careless actions of their agents in failing to reset the plane’s pressurization valve system.

An earthquake in Italy provides another more recent example of foreign criminal prosecutions for non-intentional conduct. In 2009, a 6.3-magnitude earthquake struck L’Aquila, Italy and killed over 300 people. In the aftermath of this disaster, six Italian scientists and an Italian government official were convicted of manslaughter and sentenced to six years in prison for failing to accurately predict and communicate the risk of the earthquake. See <http://www.cnn.com/2012/10/23/world/europe/italyquake-scientists-guilty/index.html>. Given that earthquakes are notoriously difficult to predict, it is unlikely that a US prosecutor would pursue—or that a US court would sustain—such a conviction. These examples illustrate some of the key differences between US and foreign law with respect to liability, sentencing, and prosecutorial discretion.

## V. Corporate Criminal Liability

### A. US Corporate Criminal Liability

Even where individual employees are held accountable for their actions, the corporate entity is not immune from criminal liability. Corporate criminal liability was first recognized in the 1909 case of *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909). In holding that a corporation may be criminally liable for the acts of its agents, the court in *New York Central* noted that “to give [corporations] immunity from all punishment . . . would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.” *Id.* at 485-86.

Since 1909, courts have held corporations criminally liable by imputing the criminal intent of the corporation’s employees to the corporate entity under the tort law principle of respondeat superior. See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1103 (1991). Under this theory, a corporation is criminally liable for the acts of its agents who “(1) commit a crime (2) within the scope of employment (3) with the intent to benefit the corporation.” *Id.*

However, the “within the scope of employment” element has been rendered almost meaningless in the criminal law context, since courts have considered criminal conduct to be within the scope of employment even where it was forbidden by corporate policy. *Id.* An example of this is the 1972 case of *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972). In this case, a hotel’s agent threatened suppliers with loss of the hotel’s business if they did not contribute money to a trade association to which the hotel belonged. *Id.* at 1002. Although such a threat was against both corporate policy and the express instructions given to the agent, the court held the corporation criminally liable. See *id.* at 1004 (emphasizing that “[s]uch liability may attach without proof that the conduct was within the agent’s actual authority, and even though it may have been contrary to express instructions”).

Corporate vicarious liability in a criminal context has been upheld where the agent’s conduct was not only unauthorized, but in direct contravention of the corporation’s policies and express instructions. However, a comprehensive and rigorous compliance program may persuade prosecutors to exercise their discretion to refrain from criminally charging an airline for the reckless or intentional acts of its employees. See U.S. Attorney’s Manual § 9-28.300, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/28mcrm.htm#9-28.300](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.300).

### B. Foreign Corporate Criminal Liability

While corporate criminal liability is well established in the US, the concept is not universally recognized. In Germany, Greece, Hungary, Mexico, and Sweden, corporate criminal liability, while not a creature of statute, comes in the form of administrative penalties assessed against corporations for their employees’ criminal acts. See Aliens Arthur Robinson, ‘Corporate Culture’ as a Basis for the Criminal Liability of Corporations, 4 (2008), available at <http://www.reports-and-materials.org/All-ens-Arthur-Robinson-Corporate-Culturepaper-for-Ruggie-Feb-2008.pdf>. On the other hand, countries such as Brazil, Bulgaria, Luxembourg, and the Slovak Republic do not recognize corporate criminal liability at all. *Id.*

Of the countries that do impose criminal liability on corporations, there are varying approaches. In South Africa, just like in the US federal criminal system, corporate criminal liability is imputed to the corporation under the theory of vicarious liability. *Id.* Alternatively, the United Kingdom, Canada, and other British Commonwealth nations employ the “identification model,” which imputes senior officials and employees’ criminal conduct to the corporation on the theory that these employees possess the same state of mind, knowledge, and intention as the corporation. *Id.* at 4, 6. Another form of corporate criminal liability, which is recognized in Australia and Switzerland, is termed “organizational liability.” Under this theory, corporations are only criminally liable if the corporate culture, practices, and procedures encouraged or tolerated the criminal conduct at issue. *Id.* Thus, an airline that frequently flies to Australia or Switzerland may avoid corporate criminal liability in those countries by maintaining a corporate culture that clearly prohibits criminal conduct.

As countries differ markedly in how they treat corporate criminal liability, it is difficult to predict the criminal consequences that an aviation company may face following an accident. However, if airline companies familiarize

themselves with the varying treatments of corporate criminal liability, they may be able to better anticipate their potential liability.

## **VI. Responding to a Criminal Investigation**

After an accident involving death or serious injury, airlines should prepare for the eventuality of criminal prosecution, even in the US. After taking the normal steps to collect and preserve all available evidence and witness statements, airlines should analyze the facts against applicable criminal statutes and Justice Department guidelines. Importantly, any decision by federal authorities to pursue a criminal case against an airline would be predicated on an analysis of the Justice Department's U.S. Attorney's Manual. The most important factors that are considered are: (1) the nature and seriousness of the offense; (2) the pervasiveness of wrongdoing within the corporation; (3) the corporation's history of similar misconduct; (4) the existence and effectiveness of a compliance program; and (5) the corporation's remedial actions. See U.S. Attorney's Manual § 9-28.300. Important to note, statements company employees or agents make during the course of their employment constitute "admissions" against the airline. Accordingly, airlines should prepare employees prior to any statements the employees make to safety organizations, such as the National Transportation Safety Board ("NTSB"). When an airline company becomes the target of a foreign criminal investigation, an entirely different—and more unpredictable—set of rules applies. For this reason, airline companies should take certain precautionary measures. First, airline companies should vet and retain, in advance, experienced criminal defense counsel in all countries in which they frequently travel, who can then brief the company on issues such as intent, collective liability, vicarious liability, the risk of arrest, and the detention of airline employees in the foreign jurisdiction. Second, in the event of an accident, and based on legal advice, airlines should consider immediate evacuation of its employees prior to the time they can be questioned or detained.

In the event of an airplane accident resulting in death or serious injury anywhere in the world, all interested parties must anticipate a criminal case. An ounce of prevention is the name of the game: advance preparation may save the company, its agents, and its employees from years of expense and exposure.

### 32. Advice to Employees on Government Interviews

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#### ADVICE TO EMPLOYEES ON GOVERNMENT INTERVIEWS

##### Sample Employee Advice of Rights Form

[DATE]

**TO: Distribution**

Subject: Government Investigation

As you may be aware, the federal government is presently conducting an investigation that apparently focuses on [insert appropriate description].

In the course of this investigation, it is possible that you may be contacted personally at home or at the office by a Government investigator wishing to speak to you regarding the investigation. In the event that you are contacted by a Government investigator who requests a telephone or personal interview, you should know of the following:

1. The investigator may request to speak to you.
2. You have a right to speak to the Government investigator as well as a right not to speak to the Government investigator.
3. The Government investigator does not have a right to insist upon an interview, and he does not possess subpoena or other powers of process requiring attendance at an interview. Submission to an interview is a completely voluntary matter.
4. **[OPTIONAL AND IF APPLICABLE]** The Government investigator may indicate that if you do not agree to an interview, you can be subpoenaed to a grand jury to testify. While the investigator personally does not have subpoena power, the United States Attorney (United States Department of Justice) does have the power to issue a subpoena to require attendance at a grand jury. By agreeing to an interview, however, you do not foreclose the issuance of a grand jury subpoena, and you still may be subpoenaed to testify before the grand jury about the matters discussed in the interview.
5. If you decide that you wish to submit to an interview, you can decide that you will go forward only in the presence of a lawyer, and can schedule the interview at a time and place convenient to you. Under any and all circumstances, you should tell the truth, and a failure to do so could result in a violation of law.
6. If you decide not to submit to an interview, you should politely decline to be interviewed. Additionally, in the event you are contacted by a Government investigator, the Company would appreciate it if you would notify the Company before you decide whether to submit to an interview. The Company has retained attorneys to counsel the Company concerning the investigation. These attorneys can meet with you to discuss the investigation and, if you desire, can accompany you during an interview should you decide to consent to an interview request. Remember, the decisions whether to have an interview, when to have an interview, and who should be present, are your personal decisions and not the decisions of the Government or the Company. Counsel for the Company whom you may notify in the event you are contacted are as follows:

**[DESIGNATED PERSONS INCLUDING THEIR OFFICE AND, IF APPROPRIATE, HOME PHONE NUMBERS]**

Finally, if you already have been contacted, the Company would appreciate it if you would notify me at the above listed office number.

If you have any questions please let me know.

(SIGNATURE)

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### 33. Advice on Searches by Government Agents

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#### ADVICE ON SEARCHES BY GOVERNMENT AGENTS SEARCH WARRANT CHECKLIST

The material contained in this summary should be viewed only as a general summary of the law by Fox Rothschild LLP and not as a substitute for legal consultation in any particular case.

**PRIOR TO ARRIVAL:** Fax a letter to the U.S. Attorney advising of the prohibition against ex parte interviews of company employees. Pack (1) paper for notes; (2) two copies of the letter faxed to the U.S. Attorney; and (3) telephone numbers for local judges and magistrates (e.g., County Bar directory).

#### **ON THE SCENE:**

**Arrival:** Make a note of your time of arrival.

**Negotiate:** You may not interfere with the search. Pledge cooperation to and negotiate with the Agent In Charge and the prosecutor while still representing the client.

**The Agent:** Find the Agent In Charge and exchange identification and business cards with him. Ask him the name and telephone number of the prosecutor handling the case.

**Employee Interviews:** Advise the Agent In Charge that ex parte interviews are prohibited and you have so advised the U.S. Attorney. Give him a copy of the letter faxed to the U.S. Attorney. Ask him that ex parte interviews cease or you be allowed access to a telephone to arrange that a judge or magistrate stop the interviews. Notify as many employees as possible that they do not have to submit to an interview or make any statements.

**The Search Warrant:** Obtain a copy of the Search Warrant ("Warrant") and, if possible, the Application and Affidavit for Search Warrant, and any continuation sheets made a part thereof ("Affidavit"). You are only entitled to the Affidavit if the Warrant contains language such as: "Affidavit(s) having been made before me and made a part hereof. . ." or "I am satisfied that the affidavit(s) which are incorporated herein....." In short, unless the Warrant expressly incorporates the Affidavit, you are not entitled to the Affidavit. Immediately examine the Warrant and answer these questions:

- Is the date of the search on or before the last date permitted by the Warrant?
- Is the time of the search during the time ordered in the Warrant?
- Is the property being searched the property described in the Warrant?
- Does the Warrant, and the Application, if available to you, appear to be signed by a federal magistrate or a state judge?
- Does the Warrant at the top correctly state the county or district in which the property being searched is located?
- If the answer to any of these questions is "no," ask the agent in charge of the search that the search immediately terminate and the agents leave the property.

**Supervisors:** Attempt to form a group to follow your instructions and instruct them to observe agents and employees in their areas and to make notes of key observations, such as:

- property searched
- property seized
- persons present
- persons interviewed
- focus of search
- communications

<b><u>The Entry:</u></b>	While fresh in their mind, ask witnesses exactly what the agents did and said when they first entered the property.
<b><u>The Witnesses:</u></b>	Obtain the identity of and business cards from as many persons present as possible, including all agents.
<b><u>The Search:</u></b>	Monitor and make notes of the search to the extent possible. What property is being seized from what areas and is that property described in the Warrant? Tell an agent if you believe that the property being seized is not described in the Warrant and make notes when your input is overruled or ignored. Make your own personal inventory as best as possible of number or volume and type of property seized.
<b><u>Privileged Property:</u></b>	Ask that property which you believe is protected by the attorney-client privilege or some other privilege either be left behind or put in a box which is taped completely around, i.e., sealed. Make notes when your input is overruled or ignored.
<b><u>The Receipt:</u></b>	A receipt or inventory of the property seized must be given to the person from whom the property was taken. This receipt is so general that it should not be signed by you or the client, though an agent will likely ask that one of you do so. On the other hand, inform the agents if you perceive omissions or inaccuracies in the receipt.
<b><u>Critical Documents:</u></b>	Ask the agent in charge if he will seize copies of rather than original critical documents or, in the alternative, if copies may be retained prior to seizure of originals.
<b><u>Agent Misconduct:</u></b>	Be alert to agent misconduct (e.g., searching an employee's purse, barring an employee from leaving though employee promises not to return, barring an employee from leaving unless and until interviewed, threatening employees, etc.) and make notes thereof.
<b><u>Debriefing:</u></b>	After departure of the agents, interview or schedule interviews of all employees who have made a statement to an agent. Also interview or schedule interviews of all supervisors regarding their observations and instruct them to personally prepare memoranda of their observations. Use a tape recorder for interviews if at all possible.
<b><u>Departure:</u></b>	Do not leave until the agents leave and the search is completed. Make certain you have (1) a copy of the Warrant; (2) a copy of the Affidavit, if available to you; (3) a copy of the receipt; and (4) your notes and materials before you leave the scene.

## TACTICS AND DEFENSES IN DEALING WITH SEARCH WARRANTS

### A. Background

1. The Fourth Amendment to the United States Constitution provides that all "persons" (a corporation, partnership, or sole proprietorship is a "person" for Fourth Amendment purposes) are protected against unreasonable searches, inspections and seizures of their premises, files and records. The Fourth Amendment also limits the government's power to issue warrants for searches and seizures. The government must have probable cause to believe a crime has occurred prior to the issuance of a warrant. Further, a search warrant must describe, with particularity, the place to be searched and/or any items to be seized.
2. Probable cause is a threshold requirement for the issuance of any search warrant authorizing a government intrusion on privacy. Generally, the law requires that a "neutral and detached" magistrate review the facts and circumstances articulated by the government, prior to the issuance of a warrant, to determine whether or not probable cause exists for a search or seizure. Probable cause for a search or seizure must be based on more than the government's mere suspicion of illegal activity. Probable cause requires that the government possess reasonable grounds to believe that the specific items or persons to be searched for and/or seized are located on the property to which entry is sought. Thus, probable cause for a search can become "stale" if too long a time passes and it becomes likely that the items sought are no longer on the premises.

3. The Fourth Amendment protects “persons” and their expectations of privacy—wherever they exist. Accordingly, there can be no “search or seizure,” as defined by the Fourth Amendment, if the government does not intrude upon an expectation of privacy. For example, a search conducted following the consent of a suspect or “target” of an investigation will be upheld by courts, even in the absence of probable cause or a search warrant. In the absence of a warrant, it is important that the target of an investigation demonstrate and maintain an expectation of privacy regarding its premises, records, and files to defeat any potential claim of consent to a search. By consenting to the government’s intrusion, a target gives up its expectation of privacy, thereby losing all Fourth Amendment protection.
4. Over the years, searches and seizures conducted by the government have generated a vast amount of litigation. As a result, interpreting the Fourth Amendment, recognizing exceptions to the probable cause and expectation-of-privacy standards, and raising other relevant issues, such as challenging the government’s use of informant testimony to establish probable cause, are exceedingly complex tasks which require legal counsel who is experienced in litigating criminal procedure issues. Moreover, the earliest possible retention of counsel, for the purpose of obtaining advice on the particular matter giving rise to the government’s search, is critical to ensure that the target of the government’s investigation is afforded the fullest protection of its rights under the law.

#### B. How to Respond to a Search Warrant

The factual details and circumstances surrounding the execution of the warrant are critical to defending the criminal investigation. It is therefore important to note and record the conduct of the agents during the search, in as much detail as possible, so that counsel may use whatever facts are helpful to challenge the warrant or the use of proceeds from the warrant and to develop potential issues for litigation.

1. Once a search is announced, counsel must be notified immediately and must proceed forthwith to the scene. Warrants are often executed by large numbers of federal agents who disperse rapidly throughout the facility and have little patience for amenities. Counsel’s role under these circumstances is delicate but vital.
2. Tell the agents or officers that counsel has been retained with regard to the investigation for which the warrant was issued and that individuals present on the premises may not be interrogated by the agents or officers without first advising counsel that they wish to contact such individuals.
3. Note what language the government agents or officers use when demanding entry to the premises. The common law requires that an agent state his or her identity and purpose prior to entry. In the absence of a warrant, do not be persuaded by an agent’s claim of authority or a threat to obtain a warrant. Permitting a search without a warrant could be construed as a voluntary consent to the search and could eliminate the protections of the Fourth Amendment. Also be wary of an employee’s inadvertent consent to a search in the absence of a warrant. (For example, an office manager may possess sufficient authority over corporate files to consent to the government’s search of those files.)
4. Read the warrant and obtain a copy of it and any other documents or affidavits attached to the warrant. A search warrant should contain the following information:
  - a. The date on which it is issued.
  - b. An authorization addressed to an officer or agent who is empowered to execute the warrant.
  - c. The identity of the issuing authority and the date when the application for the warrant was made.
  - d. The identity of the applicant and all persons whose affidavits were submitted in support of the application.
  - e. The issuing authority’s finding of reasonable cause for the warrant.
  - f. The identity of the place to be searched and the location, usually a street address, of the place to be searched.
  - g. The items constituting the object of the search.

- h. The time of day or night and the period of time, usually five to 10 days from the date the warrant was issued, during which the execution of the warrant is authorized.
  - i. The period of time, usually not more than five days, following execution of the warrant within which it must be returned to the issuing authority.
- 5. Counsel should note the names of all officers executing the warrant, identify the Agent In Charge, and identify all witnesses to the search. Counsel then should pledge cooperation, and seek to engage the agents in an accommodation to limit disruption of the facility. Counsel should offer to direct agents to areas where the material identified in the warrant is likely to be found. The agents cannot be required by counsel to search only in designated areas, but often they will accept reasonable limits on the areas to be searched.
- 6. Counsel must review the warrant carefully, noting the area to be searched and the items to be seized, which are specified on the face of the warrant.
- 7. Counsel should seal off the search area from the rest of the facility to minimize disruption and avoid chance encounters between agents and employees.
- 8. Notify all employees that, upon the advice of counsel, they may but are not obligated to discuss any aspect of the investigation with the agents or officers.
- 9. Advise all employees that their persons and/or personal effects are not subject to search unless an individual is specifically identified in the warrant. A search warrant for a premises will not authorize a search of any individual found there unless the warrant specifies that the individual may be searched or if there is probable cause to believe the individual is involved in an illegal activity.
- 10. Advise employees that they should not attempt to prevent the search from taking place since agents may use non-deadly force, if necessary, to execute the warrant.
- 11. If the search extends beyond the limits of the warrant, or if the warrant contains facial inadequacies or defects, such as a misidentification of the company or the wrong address, these matters should be called to the agents' attention immediately. This will foreclose a later claim by the government that the warrant was executed in good faith.
- 12. Counsel should accompany the agents and make detailed notes as to what areas are searched and what materials are seized. These notes are often more helpful than the formal inventory that the agents are required to leave with the company. This is especially true when the agents seize large quantities of documents that may be necessary to the ongoing business of the company. Counsel's detailed notes are essential in light of the Government's history of sometimes failing to return complete sets of seized documents. In lieu of notes, counsel can dictate the course of the search into a tape recorder. Use of a video recorder is also proper but should not be employed if the agents object to its use.
- 13. Record in detail any aspect of the search that appears to exceed the scope of the warrant, e.g., places searched or persons questioned that were not authorized by the warrant.
- 14. Note whether the agents or officers leave the premises and return later to conduct an additional search. Such "gaps" in the search may require a second warrant.
- 15. As an additional precaution, counsel should request that the agents permit the company to photocopy selected original documents before they are removed from the premises. Alternatively, counsel should seek a commitment from the Agent In Charge that the company will be permitted access to and an opportunity to duplicate all the documents once they are in federal custody.
- 16. Counsel should seek to prevent the seizure of any attorney-client materials located in the areas to be searched. If agents do seize such materials, counsel should immediately notify attorneys for the government, suggest an agreement that such documents not be removed from the premises or, alternatively, that such documents be placed in a sealed envelope, pending agreement on the nature and disposition of the material.

17. As a general proposition, counsel should attempt to monitor the search to detect overreaching by the agents, clues as to the reason for the search, and any grounds for suppression based on overreaching. Counsel should note if the agents appear familiar with the office layout or files. Counsel should attempt to determine the nature of the investigation based on the type of files that the agents are reviewing.
18. Obtain a receipt, prepared by the agent in the presence of witnesses to the search, for all items seized.
19. Upon the advice of corporate counsel, request that employees not discuss the search or investigation with the news media. If photographers or television cameras arrive, however, company executives should not attempt to dodge or duck from the cameraperson since these photographs can be highly prejudicial.

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE  
PART I – CRIMES  
CHAPTER 73 - OBSTRUCTION OF JUSTICE

Sec. 1512. Tampering with a witness, victim, or an informant

(a)

- (1) Whoever kills or attempts to kill another person, with intent to -
    - (A) prevent the attendance or testimony of any person in an official proceeding;
    - (B) prevent the production of a record, document, or other object, in an official proceeding; or
    - (C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3).
  - (2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to -
    - (A) influence, delay, or prevent the testimony of any person in an official proceeding;
    - (B) cause or induce any person to -
      - (i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
      - (ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;
      - (iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
      - (iv) be absent from an official proceeding to which that person has been summoned by legal process; or
    - (C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (3).
  - (3) The punishment for an offense under this subsection is -
    - (A) in the case of a killing, the punishment provided in sections 1111 and 1112;
    - (B) in the case of -
      - (i) an attempt to murder; or
      - (ii) the use or attempted use of physical force against any person; imprisonment for not more than 30 years; and
    - (C) in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.
- (b) **Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to –**
- (1) influence, delay, or prevent the testimony of any person in an official proceeding;

- (2) cause or induce any person to –
    - (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
    - (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
    - (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
    - (D) be absent from an official proceeding to which such person has been summoned by legal process; or
  - (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings; shall be fined under this title or imprisoned not more than 20 years, or both.
- (c) **Whoever corruptly -**
- (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
  - (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.
- (d) **Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from -**
- (1) attending or testifying in an official proceeding;
  - (2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings;
  - (3) arresting or seeking the arrest of another person in connection with a Federal offense; or
  - (4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding; or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.
- (e) **In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.**
- (f) **For the purposes of this section -**
- (1) an official proceeding need not be pending or about to be instituted at the time of the offense; and
  - (2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.
- (g) **In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance -**
- (1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or
  - (2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

- (h) **There is extraterritorial Federal jurisdiction over an offense under this section.**
- (i) **A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.**
- (j) **If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.**
- (k) **Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.**

(Added Pub. L. 97-291, Sec. 4(a), Oct. 12, 1982, 96 Stat. 1249; amended Pub. L. 99-646, Sec. 61, Nov. 10, 1986, 100 Stat. 3614; Pub. L. 100-690, title VII, Sec. 7029(a), (c), Nov. 18, 1988, 102 Stat. 4397, 4398; Pub. L. 101-650, title III, Sec. 321, Dec. 1, 1990, 104 Stat. 5117; Pub. L. 103-322, title VI, Sec. 60018, title XXXIII, Sec. 330016(1)(O), (U), Sept. 13, 1994, 108 Stat. 1975, 2148; Pub. L. 104-214, Sec. 1(2), Oct. 1, 1996, 110 Stat. 3017; Pub. L. 104-294, title VI, Sec. 604(b)(31), Oct. 11, 1996, 110 Stat. 3508; Pub. L. 107-204, title XI, Sec. 1102, July 30, 2002, 116 Stat. 807; Pub. L. 107-273, div. B, title III, Sec. 3001(a), (c)(1), Nov. 2, 2002, 116 Stat. 1803, 1804; Pub. L. 110-177, title II, Sec. 205, Jan. 7, 2008, 121 Stat. 2537.)

#### AMENDMENTS

2008 - Subsec. (a)(3)(A). Pub. L. 110-177, Sec. 205(1)(A), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112;". Subsec. (a)(3)(B). Pub. L. 110-177, Sec. 205(1)(B), substituted "30 years" for "20 years" in concluding provisions. Subsec. (a)(3)(C). Pub. L. 110-177, Sec. 205(1)(C), substituted "20 years" for "10 years". Subsec. (b). Pub. L. 110-177, Sec. 205(2), substituted "20 years" for "ten years" in concluding provisions. Subsec. (d). Pub. L. 110-177, Sec. 205(3), substituted "3 years" for "one year" in concluding provisions.

2002 - Subsec. (a)(1). Pub. L. 107-273, Sec. 3001(a)(1)(A), substituted "as provided in paragraph (3)" for "as provided in paragraph (2)" in concluding provisions. Subsec. (a)(2). Pub. L. 107-273, Sec. 3001(a)(1)(C), added par. (2). Former par. (2) redesignated (3). Subsec. (a)(3). Pub. L. 107-273, Sec. 3001(a)(1)(B), (D), redesignated par. (2) as (3), added subpars. (B) and (C), and struck out former subpar. (B) which read as follows: "(B) in the case of an attempt, imprisonment for not more than twenty years." Subsec. (b). Pub. L. 107-273, Sec. 3001(a)(2), struck out "or physical force" after "intimidation" in introductory provisions. Subsec. (b)(3). Pub. L. 107-273, Sec. 3001(c)(1), inserted "supervised release," after "probation". Subsec. (c). Pub. L. 107-204 added subsec. (c). Former subsec. (c) redesignated (d). Subsec. (d). Pub. L. 107-204 redesignated former subsec. (c) as (d). Former subsec. (d) redesignated (e). Subsec. (d)(2). Pub. L. 107-273, Sec. 3001(c)(1), inserted "supervised release," after "probation". Subsecs. (e) to (j). Pub. L. 107-204 redesignated former subsecs. (d) to (i) as (e) to (j), respectively. Subsec. (k). Pub. L. 107-273, Sec. 3001(a)(3), added subsec. (k).

1996 - Subsec. (a)(2)(A). Pub. L. 104-294 inserted "and" after semicolon at end. Subsec. (i). Pub. L. 104-214 added subsec. (i). 1994 - Subsec. (a)(2)(A). Pub. L. 103-322, Sec. 60018, amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: "(A) in the case of a killing, the punishment provided in sections 1111 and 1112 of this title; and". Subsec. (b). Pub. L. 103-322, Sec. 330016(1)(U), substituted "fined under this title" for "fined not more than \$250,000" in concluding provisions. Subsec. (c). Pub. L. 103-322, Sec. 330016(1)(O), substituted "fined under this title" for "fined not more than \$25,000" in concluding provisions. 1988 - Subsec. (b). Pub. L. 100-690, Sec. 7029(c), substituted "threatens, or corruptly persuades" for "or threatens". Subsec. (h). Pub. L. 100-690, Sec. 7029(a), added subsec. (h).

1986 - Subsec. (a). Pub. L. 99-646, Sec. 61(2), (3), added subsec. (a) and redesignated former subsec. (a) as (b). Subsecs. (b) to (g). Pub. L. 99-646, Sec. 61(1), (3), redesignated former subsec. (a) as (b), inserted ", delay, or prevent", and redesignated former subsecs. (b) to (f) as (c) to (g), respectively.

CHANGE OF NAME -- Words "magistrate judge" and "United States magistrate judge" substituted for "magistrate" and "United States magistrate", respectively, in subsec. (f)(1) pursuant to section 321 of Pub. L. 101-650, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1996 AMENDMENT -- Amendment by Pub. L. 104-294 effective Sept. 13, 1994, see section 604(d) of Pub. L. 104-294, set out as a note under section 13 of this title.

EFFECTIVE DATE -- Section 9 of Pub. L. 97-291 provided that: "(a) Except as provided in subsection (b), this Act and the amendments made by this Act [enacting this section and sections 1513 to 1515, 3579, and 3580 of this title, amending sections 1503, 1505, 1510, and 3146 of this title and Rule 32 of the Federal Rules of Criminal Procedure, and enacting provisions set out as notes under this section and sections 1501 and 3579 of this title] shall take effect on the date of the enactment of this Act [Oct. 12, 1982]. "(b)(1) The amendment made by section 2 of this Act [enacting provisions set out as a note under this section] shall apply to presentence reports ordered to be made on or after March 1, 1983. "(2) The amendments made by section 5 of this Act [enacting sections 3579 and 3580 of this title] shall apply with respect to offenses occurring on or after January 1, 1983."

CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES -- Section 2 of Pub. L. 97-291 provided that: "(a) The Congress finds and declares that: "(1) Without the cooperation of victims and witnesses, the criminal justice system would cease to function; yet with few exceptions these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders. "(2) All too often the victim of a serious crime is forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contact with a criminal justice system unresponsive to the real needs of such victim. "(3) Although the majority of serious crimes falls under the jurisdiction of State and local law enforcement agencies, the Federal Government, and in particular the Attorney General, has an important leadership role to assume in ensuring that victims of crime, whether at the Federal, State, or local level, are given proper treatment by agencies administering the criminal justice system. "(4) Under current law, law enforcement agencies must have cooperation from a victim of crime and yet neither the agencies nor the legal system can offer adequate protection or assistance when the victim, as a result of such cooperation, is threatened or intimidated. "(5) While the defendant is provided with counsel who can explain both the criminal justice process and the rights of the defendant, the victim or witness has no counterpart and is usually not even notified when the defendant is released on bail, the case is dismissed, a plea to a lesser charge is accepted, or a court date is changed. "(6) The victim and witness who cooperate with the prosecutor often find that the transportation, parking facilities, and child care services at the court are unsatisfactory and they must often share the pretrial waiting room with the defendant or his family and friends. "(7) The victim may lose valuable property to a criminal only to lose it again for long periods of time to Federal law enforcement officials, until the trial and sometimes and [sic] appeals are over; many times that property is damaged or lost, which is particularly stressful for the elderly or poor. "(b) The Congress declares that the purposes of this Act [see Short Title of 1982 Amendment note set out under section 1501 of this title] are - "(1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; "(2) to ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant; and "(3) to provide a model for legislation for State and local governments."

FEDERAL GUIDELINES FOR TREATMENT OF CRIME VICTIMS AND WITNESSES IN THE CRIMINAL JUSTICE SYSTEM -- Section 6 of Pub. L. 97-291, as amended by Pub. L. 98-473, title II, Sec. 1408(b), Oct. 12, 1984, 98 Stat. 2177, provided that: "(a) Within two hundred and seventy days after the date of enactment of this Act [Oct. 12, 1982], the Attorney General shall develop and implement guidelines for the Department of Justice consistent with the purposes of this Act [see Short Title of 1982 Amendment note set out under section 1501 of this title]. In preparing the guidelines the Attorney General shall consider the following objectives: "(1) Services to victims of crime. -- Law enforcement personnel should ensure that victims routinely receive emergency social and medical services as soon

as possible and are given information on the following - "(A) availability of crime victim compensation (where applicable); "(B) community-based victim treatment programs; "(C) the role of the victim in the criminal justice process, including what they can expect from the system as well as what the system expects from them; and "(D) stages in the criminal justice process of significance to a crime victim, and the manner in which information about such stages can be obtained. "(2) Notification of availability of protection. - A victim or witness should routinely receive information on steps that law enforcement officers and attorneys for the Government can take to protect victims and witnesses from intimidation. "(3) Scheduling changes. - All victims and witnesses who have been scheduled to attend criminal justice proceedings should either be notified as soon as possible of any scheduling changes which will affect their appearances or have available a system for alerting witnesses promptly by telephone or otherwise. "(4) Prompt notification to victims of serious crimes. - Victims, witnesses, relatives of those victims and witnesses who are minors, and relatives of homicide victims should, if such persons provide the appropriate official with a current address and telephone number, receive prompt advance notification, if possible, of - "(A) the arrest of an accused; "(B) the initial appearance of an accused before a judicial officer; "(C) the release of the accused pending judicial proceedings; and "(D) proceedings in the prosecution and punishment of the accused (including entry of a plea of guilty, trial, sentencing, and, where a term of imprisonment is imposed, a hearing to determine a parole release date and the release of the accused from such imprisonment). "(5) Consultation with victim. - The victim of a serious crime, or in the case of a minor child or a homicide, the family of the victim, should be consulted by the attorney for the Government in order to obtain the views of the victim or family about the disposition of any Federal criminal case brought as a result of such crime, including the views of the victim or family about - "(A) dismissal; "(B) release of the accused pending judicial proceedings; "(C) plea negotiations; and "(D) pretrial diversion program. "(6) Separate waiting area. - Victims and other prosecution witnesses should be provided prior to court appearance a waiting area that is separate from all other witnesses. "(7) Property return. - Law enforcement agencies and prosecutor should promptly return victim's property held for evidentiary purposes unless there is a compelling law enforcement reason for retaining it. "(8) Notification to employer. - A victim or witness who so requests should be assisted by law enforcement agencies and attorneys for the Government in informing employers that the need for victim and witness cooperation in the prosecution of the case may necessitate absence of that victim or witness from work. A victim or witness who, as a direct result of a crime or of cooperation with law enforcement agencies or attorneys for the Government, is subjected to serious financial strain, should be assisted by such agencies and attorneys in explaining to creditors the reason for such serious financial strain. "(9) Training by federal law enforcement training facilities. - Victim assistance education and training should be offered to persons taking courses at Federal law enforcement training facilities and attorneys for the Government so that victims may be promptly, properly, and completely assisted. "(10) General victim assistance. - The guidelines should also ensure that any other important assistance to victims and witnesses, such as the adoption of transportation, parking, and translator services for victims in court be provided. "(b) Nothing in this title shall be construed as creating a cause of action against the United States. "(c) The Attorney General shall assure that all Federal law enforcement agencies outside of the Department of Justice adopt guidelines consistent with subsection (a) of this section." [Amendment of section 6 of Pub. L. 97-291 by Pub. L. 98-473, set out above, effective 30 days after Oct. 12, 1984, see section 1409(a) of Pub. L. 98-473, set out as an Effective Date note under section 10601 of Title 42, The Public Health and Welfare.]

## FAA Enforcement Investigations

### 35. FAA Certificate Actions Against an Air Carrier; or Airman After an Airline Accident

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#### FAA CERTIFICATE ACTIONS AGAINST AN AIR CARRIER OR AIRMAN AFTER AN AIRCRAFT ACCIDENT

##### I. Summary

- The FAA Administrator may revoke, modify, or suspend a certificate on an emergency or non-emergency basis.
- Both emergency and non-emergency certificate actions can be reviewed by the NTSB.
- Consistent with the Pilot's Bill of Rights, Pub. L. 112-53, August 3, 2012, as amended by the Fairness to Pilots Act, title III, subtitle C, Pub. L. 115-254, October 5, 2016, the NTSB is not bound by any factual findings made by the FAA or by any FAA interpretations of statutes, regulations, and FAA policy guidance concerning sanctions for violations.
- A petition for review to the NTSB of a non-emergency certificate action stays the FAA's action during the appeal.
  - Appeal must be begun within 20 days after the date on which the Administrator's order was served on the certificate holder.
  - The Administrator files a complaint which must be answered by the certificate holder within 20 days.
  - Proceedings are held before an NTSB Administrative Law Judge (ALJ).
- The ALJ issues an initial decision after a hearing that can be appealed to the entire Board.
- If either the certificate holder or the FAA can petition the Board for a rehearing, reconsideration, or modification of a Board order.
  - Either the certificate holder or the FAA Administrator (when the Administration determines that the Board's order will have a significant adverse impact on the FAA's ability to carry out its aviation progress may petition a U.S. Court of Appeals to review the NTSB's order. Under the Pilot's Bill of Rights a certificate holder may appeal an NTSB order to a U.S. District Court rather than a U.S. Court of Appeals.
- Appeal of an emergency certificate differs in that there is no stay of the action pending appeal.
  - The FAA's finding that an emergency exists is subject to expedited appeal directly to the Board.
  - Review of the "emergency" finding must be sought within 48 hours. The Board has five days to rule.
- If the Board finds that an emergency exists, then the "emergency" ruling is appealable to a federal Court of Appeals.
- The appeal of the merits of the revocation follows the same general procedure as non-emergency actions, but with a shortened time line.
- Appeals of any final action by the Board are to the Court of Appeals for the DC Circuit or the federal Court of Appeals where the carrier has its principle place of business. In addition, an individual airman substantially
  - affected by an order of the Board may elect to file an appeal in a U.S. District Court rather than a Court of Appeals.
  - NTSB orders are only overturned if it can be demonstrated that the FAA's action was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.

## II. Authority of the FAA to revoke carrier certificates

Congress has delegated the authority to act to ensure aviation safety to the Federal Aviation Administration.

Pursuant to that delegation, the FAA Administrator is empowered to “reinspect at any time a civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or reexamine an airman holding a certificate . . . .” 49 U.S.C. § 44709. In addition, the Administrator is empowered to take a number of remedial actions pursuant to a reinspection or reexamination of any certificate holder. These include issuing “an order amending, modifying, suspending, or revoking any part of a certificate” if the Administrator decides that “safety in air commerce or air transportation and the public interest require that action . . . .” 49 U.S.C. § 44709(b)(1)(A).

In addition to the statute, the FAA has published internal guidelines to determine if a certificate should be revoked. According to these materials:

The Administrator is authorized to review any certificate when the certificate holder lacks the qualifications to hold the certificate. A certificate holder may lack the qualifications to hold the certificate because of: (i) a lack of technical [ ]; (ii) the failure to meet airman medical standards; or (iii) a lack of care, judgment, or responsibility required of a certificate holder.

Compliance and Enforcement Program, FAA Order No. 2150.3B, Chapter 7, paragraph 4.(a)(3); see also *Echo Inc. v. Hinson*, 48 F.3d 8, 10 (3d Cir. 1995).

Under normal circumstances, the Federal Aviation Act requires that, before the Administrator takes any action, the certificate holder be advised “of the charges or other reasons on which the Administrator relies for the proposed action.” 49 U.S.C. § 44709(c). In addition, the Administrator is required to “provide the holder an opportunity to answer the charges and be heard why the certificate should not be amended, modified, suspended, or revoked.” *Id.* However, this provision does not apply if the Administrator determines that there is “an emergency.” *Id.*

Thus, it is clear that the FAA Administrator is given broad powers to act without prior notice. Furthermore, the range of actions open to the Administrator allows remedial actions up to and including the immediate revocation of the carrier’s or airman’s certificate.

## III. Review by the National Transportation Safety Board

If the Administrator acts to suspend, modify or revoke a carrier’s or airman’s certificate, the next step that must be taken is an appeal of the Administrator’s decision to the National Transportation Safety Board. Any certificate holder is entitled to appeal any act by the Administrator under 49 U.S.C. § 44709 to the National Transportation Safety Board. The Board is entitled to “amend, modify, or reverse the order when the Board finds that “safety in air commerce or air transportation and the public interest do not require affirmation of the order . . . .” 49 U.S.C. § 44709(d)(1)(A). The Board is also empowered to modify a suspension or revocation of a certificate to the imposition of a civil penalty. 49 U.S.C. § 44709(d)(2). Review by the Board differs from a traditional appeal in one important respect, unlike a court of appeals, the Board is specifically not bound by any factual findings by the Administrator. 49 U.S.C. § 44709(d)(3). Finally, as set forth more fully below, under 49 U.S.C. § 44709(e)(3), the Board is authorized to review the Administrator’s finding that an emergency exists and that immediate action is required.

Review of the Administrator’s decision by the Board takes place on two separate tracks: a normal track, and an expedited track in cases where the Administrator has declared that an emergency exists. The procedures applicable to both tracks are set forth below.

#### **A. Procedure on appeal of a certificate action if the Administrator has not declared an emergency**

If no emergency has been declared, filing an appeal with the National Transportation Safety Board immediately stays any order by the FAA Administrator. 49 U.S.C. § 44709(e)(1). An appeal before the Board contesting the revocation of a certificate must be filed within 20 days of service of the order of the Administrator. 49 CFR § 821.30(a). The appeal must identify the Administrator's order and any certificate affected and the Administrator's action from which the appeal is sought. 49 CFR § 821.30(b). The respondent's notice of appeal must be served on the Administrator. 49 CFR § 821.30(a). Once the notice of appeal is filed, the Administrator is required to file a copy of its order which "shall serve as the complaint." 49 CFR § 821.31(a). The respondent then has 20 days to file an answer to the complaint, and must state any affirmative defenses. 49 CFR § 821.31(b). The burden of proof in all proceedings on the revocation of a certificate is on the Administrator. 49 CFR § 821.32.

Any party to a proceeding before the Board has the right to be represented by counsel. 49 CFR § 821.6(b). Documents filed with the Board should be sent by personal delivery, U.S. Postal Service First Class Mail (sent to the Office of Administrative Law Judges, National Transportation Safety Board, 490 L'Enfant Plaza East, S.W. Washington, DC 20594) overnight delivery service, facsimile or electronic mail as specified in the NTSB Administrative Law Judges web page on the NTSB's public website (<https://www.nts.gov/legal/alj>). 49 CFR § 821.7(a)(3) and addressed to the law judge assigned to the case, if any. 49 CFR § 821.7(a)(1). An executed original and three copies of each document must be filed. 49 CFR § 821.7(b). In addition, the first filing with the Board must contain the name and address of the individual entitled to receive service of documents in the proceeding. 49 CFR § 821.7(f).

After a complaint or a petition for review of an FAA emergency determination (see below) or of a mandatory certificate action under 49 U.S.C. § 44106(d) (revocation of aircraft certificate for controlled substances violations) 49 U.S.C § 44710(d) revocation of airman certificates for controlled substances violated, or 49 U.S.C. § 44726(d) (denial and revocation of certificate for counterfeit parts violations), is filed with the Board, any party is permitted to take discovery without seeking prior Board approval. 49 CFR. § 821.19(a). In accordance with the Pilot's Bill of Rights, Pub. L. 112-53, proceedings before an NTSB ALJ shall, to the extent practicable, be conducted in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence. In addition, a party can obtain a subpoena for the production of documents or compel the attendance of witnesses from the ALJ assigned to the case, or if none is assigned, from the chief law judge. 49 CFR § 821.20(a).

The law judge assigned to the case then sets the date for a hearing. 49 CFR. § 821.37(a). Each party has the right to present "arguments in support of, or in opposition to, motions, objections, and proposed rulings." 49 CFR § 821.39. In addition, hearsay evidence is admissible. *Id.* The parties are also afforded a reasonable opportunity to submit proposed findings and conclusions to the ALJ prior to his "initial decision." *Id.*

The ALJ renders his "initial decision," either orally, at the conclusion of the hearing, or in writing at a later date. 49 CFR § 821.42(a). The initial decision is binding if an appeal is not timely filed with the Board. 49 CFR § 821.43. This initial decision is appealed by filing a notice of appeal with the Board. The notice must be filed within 10 days after the initial decision was orally rendered or served if it was a written decision. 49 CFR § 821.47(a).<sup>1</sup> The petitioner then has either 50 days after an oral decision or 30 days after a written decision to file an appeal brief with the Board. 49 CFR § 821.48(a). The opposing party then has 30 days to file a reply brief. 49 CFR § 821.48(c). Requests for oral argument before the Board are usually not granted. 49 CFR § 821.48(e). Review by the Board is limited to a determination of whether the findings of fact are supported by a preponderance of the evidence; whether conclusions are made in accordance with law, precedent, and policy; whether the questions on appeal are substantial; and whether any prejudicial errors occurred. 49 CFR § 821.49(a).

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<sup>1</sup> *If a petitioner wishes, he may ask the ALJ to reconsider his decision within 10 days, which has the effect of moving the deadline for appeal to the Board to 10 days after the ALJ rules on the request to reconsider. Id.*

If the Board rules against a party on appeal, then the party may seek rehearing, reargument, reconsideration or modification of the Board order. 49 CFR § 821.50(a). A petition seeking further relief must be filed within 30 days of service of the Board's order. 49 CFR § 821.50(b). The opposing party has 15 days to file a reply. 49 CFR § 821.50(e). Thus, appeal to the Board is a two-tiered process. The first proceeding consists of a trial-like process before an ALJ which results in an initial decision. The second proceeding is a written appeal, usually without argument, of the ALJ's decision to the Board. If the certificate holder does not prevail, then the next step is appeal to the United States Court of Appeals as set out in section III, *infra*.

#### **B. District Court or the Procedures if the Administrator has declared an emergency**

Under normal circumstances, filing an appeal with the National Transportation Safety Board immediately stays any order by the FAA Administrator. 49 U.S.C. § 44709(e)(1). However, "the order of the Administrator is effective immediately if the Administrator advises the Board that an emergency exists and safety in commerce or air transportation requires the order to be effective immediately." If the Administrator declares an emergency, the "Board shall make a final disposition of an appeal under subsection (d) not later than 60 days after the date on which the appeal is filed." 49 U.S.C. § 44709(e)(4).

A certificate holder has the right to immediately appeal the "emergency" finding to the Board. The certificate holder must file a petition for review within 48 hours of the FAA's finding that there is an emergency affecting air safety. 49 U.S.C. § 44709(e)(3). The Board then has five days after the request for review is filed to make its ruling. *Id.* If it finds in favor of the certificate holder, then the order is stayed pending appeal. *Id.* The law judge's ruling on a certificate holder's petition is "final, and is not appealable to the Board." 49 CFR §821.54(f). If the finding is against the certificate holder, the statute is silent as to what, if any, further review is available. However, a good argument could be made that the order of the Board denying the stay would be final under 49 U.S.C § 1153(a), which would allow appeal of that order to a United States Court of Appeals, while the merits of the revocation continue to be heard before the Board.

If the Board affirms that an emergency exists, then the certificate is revoked pending review of the merits of the action by the Board. Generally, the procedures outlined in Section II(A) apply in "emergency" actions, with the following exceptions. The certificate holder must appeal within 10 days of service of the Administrator's emergency order. 49 CFR § 821.53(a). The Administrator has three days to file the order as his complaint. 49 CFR § 821.55(a). The certificate holder has five days after service of the complaint to file an answer. 49 CFR § 821.55(b). Discovery is still permitted in emergency proceedings; however, "given the short time available, parties are directed to cooperate to ensure timely completion prior to the hearing." 49 CFR. § 821.55(d). Discovery requests are to be served "as soon as possible." *Id.*

Within three days of notification of the emergency, the Board must set a date for the hearing, which cannot be more than 30 days after the respondent's appeal was received and docketed. 49 CFR § 821.56(a). The ALJ's initial decision is to be made orally upon termination of the hearing and after opportunity for oral argument. 49 CFR § 821.56(c). The certificate holder or the FAA then has two days after the initial decision has been rendered to appeal to the Board. 49 CFR § 821.57(a). Within five days after filing the notice of appeal, the appellant must file his initial brief. 49 CFR § 821.57(b). The respondent has seven days to file a reply. *Id.* Petitions for reconsideration are only permitted based on new matters which have been discovered. 49 CFR § 821.57(d).

Thus, the only real substantive difference in an emergency proceeding is the dramatically shortened time table. A loss before the Board in an emergency proceeding is still appealable to a United States Court of Appeals.

#### **IV. Judicial Review**

If the certificate holder loses his appeal to the NTSB, the next step is to seek judicial review of the NTSB order affirming the Administrator. In the case of an aircraft certificate holder, the exclusive jurisdiction to review any final order of the NTSB is vested in "the appropriate court of appeals of the United States or the United States Court of Appeals for the District of Columbia Circuit." 49 U.S.C. § 1153. The "appropriate court of appeals" is the

court of appeals where the company has its principal place of business. 49 U.S.C. § 1153(b)(1). A petition for review must be filed within 60 days of the issuance of the Board's order. 49 U.S.C. § 1153(a).

Upon receipt of the petition of review, the Board is required to file a record of the proceedings below with the Court of Appeals. 49 U.S.C. § 1153(b)(2). On appeal, any factual findings by the Board are considered conclusive if they are supported by "substantial evidence." 49 U.S.C. § 1153(b)(3). The Court of Appeals is empowered, after providing reasonable notice to the Board, to grant "interim relief by staying the order or taking other appropriate action when cause for its action exists." *Id.* Furthermore, just as with appellate review of a trial court proceeding, review on appeal is limited to those parts of the proceeding to which a timely objection was made before the Board. 49 U.S.C. § 1153(b)(4). If the aircraft certificate holder loses on appeal, he may appeal to the Supreme Court pursuant to 28 U.S.C. § 1254, by filing a petition for certiorari under procedures dealing with discretionary review of appellate decisions.

In accordance with section 2(d) of the Pilot's Bill of Rights, Pub. L. 112-53, upon a decision by the FAA under 49 U.S.C. § 44703(d) (to deny an application for the issuance or renewal of an individual's airman certificate) or under 49 U.S.C. § 44709(d) or (e) (to impose a punitive civil action or emergency order amending, modifying, suspending, or revoking any part of the individual's airman certificate), if the individual loses his appeal to the NTSB, he can elect to seek judicial review either in the U.S. District Court in which the individual resides or in the U.S. District Court for the District of Columbia. If he chooses not to file an appeal in a U.S. District Court, he may file an appeal in an appropriate U.S. Court of Appeals. In addition, under 49 U.S.C. § 1153(c), when the Administrator "decides that an order of the Board under section 44703(d), 44709, or 46301(d)(5) [FAA imposition of civil penalties against an individual acting as a pilot, flight engineer, mechanic, or repairman for violations of various statutory provisions] of [title 49, U.S.C.] will have a significant adverse impact on carrying out [the statutory provisions] related to an aviation matter, the Administrator may obtain judicial review of the order under [49 U.S.C. § 46110]. The Administrator shall be made a party to the judicial review proceedings. Findings of fact of the Board are conclusive if supported by substantial evidence."

**NATIONAL TRANSPORTATION SAFETY BOARD**

**AVIATION INVESTIGATION MANUAL**

**MAJOR TEAM INVESTIGATIONS**

[Insert PDF]



























































































































**TITLE 49. TRANSPORTATION**  
**SUBTITLE II. OTHER GOVERNMENT AGENCIES**  
**CHAPTER 11. NATIONAL TRANSPORTATION SAFETY BOARD**  
**SUBCHAPTER II. ORGANIZATION AND ADMINISTRATIVE**

49 USCS § 1111

**§ 1111. General organization**

- (a) Organization. The National Transportation Safety Board is an independent establishment of the United States Government.
- (b) Appointment of members. The Board is composed of 5 members appointed by the President, by and with the advice and consent of the Senate. Not more than 3 members may be appointed from the same political party. At least 3 members shall be appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in accident reconstruction, safety engineering, human factors, transportation safety, or transportation regulation.
- (c) Terms of office and removal. The term of office of each member is 5 years. An individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed, is appointed for the remainder of that term. When the term of office of a member ends, the member may continue to serve until a successor is appointed and qualified. The President may remove a member for inefficiency, neglect of duty, or malfeasance in office.
- (d) Chairman and Vice Chairman. The President shall designate, by and with the advice and consent of the Senate, a Chairman of the Board. The President also shall designate a Vice Chairman of the Board. The terms of office of both the Chairman and Vice Chairman are 2 years. When the Chairman is absent or unable to serve or when the position of Chairman is vacant, the Vice Chairman acts as Chairman.
- (e) Duties and powers of Chairman. The Chairman is the chief executive and administrative officer of the Board. Subject to the general policies and decisions of the Board, the Chairman shall--
  - (1) appoint and supervise officers and employees, other than regular and full-time employees in the immediate offices of another member, necessary to carry out this chapter [49 USCS §§ 1101 et seq.];
  - (2) fix the pay of officers and employees necessary to carry out this chapter [49 USCS §§ 1101 et seq.];
  - (3) distribute business among the officers, employees, and administrative units of the Board; and
  - (4) supervise the expenditures of the Board.
- (f) Quorum. Three members of the Board are a quorum in carrying out duties and powers of the Board.
- (g) Offices, bureaus, and divisions. The Board shall establish offices necessary to carry out this chapter [49 USCS §§ 1101 et seq.], including an office to investigate and report on the safe transportation of hazardous material. The Board shall establish distinct and appropriately staffed bureaus, divisions, or offices to investigate and report on accidents involving each of the following modes of transportation:
  - (1) aviation.
  - (2) highway and motor vehicle.
  - (3) rail and tracked vehicle.
  - (4) pipeline.
  - (5) marine.

- (h) Chief Financial Officer. The Chairman shall designate an officer or employee of the Board as the Chief Financial Officer. The Chief Financial Officer shall—
- (1) report directly to the Chairman on financial management and budget execution;
  - (2) direct, manage, and provide policy guidance and oversight on financial management and property and inventory control; and
  - (3) review the fees, rents, and other charges imposed by the Board for services and things of value it provides, and suggest appropriate revisions to those charges to reflect costs incurred by the Board in providing those services and things of value.
- (i) Board member staff. Each member of the Board shall select and supervise regular and full-time employees in his or her immediate office as long as any such employee has been approved for employment by the designated agency ethics official under the same guidelines that apply to all employees of the Board. Except for the Chairman, the appointment authority provided by this subsection is limited to the number of full-time equivalent positions, in addition to 1 senior professional staff at a level not to exceed the GS 15 level and 1 administrative staff, allocated to each member through the Board's annual budget and allocation process.
- (j) Seal. The Board shall have a seal that shall be judicially recognized.

**HISTORY:**

(July 5, 1994, P.L. 103-272, § 1(d), 108 Stat. 746; Nov. 1, 2000, P.L. 106-424, § 10, 114 Stat. 1886.) (As amended Dec. 21, 2006, P.L. 109-443, § 9(a), (d), 120 Stat. 3301.)

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

Prior law and revision:

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Revised Source (U.S. Code) Source (Statutes at Large) Section

- |         |  |
|---------|--|
| 1111(a) | 49 App.:1902(a). Jan. 3, 1975, Pub. L. 93-633, Sec. 303(a), (b) (2)-(c), 88 Stat. 2167,2168  |
| 1111(b) | 49 App.:1902(b)(1) Jan. 3, 1975, Pub. L. 93-(1st sentence words 633, Sec. 303(b)(1), 88 before comma, Stat;2167; Oct. 14, 1982, 2d-last sentences) 97-309 Sec. 1(1st sentence),96 Stat. 1453 |
| 1111(c) | 49 App.:1902(b)(2).  |
| 1111(d) | 49 App.:1902(b)(1) (1st sentence words after comma), (3) (1st, 2d,4th sentences).  |
| 1111(e) | 49 App.:1902(b)(3) (3d, last sentences), (c)(3)  |
| 1111(f) | 49 App.:1902(b)(4).  |
| 1111(g) | 49 App.:1902(b)(5), (c)(1).  |

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In subsection (a), the words "previously established within the Department of Transportation" are omitted as unnecessary. The words "in accordance with this section, on and after April 1, 1975" are omitted as executed.

In subsection (c), the words "except as otherwise provided in this paragraph" are omitted as surplus. The text of 49 App.:1902(b)(2) (4th sentence) is omitted as executed.

In subsection (d), the words "On or before January 1, 1976" are omitted as executed. The words "(and thereafter as required)" and "(hereafter in this chapter referred to as the "Chairman")" are omitted as unnecessary.

In subsection (e), before clause (1), the words "is the chief executive and administrative officer of the Board" are substituted for "shall be the chief executive officer of the Board and shall exercise the executive and administrative functions of the Board" for clarity. The words "Subject to the general policies and decisions of the Board, the Chairman shall" are substituted for 49 App.:1902(b)(3) (last sentence) to eliminate unnecessary words. In clause (1), the words "Subject to the civil service and classification laws" are omitted as unnecessary because of title 5, United States Code, especially sections 3301, 5101, and 5331. The words "the Board is authorized" are omitted for consistency because the authority to appoint officers and employees is vested in the Chairman subject to the "general policies and decisions of the Board" as provided in the source provisions. The words "including investigators, attorneys, and administrative law judges" are omitted as covered by "officers and employees". The words "carry out this chapter" are substituted for "carry out its powers and duties under this chapter" to eliminate unnecessary words. In clause (3), the words "expenditures of the Board" are substituted for "the use and expenditure of funds" for clarity.

In subsection (f), the words "duties and powers" are substituted for "function" for consistency in the revised title and with other titles of the Code.

In subsection (g), the text of 49 App.:1902(c)(1) is omitted as unnecessary because of 40:ch. 10.

Amendments:

2000. Act Nov. 1, 2000, redesignated subsec. (h) as subsec. (i), and inserted a new subsec. (h).

2006. Act Dec. 21, 2006, in subsec. (e), substituted para. (1) for one which read: "(1) appoint, supervise, and fix the pay of officers and employees necessary to carry out this chapter;"; redesignated paras. (2) and (3) as paras. (3) and (4), respectively, and inserted new para. (2); in subsec. (g), added para. (5); redesignated subsec. (i) as subsec. (j); and inserted new subsec. (i).

Other provisions:

**Improved audit procedures.** Act Nov. 1, 2000, P.L. 106-424, § 11, 114 Stat. 1887, provides: "The National Transportation Safety Board, in consultation with the Inspector General of the Department of Transportation, shall develop and implement comprehensive internal audit controls for its financial programs based on the findings and recommendations of the private sector audit firm contract entered into by the Board in March, 2000. The improved internal audit controls shall, at a minimum, address Board asset management systems, including systems for accounting management, debt collection, travel, and property and inventory management and control."

**Utilization plan.** Act Dec. 21, 2006, P.L. 109-443, § 2(a)(2), 120 Stat. 3297, provides:

(A) Plan. Within 90 days after the date of enactment of this Act, the National Transportation Safety Board shall—

- (i) develop a plan to achieve, to the maximum extent feasible, the self-sufficient operation of the National Transportation Safety Board Academy and utilize the Academy's facilities and resources;
  - (ii) submit a draft of the plan to the Comptroller General for review and comment; and
  - (iii) submit a draft of the plan to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives.
- (B) Plan development considerations. The Board shall—
- (i) give consideration in developing the plan under subparagraph (A)(i) to other revenue-generating measures, including subleasing the facility to another entity; and
  - (ii) include in the plan a detailed financial statement that covers current Academy expenses and revenues and an analysis of the projected impact of the plan on the Academy's expenses and revenues.
- (C) Report. Within 180 days after the date of enactment of this Act, the National Transportation Safety Board shall submit a report to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives that includes—
- (i) an updated copy of the plan developed pursuant to subparagraph (A)(i);
  - (ii) any comments and recommendations made by the Comptroller General pursuant to the Government Accountability Office's review of the draft plan; and
  - (iii) a response to the Comptroller General's comments and recommendations, including a description of any modifications made to the plan in response to those comments and recommendations.
- (D) Implementation. The plan developed pursuant to subparagraph (A)(i) shall be implemented within 2 years after the date of enactment of this Act.

**Audit procedures.** Act Dec. 21, 2006, P.L. 109-443, § 6, 120 Stat. 3300, provides: "The National Transportation Safety Board, in consultation with the Inspector General of the Department of Transportation, shall continue to develop and implement comprehensive internal audit controls for its operations. The audit controls shall address, at a minimum, Board asset management systems, including systems for accounting management, debt collection, travel, and property and inventory management and control."

**NOTES:**

Code of Federal Regulations:

National Transportation Safety Board--Organization and functions of the Board and delegations of authority, 49 CFR Part 800.

National Transportation Safety Board--Public availability of information, 49 CFR Part 801.

National Transportation Safety Board--Rules of practice in air safety proceedings, 49 CFR Part 821.

National Transportation Safety Board--Notification and reporting of aircraft accidents or incidents and overdue aircraft, and preservation of aircraft wreckage, mail, cargo, and records, 49 CFR Part 830.

National Transportation Safety Board--Accident/incident investigation procedures, 49 CFR Part 831.

Research Guide:

Federal Procedure:

2 Fed Proc L Ed, Administrative Procedure §§ 2:29, 30.

Am Jur:

8A Am Jur 2d, Aviation §§ 13, 17.

Interpretive Notes and Decisions:

Federal Aviation Administration (FAA) is not in a position to "allow" National Transportation Safety Board (NTSB) to do anything, since NTSB is independent agency under Independent Safety Board Act of 1974 (former 49 USCS Appx. §§ 1901 et seq.) with authority under former 49 USCS Appx. § 1429(a) to amend, modify, or reverse if FAA Administrator's order if it finds that safety in air commerce or air transportation and public interest do not require affirmation Administrator's order. *Go Leasing v National Transp. Safety Bd.* (1986, CA9) 800 F2d 1514.

**TITLE 49. TRANSPORTATION**  
**SUBTITLE II. OTHER GOVERNMENT AGENCIES**  
**CHAPTER 11. NATIONAL TRANSPORTATION SAFETY BOARD**  
**SUBCHAPTER III. AUTHORITY**

49 USCS § 1131

**§ 1131. General authority**

(a) General.

- (1) The National Transportation Safety Board shall investigate or have investigated (in detail the Board prescribes) and establish the facts, circumstances, and cause or probable cause of--
  - (A) an aircraft accident the Board has authority to investigate under section 1132 of this title [49 USCS § 1132] or an aircraft accident involving a public aircraft as defined by section 40102(a)(37) of this title [49 USCS § 40102(a)(37)] other than an aircraft operated by the Armed Forces or by an intelligence agency of the United States;
  - (B) a highway accident, including a railroad grade crossing accident, the Board selects in cooperation with a State;
  - (C) a railroad accident in which there is a fatality or substantial property damage, or that involves a passenger train;
  - (D) a pipeline accident in which there is a fatality, substantial property damage, or significant injury to the environment;
  - (E) a major marine casualty (except a casualty involving only public vessels) occurring on or under the navigable waters, internal waters, or the territorial sea of the United States as described in Presidential Proclamation No. 5928 of December 27, 1988 [43 USCS § 1331 note], or involving a vessel of the United States (as defined in section 2101(46) of title 46), under regulations prescribed jointly by the Board and the head of the department in which the Coast Guard is operating; and
  - (F) any other accident related to the transportation of individuals or property when the Board decides--
    - (i) the accident is catastrophic;
    - (ii) the accident involves problems of a recurring character; or
    - (iii) the investigation of the accident would carry out this chapter [49 USCS §§ 1101 et seq.].
- (2)
  - (A) Subject to the requirements of this paragraph, an investigation by the Board under paragraph (1)(A)-(D) or (F) of this subsection has priority over any investigation by another department, agency, or instrumentality of the United States Government. The Board shall provide for appropriate participation by other departments, agencies, or instrumentalities in the investigation. However, those departments, agencies, or instrumentalities may not participate in the decision of the Board about the probable cause of the accident.
  - (B) If the Attorney General, in consultation with the Chairman of the Board, determines and notifies the Board that circumstances reasonably indicate that the accident may have been caused by an intentional criminal act, the Board shall relinquish investigative priority to the Federal Bureau of Investigation. The relinquishment of investigative priority by the Board shall not otherwise affect the authority of the Board to continue its investigation under this section.
  - (C) If a Federal law enforcement agency suspects and notifies the Board that an accident being investigated by the Board under subparagraph (A), (B), (C), or (D) of paragraph (1) may have been

caused by an intentional criminal act, the Board, in consultation with the law enforcement agency, shall take necessary actions to ensure that evidence of the criminal act is preserved.

- (3) This section and sections 1113, 1116(b), 1133, and 1134(a) and (c)-(e) of this title [49 USCS §§ 1113, 1116(b), 1133, and 1134(a) and (c)-(e)] do not affect the authority of another department, agency, or instrumentality of the Government to investigate an accident under applicable law or to obtain information directly from the parties involved in, and witnesses to, the accident. The Board and other departments, agencies, and instrumentalities shall ensure that appropriate information developed about the accident is exchanged in a timely manner.
- (b) Accidents involving public vessels.
- (1) The Board or the head of the department in which the Coast Guard is operating shall investigate and establish the facts, circumstances, and cause or probable cause of a marine accident involving a public vessel and any other vessel. The results of the investigation shall be made available to the public.
- (2) Paragraph (1) of this subsection and subsection (a)(1)(E) of this section do not affect the responsibility, under another law of the United States, of the head of the department in which the Coast Guard is operating.
- (c) Accidents not involving government misfeasance or nonfeasance.
- (1) When asked by the Board, the Secretary of Transportation or the Secretary of the department in which the Coast Guard is operating may--
- (A) investigate an accident described under subsection (a) or (b) of this section in which misfeasance or nonfeasance by the Government has not been alleged; and (B) report the facts and circumstances of the accident to the Board.
- (2) The Board shall use the report in establishing cause or probable cause of an accident described under subsection (a) or (b) of this section.
- (d) Accidents involving public aircraft. The Board, in furtherance of its investigative duties with respect to public aircraft accidents under subsection (a)(1)(A) of this section, shall have the same duties and powers as are specified for civil aircraft accidents under sections 1132(a), 1132(b), and 1134(a), (b), (d), and (f) of this title [49 USCS §§ 1132(a), 1132(b), and 1134(a), (b), (d), and (f)].
- (e) Accident reports. The Board shall report on the facts and circumstances of each accident investigated by it under subsection (a) or (b) of this section. The Board shall make each report available to the public at reasonable cost.

**HISTORY:**

(July 5, 1994, P.L. 103-272, § 1(d), 108 Stat. 752; Oct. 25, 1994, P.L. 103-411, § 3(c), 108 Stat. 4237; Nov. 1, 2000, P.L. 106-424, §§ 6(a), 7, 114 Stat. 1885, 1886; Dec. 6, 2003, P.L. 108-168, § 7, 117 Stat. 2034.) (As amended Dec. 21, 2006, P.L. 109-443, § 9(b), (c), 120 Stat. 3301.)

**HISTORY; ANCILLARY LAWS AND DIRECTIVES**

Prior law and revision:

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Revised Source (U.S. Code) Source (Statutes at Large) Section

1131(a)(1) 49 App.:1903(a) Jan. 3, 1975, Pub. L. 93-633,  
(1)(A)-(E) (less Sec. 304(a)(1)(A)-(F), 88 Stat.  
last sentence of 2168; Oct. 24, 1992, Pub. L.  
(E)), (F). 102-508, Sec. 303, 106 Stat.3307.

1131(a)(2) 49 App.:1903(a)(1) Jan. 3, 1975, Pub. L. 93-633,  
(2d, 3d sentences). Sec. 304(a)(1) (less (A)-(F)),

88 Stat. 2168; Nov. 3, 1981,  
Pub. L. 97-74, Sec. 3, 95 Stat. 1065.

1131(a)(3) 49 App.:1903(a)(1)  
(4th, 5th sentences).

1131(b) 49 App.:1903(a)(1)(E)  
(last sentence).

1131(c) 49 App.:1441(f). Aug. 23, 1958, Pub. L. 85-726,  
Sec. 701(a)(4), (f), 72 Stat. 781.

49 App.:1655(c)(1). Oct. 15, 1966, Pub. L. 89-670,  
Sec. 6(c)(1), 80 Stat. 938;  
Jan. 12, 1983, Pub. L. 97-449,  
Sec. 7(b), 96 Stat. 2444.

49 App.:1655(d) Oct. 15, 1966, Pub. L. 89-670,  
(1st sentence). Sec. 6(d) (1st sentence), 80  
Stat. 938.

49 App.:1903(a)(1)(A)  
(6th, last sentences).

1131(d) 49 App.:1441(a)(4).  
49 App.:1655(d)  
(1st sentence).

49 App.:1903(a) (1)(A).

49 App.:1903(a)(2). Jan. 3, 1975, Pub. L. 93-633,  
Sec. 304(a)(2), 88 Stat. 2168;  
July 19, 1988, Pub. L. 100-372,  
Sec. 3(a), 102 Stat. 876.

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In this section, the word "conditions" is omitted as being included in "circumstances". The words "head of the department in which the Coast Guard is operating" are substituted for "Secretary of the department in which the Coast Guard is operating" for consistency in the revised title and with other titles of the United States Code.

In subsection (a)(1)(A), the words "the Board has authority to investigate under section 1132 of this title" are substituted for "which is within the scope of the functions, powers, and duties transferred from the Civil Aeronautics Board under section 1655(d) of this Appendix pursuant to title VII of the Federal Aviation Act of 1958, as amended [49 App. U.S.C. 1441 et seq.]" because of the restatement.

In subsection (a)(1)(F), before subclause (i), the word "decides" is substituted for "in the judgment of" for clarity. The word "individuals" is substituted for "people" for consistency in the revised title. In subclause (iii), the words "the investigation of" are added as being more precise.

In subsection (a)(3), the word "developed" is substituted for "obtained or developed" to eliminate unnecessary words.

In subsection (b)(2), the word "affect" is substituted for "eliminate or diminish" for clarity.

In subsection (c), the text of 49 App.:1441(f) is omitted as superseded by 49 App.:1903(a)(1) (6th, last sentences). In subsection (d), the words "in writing" in 49 App.:1903(a)(2) are omitted as surplus. The words "by it" are added for clarity. The text of 49 App.:1441(a)(4) is omitted as superseded by 49 App.:1903(a)(1)(A) and (2).

Amendments:

1994. Act Oct. 25, 1994 (effective 180 days following the date of enactment, as provided by § 3(d) of such Act, which appears as a note to this section), in subsec. (a)(1)(A), inserted "or an aircraft accident involving a public aircraft as defined by section 40102(a)(37) of this title other than an aircraft operated by the Armed Forces or by an intelligence agency of the United States"; redesignated subsec. (d) as subsec. (e); and added new subsec. (d).

2000. Act Nov. 1, 2000, in subsec. (a)(2), designated the existing text as subpara. (A) and, in such subparagraph as so designated, substituted "Subject to the requirements of this paragraph, an investigation" for "An investigation", and added subparas. (B) and (C); and, in subsec. (d), substituted "1134(a), (b), (d), and (f)" for "1134(b)(2)".

2003. Act Dec. 6, 2003, made a technical correction which did not affect the text of this section.

2006. Act Dec. 21, 2006, in subsec. (a)(1)(E), substituted "on or under the navigable waters, internal waters, or the territorial sea of the United States as described in Presidential Proclamation No. 5928 of December 27, 1988," for "on the navigable waters or territorial sea of the United States," and inserted "(as defined in section 2101(46) of title 46)"; and, in subsec. (c)(1), in the introductory matter, inserted "or the Secretary of the department in which the Coast Guard is operating".

Other provisions:

**Territorial sea of United States.** For extension of the territorial sea of the United States, see Proc. No. 5928, which appears as 43 USCS § 1331 note.

**Effective date of Oct. 25, 1994 amendments.** Act Oct. 25, 1994, P.L. 103-411, § 3(d), 108 Stat. 4237, provides: "The amendments made by subsections (a) and (c) [amending this section and 49 USCS § 40102(a)(37)] shall take effect on the 180th day following the date of the enactment of this Act."

**Revision of 1977 agreement on investigation of accidents.** Act Nov. 1, 2000, P.L. 106-424, § 6(b), 114 Stat. 1886, provides: "Not later than 1 year after the date of the enactment of this Act, the National Transportation Safety Board and the Federal Bureau of Investigation shall revise their 1977 agreement on the investigation of accidents to take into account the amendments made by this Act [for full classification of such Act, consult USCS Tables volumes]."

**Revision of memorandum of understanding governing major marine accidents.** Act Nov. 1, 2000, P.L. 106-424, § 8, 114 Stat. 1886, provides: "Not later than 1 year after the date of the enactment of this Act, the National Transportation Safety Board and the United States Coast Guard shall revise their Memorandum of Understanding governing major marine accidents-- "(1) to redefine or clarify the standards used to determine when the National Transportation Safety Board will lead an investigation; and "(2) to develop new standards to determine when a major marine accident involves significant safety issues relating to Coast Guard safety functions."

**Revision of memorandum of understanding.** Act Dec. 6, 2003, P.L. 108-168, § 3(b), 117 Stat. 2033, provides: "Not later than 1 year after the date of enactment of this Act, the National Transportation Safety Board and the Federal Bureau of Investigation shall revise their 1977 agreement on the investigation of accidents to take into account the amendments made by this section [adding 49 USCS § 1136(j)] and shall submit a copy of the revised agreement to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate."

#### NOTES:

Code of Federal Regulations:

Federal Aviation Administration, Department of Transportation--IFR altitudes, 14 CFR Part 95.

Office of the Secretary, Department of Transportation (Aviation Proceedings)--Inspection of accounts and property, 14 CFR

Part 240.

National Transportation Safety Board--Organization and functions of the Board and delegations of authority, 49 CFR Part 800.

National Transportation Safety Board--Public availability of information, 49 CFR Part 801.

National Transportation Safety Board--Rules of practice in air safety proceedings, 49 CFR Part 821.

National Transportation Safety Board--Notification and reporting of aircraft accidents or incidents and overdue aircraft, and preservation of aircraft wreckage, mail, cargo, and records, 49 CFR Part 830.

National Transportation Safety Board--Accident/incident investigation procedures, 49 CFR Part 831.

National Transportation Safety Board--Testimony of Board employees, 49 CFR Part 835.

National Transportation Safety Board--Rules of practice in transportation; accident/incident hearings and reports, 49 CFR Part 845.

Research Guide:

Federal Procedure:

4 Fed Proc L Ed, Aviation and Space § 7:420.

Am Jur:

61 Am Jur 2d, Pipelines § 20.

Interpretive Notes and Decisions:

Court of appeals upheld order of National Transportation Safety Board, on review under 49 USCS §§ 1131 and 1133, reinstating Federal Aviation Administration's revocation of aircraft mechanic's certificate for failing to provide urine sample for random drug test. *King v NTSB* (2004, CA8) 362 F3d 439. NTSB exhibits offered into evidence, which consisted of interviews with various witnesses in connection with two collisions, as well as NTSB hearing transcripts, were inadmissible because they contained statements by persons not represented by counsel, because witnesses had been questioned by persons other than judicial or legal officers of court, and because matters were offered solely for truth of matter asserted, that is, alleged negligence of parties involved in litigation. *In re Am. Milling Co.* (2003, ED Mo) 270 F Supp 2d 1068, 2003 AMC 2645, *affd in part and revd in part* (2005, CA8 Mo) 2005 US App LEXIS 8717, *reh den, reh, en banc, den* (2005, CA8) 2005 US App LEXIS 11903.

**14 CFR Part 120  
Post- Accident Drug and Alcohol Testing**

Drug Testing:

**§ 120.105 Employees who must be tested.**

Each employee, including any assistant, helper, or individual in a training status, who performs a safety-sensitive function listed in this section directly or by contract (including by subcontract at any tier) for an employer as defined in this subpart must be subject to drug testing under a drug testing program implemented in accordance with this subpart. This includes full-time, part-time, temporary, and intermittent employees regardless of the degree of supervision. The safety-sensitive functions are:

- (a) Flight crewmember duties.
- (b) Flight attendant duties.
- (c) Flight instruction duties.
- (d) Aircraft dispatcher duties.
- (e) Aircraft maintenance and preventive maintenance duties.
- (f) Ground security coordinator duties.
- (g) Aviation screening duties.
- (h) Air traffic control duties.

**§ 120.109 Types of drug testing required.**

- (c) Post-accident drug testing. Each employer shall test each employee who performs a safety-sensitive function for the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines, or a metabolite of those drugs in the employee's system if that employee's performance either contributed to an accident or cannot be completely discounted as a contributing factor to the accident. The employee shall be tested as soon as possible but not later than 32 hours after the accident. The decision not to administer a test under this section must be based on a determination, using the best information available at the time of the determination, that the employee's performance could not have contributed to the accident. The employee shall submit to post-accident testing under this section.

Alcohol Testing:

**§ 120.215 Covered employees.**

- (a) Each employee, including any assistant, helper, or individual in a training status, who performs a safety sensitive function listed in this section directly or by contract (including by subcontract at any tier) for an employer as defined in this subpart must be subject to alcohol testing under an alcohol testing program implemented in accordance with this subpart. This includes fulltime, part-time, temporary, and intermittent employees regardless of the degree of supervision. The safety-sensitive functions are:
  - (1) Flight crewmember duties.
  - (2) Flight attendant duties.
  - (3) Flight instruction duties.
  - (4) Aircraft dispatcher duties.

- (5) Aircraft maintenance or preventive maintenance duties.
- (6) Ground security coordinator duties.
- (7) Aviation screening duties.
- (8) Air traffic control duties.

Prior to conducting any alcohol test on a covered employee subject to the alcohol testing regulations of more than one DOT agency, the employer must determine which DOT agency authorizes or requires the test.

**§ 120.217 Tests required.**

(b) Post-accident alcohol testing .

- (1) As soon as practicable following an accident, each employer shall test each surviving covered employee for alcohol if that employee's performance of a safety-sensitive function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section shall be based on the employer's determination, using the best available information at the time of the determination, that the covered employee's performance could not have contributed to the accident.
- (2) If a test required by this section is not administered within 2 hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within 8 hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FAA upon request of the Administrator or his or her designee.
- (3) A covered employee who is subject to post-accident testing shall remain readily available for such testing or may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

8/5/2009 Appendix A. FAA Drug Abatement Program 9120.1A Checklist of Inspection Elements Appendix A 1.0 Employer Administrative and Quality Assurance Activities A-13 1.07 Types of Testing – Post-Accident

1.07.01 Do you conduct post-accident testing when the employee's performance either contributes to the accident or cannot be completely discounted as a contributing factor? (14 CFR §120.109(c) and §120.217(b))

Yes  No  N/A

1.07.02 Do you make the decision not to conduct post-accident testing based on a determination, using the best information available at the time of the determination, that the employee's performance has not contributed to the accident? (14 CFR §120.109(c) and §120.217(b)(1))

Yes  No  N/A

1.07.03 Do you conduct post-accident drug testing as soon as possible, but no later than 32 hours after the accident? (14 CFR §120.109(c))

Yes  No  N/A

1.07.04 Reserved for Future Use

- 1.07.05 Do you conduct post-accident alcohol testing as soon as practicable, but no later than 8 hours after the accident? (14 CFR §120.217(b)(2))  
Yes  No  N/A
- 1.07.06 Do you prepare and maintain a report stating the reasons the post-accident alcohol test is not conducted within 2 hours of the accident? (14 CFR §120.217(b)(2))  
Yes  No  N/A
- 1.07.07 Do you cease attempts to conduct post-accident alcohol testing 8 hours after the accident and do you prepare and maintain a report stating the reasons the post-accident alcohol test is not conducted within 8 hours of the accident? (14 CFR §120.217(b)(2))  
Yes  No  N/A
- 1.07.08 Do you submit post-accident alcohol testing reports to the FAA when requested? (14 CFR §120.217(b)(2))  
Yes  No  N/A
- 1.07.09 Do you make the determination that an employee refused to submit to post accident testing after the employee is identified for testing and does not remain readily available? (14 CFR §120.217(b)(3))  
Yes  No  N/A
- 1.07.10 Do you ensure that a covered employee is allowed to leave the scene of an accident for a period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care?  
Yes  No  N/A

(14 CFR §120.217(b)(3))

**Index of Excerpts from  
U.S. Department of State Foreign Affairs Manual**

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- 912.2 Definitions
- 912.3 U.S. Participation in Civil Aircraft Accident and Serious Incident Investigation
- 912.4 Notifying the Department of Aviation Accidents and Serious Incidents
  - 912.4-1 Types of Reports
  - 912.4-2 Notification Formats
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    - 1836.1 Site Security
    - 1836.2 Investigation Assistance
    - 1836.3 Identification of Victims
  - 1837 Working with NTSB, Airlines and Airline Family Assistance Contractors
- 7 FAM Exhibit 1830(A): Checklist of Post’s Responsibilities in an Aviation Crisis
- 7 FAM Exhibit 1830(B): Department of State – National Transportation Safety Board (NTSB) Memorandum of Understanding (MOU)
- 7 FAM Exh. 1830(C): Bureau of Consular Affairs Memorandum of Understanding (MOU) of Best Practices with Airlines

## 2 FAM 912 AIRCRAFT ACCIDENTS

### 2 FAM 912.1 Scope, Authority, and Responsibilities

(CT:GEN-396; 07-24-2012)

- a. While the responsibility for civil aviation accident investigation rests primarily with the National Transportation Safety Board (NTSB), it is Department policy that State Department personnel at posts abroad will provide certain reporting as outlined in this subchapter.
- b. The Office of Transportation Policy (EB/TRA/OTP) coordinates these activities for the Department of State.

### 2 FAM 912.2 Definitions

(CT:GEN-356; 04-07-2009)

*Accident:* An aircraft related occurrence in which a person is fatally or seriously injured, the aircraft is substantially damaged or the aircraft is missing.

*Annex 13 to the Chicago Convention:* An Annex to the Convention on International Civil Aviation (the "Chicago Convention"), which provides the international requirements (known as "Standards and Recommended Practices") for the investigation of aircraft accidents and incidents.

*Chicago Convention:* Term for the Convention on International Civil Aviation (Chicago, 1944), the founding document of the International Civil Aviation Organization (ICAO).

*Incident:* An occurrence, other than an accident, associated with the operation of an aircraft which affects or could affect the safety of operation.

*State of Design:* The State having jurisdiction over the organization responsible for the type certificate (design) of an aircraft.

*State of Manufacture:* The State having jurisdiction over the organization responsible for the final assembly of the aircraft.

*State of Occurrence:* The State in the territory of which an accident or incident occurs.

*State of Registry:* The State in which an aircraft is registered.

*State of the Operator:* The State in which the aircraft operator's principal place of business is located, or, if there is no such place of business, the operator's permanent residence.

### 2 FAM 912.3 U.S. Participation in Civil Aircraft Accident and Serious Incident Investigation

(CT: GEN-396; 07-24-2012)

- a. The National Transportation Safety Board (NTSB) is established by Congress as the independent accident investigation agency of the United States (Independent Safety Board Act of 1974). The Safety Board is responsible for the investigation and determination of probable cause of every domestic civil aviation accident and significant accidents in other modes of transportation. It also participates, when entitled under Annex 13 to the Chicago Convention, in foreign governments' investigations of aviation accidents and serious incidents involving U.S. citizens, operators, or aircraft. The NTSB consists of five members appointed by the President and is supported by a technical investigation staff in Washington, D.C. and by investigators in regional offices throughout the United States.
- b. When a civil aviation accident or serious incident occurs in a foreign country that is a party to the Chicago Convention, Annex 13 to the Convention requires that the host government designate an Investigator-in-Charge and to institute an investigation immediately into the circumstances of the accident or serious incident. Although the State of Occurrence of the accident is responsible for and in most cases conducts the investigation, the State of Occurrence, with mutual arrangement, may delegate the whole or any part of the conduct of the investigation to another State.

- c. In the case of accidents or serious incidents occurring outside the territory of any state (international waters), the State of Registry is responsible to conduct the investigation. However it, too, with mutual arrangement, may delegate the whole or any part of the conduct of the investigation to another State.
- d. The States of Registry, Operator, Design and Manufacture have the right to name an accredited representative to participate in investigations as specified in Annex 13 to the Convention. NTSB designates the accredited representatives from the technical investigator staff.
- e. The right of a State to send an accredited representative also includes the right to appoint technical advisers. Advisers may include representatives of the carrier, the Federal Aviation Administration (FAA), the manufacturer of the aircraft and/or its major components, the professional aviation associations, and others. Advisers will remain under the supervision and control of the accredited representative. Their participation in the investigation is limited to the extent necessary to enable the accredited representative to provide beneficial service.
- f. Consistent with available resources, mission personnel should provide requested assistance to the U.S.-accredited representative and his or her technical advisers. The Department, acting upon advice received from NTSB or the host country, will make every effort to define by appropriate communications the assistance required prior to the arrival of the accredited representative and advisers.

## **2 FAM 912.4 Notifying the Department of Aviation Accidents and Serious Incidents**

### **2 FAM 912.4-1 Types of Reports**

(CT:GEN-396; 07-24-2012)

Posts filing reports on aviation accidents or serious incidents should send via cable, or electronic mail when appropriate, all available information immediately to the Office of Transportation Policy (EB/TRA/OTP). Reports are required if the accident involves:

- (1) U.S.-registered, -operated, -designed and/or -manufactured aircraft; and/or
- (2) Foreign-registered, -operated, -designed and/or -manufactured aircraft with U.S. citizens on board.

### **2 FAM 912.4-2 Notification Formats**

(CT:GEN-396; 07-24-2012)

In transmitting notifications of aviation accidents and incidents to the Department for distribution to the NTSB, the FAA, and other U.S. agencies, as appropriate, use the standard format shown in the numbered subparagraphs of this section below.

The initial notification should include the following information (if the information pertinent to a particular entry is not available initially, that entry should read "Not Available"):

- (1) The identifying abbreviation "ACCID" (for accident);
- (2) Aircraft type, make and model;
- (3) State of manufacture and registration information (i.e., country of registration and registration marks);
- (4) Name and nationality of the pilot-in-command, owner, operator, and charterer, if any;
- (5) Date and time (GMT) of the accident;
- (6) Last point of departure and point of intended landing;
- (7) Position of the aircraft with reference to some easily defined geographical point and to latitude and longitude;
- (8) Numbers of crew and passengers; numbers of those killed or seriously injured;

- (9) Nature of the accident (observable facts, e.g., aircraft overran runway during take-off or landing, Crashlanded following a bird strike, hard landing after landing gear collapsed, engine failure or fire during flight, collision while taxiing, etc.) and the extent of damage to the aircraft, so far as is known, e.g., cracked fuselage, total loss, destroyed;
- (10) Whether the State of Occurrence intends to conduct an accident inquiry; and whether there are any concerns with NTSB participation in the accident inquiry in the case of a U.S.-Registered, - Operated, - Designed, or -Manufactured aircraft;
- (11) Physical characteristics of the accident location; and
- (12) Any additional information as required by Department interests to be included as "Remarks" in the notification message.

## **2 FAM 912.5 Foreign Government Accident Reports**

(CT: GEN-371; 07-21-2010)

If appropriate, post should assist with communications regarding preliminary, interim and final accident reports to ensure that queries are directed to the appropriate and responsible accident investigation authorities of the State responsible for the investigation. If requested, post should assist as necessary to ensure required reports are delivered to the NTSB in a timely manner.

## **2 FAM 913 VIOLATION OF FOREIGN AVIATION REGULATIONS**

(CT:GEN-396; 07-24-2012)

Alleged violations of foreign aviation laws or regulations reported by foreign authorities and which involve U.S.-registered aircraft and/or U.S. FAA-certified pilots and crew should be transmitted to the FAA field or regional office with information copies to the appropriate FAA region and Department of State, Attn: EB/TRA/OTP. You must report alleged violations that involve non-U.S. aircraft/airmen to the Department and to FAA headquarters.

To facilitate the investigation, it is important that the allegation include as much of the following information as possible:

- (1) Aircraft registration;
- (2) Aircraft type, make, and model;
- (3) Aircraft operator (name and nationality of pilot and air carrier);
- (4) Date, time, and location of incident;
- (5) Airport arrival/departure data;
- (6) Purpose of flight;
- (7) Narrative account; and
- (8) Quotation of the foreign law(s) or regulation(s) violated.

## **7 FAM 220 APPENDIX A DEATH ON AN AIRCRAFT**

(CT; CON-165; 04-18-2007)

- a. **Certification of a Death:** A death occurring on an aircraft while in flight usually cannot be certified until the aircraft lands and competent medical personnel can certify the death. In such cases, death is deemed to have occurred in the territory of the country where the aircraft has next landed, and the appropriate authorities of that country will issue a death.
- b. **Aircraft Proceeding to Foreign Airports:** A consular officer must issue Form DS-2060 when an aircraft bearing the remains of a U.S. citizen who died during the flight, lands at an airport within the consular district.

- c. **Aircraft Proceeding to U.S. Airports:** Consular officers are not responsible for preparing a Report of Death when a U.S. citizen dies during a flight from an airport in their consular district to an airport in the United States. The death certificate in such case is issued by the civil authorities in the U.S. state in which the airport is located.
- d. 7 FAM 1830 provides guidance about aviation disasters.

#### **7 FAM 230 APPENDIX A PERSONAL EFFECTS AND DEATHS ON THE HIGH SEAS**

(CT: CON-165; 04-18-2007)

- a. **Death on the High Seas:** There is no express provision of law authorizing the consular officer to take possession and dispose of the personal estate of a U.S. citizen, other than a seaman, who dies on the high seas.
- b. **Death Aboard A Vessel of American Registry:** If the death of a U.S. citizen, other than a seaman, occurs on board an American vessel, the consular officer should request the master of the vessel, in the absence of an authorized person, to take custody of and return the personal estate to the shipping company in the United States for forwarding to the legal representative or other authorized person.
- c. **Death Aboard A Vessel of Foreign Registry:** In the absence of a legal representative or other authorized person, the consular officer should take possession and dispose of the personal estate of a U.S. citizen who dies aboard a foreign vessel. The procedure in such cases is identical with that followed in the disposition of the estate of any United States citizen who may have died within the consular district with personal estate located within the consular district.
- d. **Seamen:** 7 FAM 760 provides guidance regarding death of seamen.

#### **7 FAM 1830 AVIATION AND OTHER TRANSPORTATION DISASTERS**

(CT:CON-407; 06-29-2012)  
(Office of Origin CA/OCS/L)

#### **7 FAM 1831 INTRODUCTION**

(CT:CON-212; 11-20-2007)

- a. The U.S. Department of State is responsible for coordinating and managing the federal response to aviation disasters involving U.S. citizens abroad. In recent years the Department has made significant changes to the way that it handles aviation disasters that involve U.S. citizens outside the United States. These changes are highlighted in this subchapter and include:
  - (1) Closer Coordination by CA with Air Carriers: The CA Memorandum of Understanding (MOU) with Domestic Air Carriers (see 7 FAM Exhibit 1830C) is the foundation for closer coordination. Now CA/OCS;
    - (a) Participates in U.S. air carrier disaster exercise training;
    - (b) Can exchange personnel during actual disasters so there is an airline representative working with us in the Operations Center's Consular Task Force room (CA/OCS Crisis Management coordinates with Diplomatic Security (DS) in obtaining security clearances and Department badges for designated airline personnel); and
    - (c) CA representative may serve as liaison at the Airlines crisis operation center.
  - (2) Family Assistance by Air Carriers: Most U.S. air carriers and their foreign code shares have retained private companies to provide assistance to families of victims of aviation disasters. The private

companies implement airline family assistance plans mandated by U.S. law for carriers landing or taking off in the United States. (See 7 FAM 1832 b).

- (3) Consular Role in Aviation Disasters Abroad: CA/OCS and posts abroad play a vital role in assistance to families of victims of aviation disasters. This is particularly true when the crash involves a foreign local carrier, which would not be bound by the requirements of the Foreign Air Carrier Family Assistance Act explained below.
  - (4) Consular Role in Domestic Aviation Disasters: The State Department memorandum of understanding (MOU) with the National Transportation Safety Board (NTSB) on domestic aviation disasters requires specific assistance when an aviation disaster occurs in the United States involving foreign nationals. (See 7 FAM Exhibit 1830B). Our posts abroad also are involved, issuing visas to family members of victims and notifying U.S. citizens abroad with family members on the domestic flight. (See 7 FAM 1839).
  - (5) Passenger Manifests: On February 18, 1998, the FAA published a Final Rule Requiring Enhanced Passenger Manifests (14 CFR 243). (See 7 FAM 1832 b(4) and 7 FAM 1834.1.)
- b. Notify and Coordinate Through the Operations Center: In the event of an aviation or other transportation disaster in the consular district, post(s) should coordinate through the Department of State Operations Center (202-647-1512). Posts should also advise the Operations Center and CA/OCS when there is confirmation that there were no U.S. citizens (passengers or crew) involved in the disaster.
- (1) The Operations Center will alert the CA/OCS Duty Officer and CA/OCS Duty Director as appropriate as well as other Department stakeholders.
  - (2) The Operations Center will alert other appropriate U.S. federal agencies, including, but not limited to the National Transportation Safety Board (NTSB).
  - (3) The OCS Duty Director will coordinate with the OCS Crisis Team on call, the OCS Call Center, the Passport Services Duty Officer and the Visa Office Duty Officer as needed.
  - (4) An incident requiring the sustained, close attention of the Department may require the formation of a task force or monitoring group. (See 12 FAH-1 H-023.1-3).
  - (5) Consular Aviation Disaster Checklist: A checklist on consular responsibilities in an aviation disaster is provided at 7 FAM Exhibit 1830A.
- c. Inter-Agency Liaison with Government and Private Sector: Coordination is a key aspect of the Department's response to aviation and other transportation disasters. (See 12 FAH-1 H-020 U.S. Government Organization for Crisis Management, and 7 FAM Exhibit 1830G).
- d. Criminal Investigation: The cause of the disaster may not be immediately clear. Until determined otherwise, the scene of the disaster may be treated as a crime scene and, thus the subject of a criminal investigation (for example, relating to possible terrorism, sabotage, or suicide). Accordingly, evidentiary considerations would apply and the Department would coordinate closely with U.S. and foreign law enforcement.
- e. Responsibilities of Department of State in an Aviation Disaster: When a large-scale aviation disaster occurs, several Department of State bureaus and offices play significant roles in responding to the crisis.
- (1) CA: The Bureau of Consular Affairs (CA) is responsible for providing assistance and services to U.S. citizen victims and their families. It also coordinates provision of family assistance with the airlines, National Transportation Safety Board (NTSB), the FBI, the Department of Justice Office for Victims of Crime, and foreign governments as appropriate. 1 FAM 251; The Deputy Assistant Secretary for Overseas Citizens Services (CA/OCS) formulates policy and directs, coordinates, monitors, and provides emergency and services to U.S. citizens residing or traveling abroad, and coordinates the return and identification of remains of U.S. citizen disaster victims. (See 1 FAM 255).
  - (2) EB/TRA: The Bureau of Economic and Business Affairs, Office of Transportation Affairs provides the fullest possible support to the U.S. global transportation industry, vital to the prosperity and security of Americans and citizens of every nation around the world. In the event of an aviation disaster, EB/TRA

plays a significant role in coordination with the Department of Transportation, National Transportation Safety Board (NTSB), FAA (Federal Aviation Administration), the International Civil Aviation Organization (ICAO), the Airline Pilots Association (ALPA) and the airline industry. (See 1 FAM 426).

- (3) L/CA: Provides general legal advice on the performance of consular functions by foreign consular officers in the United States and on U.S. obligations relating to the performance of such functions
- (4) L/EB: The Office of the Legal Adviser for Economic and Business Affairs provides legal advice on civil aviation. (See 1 FAM 246.5).
- (5) DS: The Bureau of Diplomatic Security provides coordination with U.S. and foreign law enforcement authorities.
- (6) S/ES-O/CMS: Crisis Management Support (CMS) in the Executive Secretariat is the crisis advisor for the Executive Secretariat of the Department of State. In fulfilling that role, CMS gathers, assesses and disseminates information to Department principals about events that threaten the security of U.S. missions, their personnel and U.S. citizens overseas. It also directly supports any task force or working group convened by the Executive Secretary in the wake of a disaster.
- (7) S/CT: If the cause of the disaster is suspected or determined to be related to terrorism, the Office of the Coordinator for Counter Terrorism would also play an important role.

**See:**

- 12 FAH-1 Annex H – Hijacking
  - 12 FAH-1 Annex I - Assistance to U.S. Citizens in a Major Accident or Disaster
  - 12 FAH-1 Annex J - Assistance to the Host Country in a Major Accident or Disaster
- f. Responsibilities of Other U.S. Government Agencies. NTSB - National Transportation Safety Board is an independent Federal agency charged by Congress with investigating every civil aviation accident in the United States and significant accidents in the other modes of transportation -- railroad, highway, marine and pipeline --and issuing safety recommendations aimed at preventing future accidents. 49 U.S.C. 1136 addresses the role of the NTSB in providing assistance to families of passengers involved in aircraft accidents.
- (1) Twelve Mile Limit: On December 27, 1988, President Reagan by proclamation extended the territorial seas of the United States to 12 miles from the coast. Jurisdiction to the 12 mile limit is consistent with the limit exercised by many nations and is based on international law. National Transportation Safety Board marine jurisdiction is expressed as jurisdiction over accidents on the navigable waters or territorial seas of the United States. NTSB jurisdiction to 12 miles would, therefore, appear to have been established by the 1988 proclamation.  
  
Note: In actual practice, it would be extremely difficult for the NTSB not to be involved in any crash involving a U.S. carrier or any plane crashing on its way to or from the United States.
  - (2) The NTSB also participates in the investigation of aviation accidents and serious incidents outside the United States in accordance with the Chicago Convention of the International Civil Aviation Organization (ICAO) and the Standards and Recommended Practices (SARPS) provided in Annex 13 to the Convention.
  - (3) Aviation Disaster in a Foreign State: When an accident or serious incident occurs in a foreign state involving a civil aircraft of U.S. Registry, a U.S. operator, or an aircraft of U.S. design or U.S. manufacture, where the foreign state is a signatory to the ICAO Convention, that state is responsible for the investigation. In accord with the ICAO Annex 13 SARPS, upon receipt of ICAO Notification of the accident or serious incident, the NTSB designates a U.S. Accredited Representative and appoints advisors to carry out the obligations, receive the entitlements, provide consultation, and receive safety recommendations from the investigating state. Should an accident or serious incident occur in a foreign state not bound by the provisions of Annex 13 to the ICAO Convention, or if a foreign state delegates all or part of an investigation by mutual consent to the NTSB, or if the accident or serious incident involves a public

aircraft, the conduct of the investigation shall be in consonance with any agreement entered into between and the United States and the foreign state.

- (4) International Waters: The provisions of Annex 13 to the Convention on International Civil Aviation, the investigation of an airplane crash occurring in international waters falls under the jurisdiction of the airplane's country of registry. That country may request NTSB assistance with the investigation.

**See:**

- NTSB Transportation Disaster Assistance
  - NTSB foreign investigations
- g. 7 FAM Exhibit 1830F provides reference and resources about crisis management and aviation and other transportation disasters.
- h. 7 FAM Exhibit 1830G provides hyperlinks to Internet resources about aviation disasters.
- i. 7 FAM Exhibit 1830H provides a summary of inter-agency liaison and aviation disasters.

**7 FAM 1832 AUTHORITIES**

(CT:CON-407; 06-29-2012)

- a. The Aviation Security Act of 1990, Public Law 101-604. Section 321(f) of the Aviation Security Improvement Act of 1990, Public Law 101-604 (49 U.S.C. 44905), prohibits the notification of a civil aviation threat to "only selective potential travelers unless such threat applies only to them." This is the basis for the "no double standard" policy (7 FAM 052). This statute also mandates a series of responsibilities pertaining to the treatment of victims and their families following an aviation disaster abroad. In addition to linking to the statute, this section provides a summary of the responsibilities for the sake of clarify and to offer an historical perspective.
- (1) 22 U.S.C. 5501(b)(1)(C) International Negotiations Concerning Aviation Security (Passenger Manifests) provides that the Departments of State and Transportation will negotiate agreements to achieve improved availability of passenger manifest information;
- (2) 22 U.S.C. 5503 Department of State Notification of Families of Victims (of Aviation Disasters) provides that "it is the policy of the Department of State, pursuant to section 2715 of this title (22 U.S.C. 2715), to directly and promptly notify the families of victims of aviation disasters abroad concerning citizens of the United States directly affected by such a disaster, including timely written notice. The Secretary of State shall ensure that such notification by the Department of State is carried out notwithstanding notification by any other person"; and
- (3) 22 U.S.C. 5504 Designation of State Department Family Liaison and Toll-Free Family Communications System provides that.
- (a) In the event of an aviation disaster directly involving United States citizens abroad, if possible, the Department of State will assign a specific individual, and an alternate, as the Department of State liaison for the family of each such citizen; and
- (b) In the establishment of the Department of State toll-free communications system to facilitate inquiries concerning the affect of any disaster abroad on United States citizens residing or traveling abroad, the Secretary of State shall ensure that a toll-free telephone number is reserved for the exclusive use of the families of citizens who have been determined to be directly involved in any such disaster.
- (4) 22 U.S.C. 5505 Disaster Training for State Department Personnel. This statute provides that the Secretary of State shall institute a supplemental program of training in disaster management for all consular officers. It further provides:

- (a) In expanding the training program under subsection (a) of this section, the Secretary of State shall consult with death and bereavement counselors concerning the particular demands posed by aviation tragedies and terrorist activities.
  - (b) In providing such additional training under subsection (a) of this section the Secretary of State shall consider supplementing the current training program through—
  - (c) Providing specialized training to create a team of "disaster specialists" to deploy immediately in a crisis; or
  - (d) Securing outside experts to be brought in during the initial phases to assist consular personnel.
- (5) 22 U.S.C. 5506 Department of State Responsibilities and Procedures at International Disaster Site. This statute provides that not less than one senior officer from the Bureau of Consular Affairs of the Department of State (or a post abroad) shall be dispatched to the site of an international disaster involving significant numbers of U.S. citizens abroad. (The statute does not define how senior or what constitutes a significant number). It also provides for deployment of crisis response teams to provide on-site assistance to families who may visit the site and to act as an ombudsman in matters involving the foreign local government authorities and social service agencies. Crisis teams may include public affairs, forensic, and bereavement experts, and are to be sent to the site of any international disaster involving United States citizens abroad to augment in-country Embassy and consulate staff.
- (6) 22 U.S.C. 5507 Recovery and Disposition of Remains and Personal Effects. This statute provides that it is the policy of the Department of State to provide liaison with foreign governments and persons, and with United States air carriers, concerning arrangements for the preparation and transport to the United States of the remains of citizens who die abroad, as well as the disposition of personal effects.
- (7) 22 U.S.C. 5509 Official Department of State Recognition of Private U.S. Citizen Victims. This statute provides that the Secretary of State shall promulgate guidelines for appropriate ceremonies or other official expressions of respect and support for the families of United States citizens who are killed through acts of terrorism abroad. Traditionally, a senior diplomatic or consular officer or a senior official from the Bureau of Consular Affairs participates in appropriate ceremonies for victims of large-scale disasters. In addition, appropriate expressions of sympathy may be provided to individual families.
- b. Other Legislation Relating to Transportation Disaster Assistance:
- (1) On October 9, 1996, Public Law 104-264, Title VII, Aviation Disaster Family Assistance Act established the basis for assistance to families of victims of domestic aviation disasters. This plan relates to domestic aviation disasters and includes Department of State responsibilities with respect to coordination with foreign governments.
  - (2) On April 9, 1997, the NTSB issued a Federal Family Assistance Plan for Aviation Disasters, as mandated by the Aviation Disaster Family Assistance Act of 1996. This was updated in the Federal Family Assistance Plan for Aviation Disasters of August 1, 2000 (FFAP) and FFAP Index. The current 2008 Federal Family Assistance Plan for Aviation Disasters is now available on the NTSB Internet web page. In addition to some changes to the basic format of the plan as well as some updating of content and language, please note the following additions:
    - Table of contents.
    - Victim Support Tasks (VST) checklists. The items in the checklists are extracted directly from the full content VSTs.
    - A series of manifest FAQs.
    - An acronym list.
  - (3) On December 16, 1997, Public Law 105-148, the Foreign Air Carrier Family Support Act, required foreign air carriers with flights to, from, or transiting the United States, to transmit a plan to the NTSB addressing the needs of the families of passengers involved in aircraft accidents that involve an aircraft under the

control of the foreign air carrier.

NTSB Note: The NTSB has compiled the Act plus the three amendments into a document.

- (4) On February 18, 1998, the FAA published a Final Rule Requiring Enhanced Passenger Manifests (14 CFR 243) U.S. air carriers flying abroad, and foreign air carriers operating flights to or from the United States, must provide passenger manifests listing U.S. citizens to the Department of State, Operations Center not later than 1 hour after the carrier is notified of the aviation disaster, or if not technologically feasible, then as expeditiously as possible, but not later than 3 hours after the aviation disaster. See the Department of Transportation Assistance to Families of Aviation Disasters documents.
- c. Regulations: As of the publication of this subchapter, the Department (CA/OCS/L, EB and the Office of the Legal Adviser (L)) is in the process of revising 22 CFR 102 regarding civil aviation accidents.

## **7 FAM 1833 NOTIFICATION AND ALERTS**

(CT: CON-170; 05-30-2007)

- a. A post may be the first to know of an aviation crisis in its district. Sometimes, however, the Department's Operations Center will get the first alert, and advise the post. Assuming you are the first to learn of the crash, you should immediately notify the Operations Center (202-647-1512) and attempt to obtain the following information which will form the basis for initial talking points, press guidance and public announcements:
  - (1) Place of incident (or general vicinity of incident), number of passengers and crew based on preliminary departure information and number of injured and fatalities (if known).
  - (2) Flight number, origination, connection points and final destination (if known), and whether the flight was domestic or international.

### **SAMPLE NOTIFICATION TO THE DEPARTMENT TO BE INCORPORATED IN DEPARTMENT'S INITIAL TALKING POINTS WHEN CONFIRMED**

(Name of Authority (foreign government or airline)) confirms that on (date) at (hour: minutes) local (city/country) time,

(Name of Airlines) Flight (number), (type of aircraft) crashed (Details; Where? On take off? On landing?) at (place).

The flight departed (city of departure) at (time) bound for (intervening destinations, final destination).

The aircraft is reported to have (number of passengers) and a crew of (number of crew). The U.S. Department of State has requested a copy of the passenger manifest.

(Any known survivors?)

(It is unknown at the present time whether there were any U.S. citizens onboard)

(There are no confirmed reports of any U.S. citizens injured or killed at this time.)

(We are unable to publicly release the names of U.S. citizen victims at this time pending notification of the families.)

(The U.S. Department of State has convened a (task force/working group) to assist U.S. citizen victims and their families. Families may contact the U.S. Department of State at (insert phone number). The U.S. Embassy in (city, country) may be reached at (insert phone number).

(The U.S. Department of State crisis task force may be reached at 202-647-1512.

(NOTE: this is the number for the State Department Operations Center. A dedicated number will be established for the individual task force and will be provided to posts as soon as possible.)

(Insert CA Call Center Number as soon as it is operational for 24/7 calls in the event of a task force. The standard CA Call Center numbers are 01-888-407-4747 and toll from overseas: 202-501-4444.)

NTSB Note: NTSB Communications Center 202-314-6290.

- b. The U.S. embassy or consulate should contact
- (1) Department of State Operations Center: You must immediately notify the Operations Center (202-647-1512).
  - (2) Post Emergency Action Committee (EAC): Using established telephone tree, notify members of post's Emergency Action Committee.
  - (3) Post's Management Officer: A disaster of any magnitude will require post to support additional Department and other U.S. Government agency personnel sent in to help post manage the disaster. It may be critically important to secure a large number of hotel rooms, rental cars or vans (with drivers), rental cell phones, and even coffins. If these items are not reserved quickly, they may be difficult or impossible to obtain at a later date.
  - (4) Airline: CA/OCS/ACS Crisis Management maintains a list of emergency contacts for U.S. airline carriers. We will be contacting those persons from Washington. Posts should contact the local airline representative if there is one, and determine how the airline company plans to configure for crisis. Your post Emergency Action Plan should include pointers as to who at post may have the best contacts — the consular section, the management section, the economic section, the regional security officer (RSO) or the military attaché. Your range of contacts may include:
    - (a) Local representative on scene;
    - (b) Contract representative (See Airline Responsibilities below);
    - (c) Command center at home office; and
    - (d) Command center at international airport.
  - (5) Foreign Officials: Contact host government officials who are responsible for that government's response to the disaster (aviation officials, crisis managers, military, police, etc.)
  - (6) Other Posts: Posts other than the one in whose consular district the disaster occurred will often have a significant role. You should notify those posts that may fill one of the following roles:
    - (a) Departure Point: Post can assist with securing manifest, locating family members, communicating with airline, etc;
    - (b) Arrival Point: Also assist with waiting family members, airline officials; and
    - (c) Intermediate Stops: If the flight has international stops en route to the final destination, posts there can help verify enplaning and deplaning passengers.
  - (7) Other Contacts: 7 FAM 1880 provides further suggestions on persons to contact.

### **7 FAM 1834 OBTAIN THE MANIFEST**

(CT: CON-170; 05-30-2007)

The flight manifest listing passengers and crew is an essential tool in dealing with the early stages of an aviation disaster. In some cases, the U.S. Department of State Operations Center, the U.S. Department of State crisis Task Force, or CA/OCS may be the first to obtain the manifest, particularly from U.S. based commercial carriers.

In other cases, it may be your responsibility as consular officer to deal directly with the carrier on this important issue. In the event of an aviation disaster abroad involving a U.S. carrier or a foreign carrier flying into or out of the United States, authorities in Washington (NTSB, FAA, Department of Transportation, and the Department of State) will be attempting to obtain the passenger manifest. We will also enlist the help of posts abroad to coordinate with local airline authorities.

## **7 FAM 1834.1 The Passenger Manifest Final Rule of 1998**

(CT:CON-144; 09-13-2006)

On February 18, 1998, the FAA published a Final Rule Requiring Enhanced Passenger Manifests (14 CFR 243).

This applies to any aviation disaster involving an airline (U.S. or foreign) that operates to, from or within the United States. Under this rule:

- (1) In the event of a disaster outside the United States, the airline must provide a passenger manifest to "appropriate representatives of the United States Department of State" (Operations Center) "Not later than one hour after any such carrier is notified of an aviation disaster, ...or" "If it is not technologically feasible or reasonable to fulfill the requirement within 1 hour, then as expeditiously as possible, but not later than 3 hours after such notification."
- (2) The rules provides, "For the purposes of this section, a passenger manifest should include the following information: The full name of each passenger, the passport number for each passenger, if one is required for travel; and the name and telephone number of a contact for each passenger."

## **7 FAM 1834.2 Getting the Manifest from other Carriers**

(CT:CON-144; 09-13-2006)

Disasters involving non-U.S. carriers that serve the foreign domestic market are not subject to the above rule. Often in the immediate aftermath of a crash, the carrier is reluctant to release any information fearing legal or public relations consequences. You may have to overcome this reluctance to cooperate in order to secure the manifest directly from the carrier. The following arguments may be useful:

- (1) Explain that your immediate role is to identify U.S. citizens or nationals, and notify the next of kin.
- (2) Point out that this need not conflict with what airline representatives may feel is their responsibility to notify next of kin (NOK), and suggest you and the airline company work together to provide early, simultaneous notification.
- (3) Take the opportunity to explain that there are no "American names." A U.S. citizen or national may bear a name from any ethnicity or region of the world.
- (4) Assure the company that it is not your intent to release any information from the manifest to the media.

Note: For some foreign carriers, particularly national (versus international) carriers, a manifest may not be available or exist at all, but the point of departure for the flight may still have the boarding passes/ticket stubs.

## **7 FAM 1835 FAMILY ASSISTANCE**

(CT: CON-407; 06-29-2012)

- a. Calling on all your Skills and Compassion: While any death or injury of a U.S. citizen abroad from non-natural causes is tragic and significant, aviation disasters, whether caused by accident or deliberate act (terrorism, sabotage, etc.), can be among the most difficult and challenging of all crisis work for consular officers. The guidance provided in this subchapter is the culmination of more than 30 years of experience in the Bureau of Consular Affairs. When CA conducts training for consular officers to prepare them to work on aviation disasters or other tragedies, it is not unusual for us to try to put the magnitude of this work into perspective by showing filmed interviews with families of victims. During the training, instructors ask participants how they would like their family to be informed of their death in similar circumstances and treated thereafter. It is impossible to understate the depth of the suffering of these families or to overestimate how important your role is in diminishing the possibility of inflicting more wounds on the families and lightening the burdens on them.

**Read More About Aviation Disasters and Family Assistance:**

- NTSB Remarks
  - NTSB: The Evolution and Future of Family Assistance
- b. U.S. law requires that U.S. air carriers and most foreign air carriers flying to and from the United States provide specific assistance to families of aviation disasters.
- (1) The Aviation Disaster Family Assistance Act of 1996; and
  - (2) The Foreign Air Carrier Family Support Act of 1997 provided that, no later than June 15, 1998, foreign air carriers providing air transportation in the United States must file with the Department of Transportation and NTSB a plan to address the needs of families of passengers involved in an accident that involves an aircraft under the foreign carrier's control and results in a significant loss of life. See Frequently Asked Questions about the Foreign Air Carrier Family Support Act.
- c. Remembering the Victims and Lessons Learned in Training: Specialized Aviation Disaster, Victim Assistance and Bereavement Training: 22 U.S.C. 5505 provides that the Department shall develop disaster training for consular officers, including training by death and bereavement counselors and consider providing specialized training to teams dispatched to the scene of aviation disasters and family assistance centers. As explained in 7 FAM 1837, CA/OCS provides this additional training to OCS employees and CA fly-away team members through specialized training at the NTSB Academy and training exchanges with U.S. air carriers. This is in addition to our general victim assistance training (see 7 FAM 1900).
- (1) Crisis Management Training: In addition to crisis training available at the Foreign Service Institute and inhouse training in CA/OCS, we frequently include crisis management and family assistance in CA's consular leadership training.
  - (2) Sensitivity Training from the Family Perspective: We work with families of victims of aviation disasters, such as the National Air Disaster Alliance, in our sensitivity training for consular officers, to try to ensure that families receive the consular assistance they need and that the assistance is provided with compassion for the families and respect for the victims. We are grateful to all the families with whom we have worked for their generosity of spirit in sharing their personal tragedies with us to assist us help other families and victims.
  - (3) Cultural Sensitivity: CA/OCS has also worked with the National Funeral Directors Association (U.S.) to endeavor to develop reference material about funeral customs. Local chapters of the Red Cross and Red Crescent Societies can also be helpful in this regard. If posts are able to obtain sources of information about foreign funeral and mourning customs and bereavement, please provide them to CA/OCS/L (Ask-OCS-LDom- Post@state.gov).
  - (4) Understanding the Magnitude: This subchapter provides guidance to both posts abroad and to CA/OCS employees. While a post will hopefully experience few aviation disasters, OCS employees generally have decades of experience in this work. CA/OCS maintains a list of significant aviation disasters (this does not include crashes of private planes) we have handled since 1977, including the number of U.S. citizen fatalities and injuries in each incident. It is available on the CA/OCS shared drive OCSDOCS/AVIATION/statistics as part of our efforts to document deaths of U.S. citizens abroad from non-natural causes, as required by law.
  - (5) Lessons Learned: We also maintain lessons learned material prepared by dedicated consular officers in the aftermath of aviation disaster tragedies and other disasters on the CA/OCS Intranet Crisis Management Lessons Learned feature.
- d. Coordination on Death Notification: The Department of State, NTSB, other federal agencies and airlines have developed family assistance plans to maximize assistance to families and to try to avoid duplication and confusion. One aspect of this approach is that we do not dispute who should notify the family first about the tragedy. This is reflected in our memorandum of understanding (MOU)s with the NTSB and the air carriers.

What is important is not who makes the initial call, but that the family be notified of the tragedy in a timely manner, with compassion, authority, and without confusion.

- e. **Caseworker Approach:** The Bureau of Consular Affairs recognizes that proactive consular assistance for families is imperative. To that end, we take a "caseworker" approach to aviation disasters, which often involve long term contact with families over many months or more. This means that we designate a particular officer in CA/OCS, and a specific contact at the U.S. embassy or consulate, for each family or victim, in accordance with 22 U.S.C. 5504(a). We also provide families with a toll-free number for their use in contacting the Department, in accordance with 22 U.S.C. 5504(b).
- f. **Assistance to Family Members Who Wish to Travel to the Disaster Site:**
  - (1) **Department Assistance:** CA/OCS works with CA/PPT to provide expeditious U.S. passport assistance to families who wish to travel to the disaster site. If foreign visas are required, CA/OCS will work with the Department of State country desks or regional bureaus to convey the urgency to foreign embassies and consulates in the United States.
  - (2) **Airline Assistance:** The airline may offer tickets and/or meal vouchers to family members to cover expenditures incurred in traveling to the site.

**Note:**

Appendix A, Inter-Agency Task Force on Assistance to Families of Aviation Disasters, Recommendations:

1.1 Definition of "family member" for purposes of notification and provision of airline services.

1.1.1 The airlines, in choosing its definition of "family member" for the purposes of notification and assistance for travel to and accommodations at the site of crash or memorial services, should recognize that today's families may not have traditional boundaries.

Appendix B, Definition of Family Member of the Federal Plan for Aviation Accidents Involving Aircraft Operated or Chartered by Federal Agencies issued by the NTSB on October 7, 1999 provides:

"The person that would normally be the next of kin for initial notification purposes. Generally, this means spouse, children, parents, and/or siblings. For family assistance purposes, a family member may also include close members of the family such as a grandparent, aunt, uncle, or other relative. It might also include a fiancée, step-children, cousins, companions, or other person outside the traditional definition of family. The definition is left to the sponsoring agency."

The Frequently Asked Questions for the Federal Family Assistance Plan for Aviation Disasters — August 1, 2000 also includes this language.

Appendix E, Question 1 of the Federal Plan for Aviation Accidents Involving Aircraft Operated or Chartered by Federal Agencies issued by the NTSB on October 7, 1999 provides:

**1. Is there a specific definition of who constitutes a family member?**

Answer: U.S. federal and state laws define who constitutes a family member from a legal point of view. These legal definitions may also vary from state to state. The traditional view included spouse, children, mother, father, brother and sister. Terms such as stepparents, stepsiblings and life partners have become more common in recent years in defining some family environments. It is suggested that the sponsoring agency should plan on dealing with a variety of family member scenarios and to take each one on a case-by-case basis."

- (3) **Other U.S. Government Assistance - Crime victim assistance programs may be available to assist victims and their families if the aviation disaster is the result of a criminal act. (See 7 FAM 1900). CA/OCS's crime victim assistance specialists will coordinate with the Department of Justice Office for Victims of Crime and the FBI Office of Victim Assistance and keep posts and families advised of services available.**

**See:**

- Responding to Victims of Terrorism and Mass Violence Crimes

- Providing Relief to Families After a Mass Fatality (PRFAMF) (pdf) or PRFAMF (html)
- (4) Post Assistance: Posts should anticipate the arrival of family members at the scene. In part because of the long delays in identification often connected with air disasters, and in part because commercial air carriers generally provide free transportation and support for family members, you should prepare for a large number of family members arriving at the scene. Although the airline may have representatives accompanying family members and meeting them on arrival, post should also meet incoming flights with personnel capable of briefing and assisting family members. You should also make sure the family members know how to reach the embassy during working hours and after hours in an emergency. Remember that these families are vulnerable.
- g. Crisis or Control Room: The air carrier will often try to place all family members in the same hotel, and to set up a control or crisis room at that location. Depending on the circumstances and the working relationship, post should either participate with the carrier in staffing the control room, or establish a separate room.
- h. Briefings: Keeping family members fully informed on a regular basis is one of your most important functions. Briefings should take place in a comfortable, private environment (hotel meeting rooms are ideal) on a regular basis. Briefings for families should be distinct from media briefings. If NTSB or a similar investigative agency is providing daily briefings to the media and family members of all nationalities, you should try to schedule your briefings as an adjunct, either before or after the larger meeting, and with the same frequency. The Ambassador or other ranking embassy official (DCM, Consul General) should attend the first meeting and periodically appear at the scheduled daily briefings as often as possible. Keep the Department (CA/OCS) advised of what transpires at these briefings so we can be sure to provide the same information to families in the United States. It may be possible to arrange for video teleconference to the United States to locations where families can receive these briefings first hand. Explore this possibility with the airlines and local authorities and advise the Department (CA/OCS).
- i. Media Relations and Rumor Control: Families will soon discover that in the aftermath of an air disaster, there is an overwhelming amount of information produced by the media, host government officials, the airlines, etc. At times this information will seem to conflict. You should explain to families early on that this is not an uncommon phenomenon. Clarify that, while you may be a little behind the media and other sources that are free to report unsubstantiated information; our role is to provide accurate, confirmed information. Use the daily briefings as a forum to separate rumors and speculation from established fact. Consular officers should work closely with post public affairs officers who will be dealing directly with the media. The primary source of information may be the airlines and the host government, unless U.S. investigators are invited to participate. (See 12 FAH-1 H-400 Public Affairs).

**See:**

Appendix A, Task Force Recommendations (These recommendations pertain to a domestic aviation disaster in the United States or other disaster being investigated by the NTSB.)

8. Recommendations on methods to ensure that representatives of media organizations do not intrude on the privacy of families of passengers involved in an aviation disaster.

8.1 The men and women of the media are in the best position to address instances of insensitive treatment that family members have received following an aviation disaster. The Task Force calls upon members of the media to respect the privacy of family members after an air crash. The Task Force also calls upon each media organization, as well as professional trade associations, to establish standards respecting the rights of families.

8.2 The NTSB should serve as a liaison between family members and the press during the initial days following an aviation disaster.

8.3 The NTSB should work with the families and the media to appropriately limit media contact with the families so that families can decide in advance whether they wish to speak with the media. The NTSB should inform families that it is their choice if they want to interact with the media.

8.4 Family members of the victim should have time to cope with the tragedy prior to having the family member's name publicly released, and should be provided an opportunity to personally notify other loved ones of their family member's involvement in an aviation disaster.

**See NTSB Press Releases:**

- NTSB Resources for Journalists
  - NTSB Public Affairs Office Contacts
  - NTSB Academy
  - Airports Council International Media Relations and Crisis Communications Seminar
  - NTSB Managing Communications During and Aircraft Disaster
  - NTSB Media Training for NTSB Investigators
  - American Red Cross — Standardization of Disaster Messages
  - Task Force on Assistance to Families of Aviation Disasters Recommendation 8 — The Media
  - National Center for Victims of Crime Tips for Families Interviews with the Media
- j. Morgue or Crash Site Visits: Often arriving family members believe they can visually identify remains. Unfortunately, air crash victims are often not visually identifiable. Explain that the host government controls access to the morgue and access may not be allowed, particularly if it is a makeshift facility. The crash site is the scene of the investigation; access, if granted, may only be at some distance from the actual site. If a visit is allowed, carefully explain to family members, without actually discouraging the visit, the circumstances they would encounter. Encourage families to identify only one member to make the visit, and brief and prepare that individual in advance. An officer should accompany the family member on the morgue visit. If the scope of the disaster warrants, you should consider establishing a control officer at the morgue and/or crash site, not only to assist families but also to liaise with forensic and mortuary personnel there.
- k. Identification and Return of Remains: Consult with the families regarding identification and return of remains.
- l. Disposition of Unidentified Remains: The practices of the host country may dictate procedures on disposition of unidentified remains of victims. It is important for the post to convey to the host country authorities the sensitivities of families of U.S. citizen victims. In particular, if at all possible, knowledge and consent by next-of-kin should be obtained prior to burial or disposition.
- m. Personal Effects: We recognize that the identification and association of personal effects is a difficult and often time consuming process. Nevertheless, families frequently have an emotional need to recover some item - a wedding ring, purse, wallet or article of clothing - as such effects are the last association or connection with their loved one. It is critical that U.S. Government authorities consult with the families about the personal effects of the victims, and that they return the personal effects to the families unless there is a need or a requirement that they be retained for accident or criminal investigation. Urge responsible authorities to retain any unclaimed possessions for a minimum of 18 months. The process for the return of unassociated personal effects is deliberate and potentially lengthy. To do this correctly, all items are first cleaned as needed, inventoried, numbered, and photographed. Once these steps are completed, authorities may choose to produce a photo catalogue and send to all survivors and/or families of the victims. Because there can be a wide range of emotional reactions upon receipt of this catalogue, it is advisable to notify families before mailing, or to clearly identify the mailing container as to its contents. Provide instructions on how to claim an item. Once all victims or families have responded, sole-claimant items should be returned according to instructions received from the family. Multiple claims to items would require additional evidence of entitlement, such as photographs, invoices, etc.. The item is returned once ownership is determined. There are a growing number of commercial firms that specialize in catastrophe assistance, which may also include the proper preparation and return of personal effects. The NTSB can provide the firms' names for consideration.

**For example:**

- Kenyon International
- Family Enterprises Inc (FEI)

Note: FEI does not handle personal effects - they handle call center-type activities

- BMS Catastrophe

NOTE: DISCLAIMER: The Department of State assumes no responsibility or liability for the professional ability or reputation of, or the quality of services provided by these organizations.

- n. Memorials: The erection of memorials and the holding of services are recognized as key elements in healing the grief that family members experience. Should services be held and/or a monument built, it is advisable to involve interested family members early and keep them involved as appropriate. Some important factors are: notification of all families, due consideration to the diversity of backgrounds and beliefs, easy accessibility to the monument by visiting family members, and public and private sources of funding.

## **7 FAM 1836 WORKING WITH THE HOST GOVERNMENT**

(CT: CON-144; 09-13-2006)

- a. The host government has the primary responsibility for managing the crisis. You should be familiar with the host government authorities responsible for investigating and providing family assistance in transportation disasters.

**For Example:**

U.K. Department of Transport Accident Investigation

New Zealand - Transportation Accident Investigation Commission

Canada - Transportation Safety Board

- b. You should immediately develop contacts and maintain them through the life of the crisis.
- c. Some issues particularly pertinent to aviation disasters include:

### **7 FAM 1836.1 Site Security**

(CT:CON-144; 09-13-2006)

Stress to local officials the need for crowd control at the site. Families of victims and survivors, the media, local on-lookers, even looters could arrive unexpectedly at the crash site. Uncontrolled access could impair identification of remains and property, result in damage to, or theft of, personal effects, and impede any investigation into the cause of the crash. Host country authorities may also wish to take into account the importance of security at the hotel where the families are staying to protect them from aggressive media.

### **7 FAM 1836.2 Investigation Assistance**

(CT: CON-170; 05-30-2007)

Determine if local authorities want assistance from the National Transportation Safety Board (NTSB). Ensure that local officials are aware of the potential assistance available from the United States, particularly in cases where you are not confident that the host government has the resources and technology needed. You must have a formal request from local authorities before the U.S. Government can consider making such assistance available. Post should relay the request through the Department task force, which will communicate directly with NTSB and FAA. (See 12 FAH-1 Annex J, Assistance to Host Country in a Major Accident or Disaster). (NTSB cannot assist in all cases - so any questions posed to the host country should be couched in careful terms so as to not promise assistance before the NTSB agrees).

NOTE: U.S. interests do have the right, under the Chicago Convention, to participate in an investigation involving a U.S. manufactured aircraft, although the official invitation must still be made by the host government.

### **7 FAM 1836.3 Identification of Victims**

(CT:CON-144; 09-13-2006)

Determine whether local authorities need forensic assistance to identify the victims' remains. Local officials must make a formal request through the mission before the United States will consider sending FBI and/or U.S. military forensic experts. Post should relay requests through the Department task force, which will communicate directly with FBI and the Department of Defense/USAF. (See 12 FAH-1 Annex J, Assistance to Host Country in a Major Accident or Disaster, 7 FAM 1870, and 7 FAM 200).

### **7 FAM 1837 WORKING WITH NTSB, AIRLINES AND AIRLINE FAMILY ASSISTANCE CONTRACTORS**

(CT:CON-144; 09-13-2006)

- a. Working with the NTSB: In the event of an aviation, or other major transportation disaster, CA/OCS coordinates with the NTSB - Office of Transportation Disaster Assistance as appropriate.
- b. Training: CA/OCS also participates in aviation disaster training provided by the NTSB Academy. The NTSB offers several helpful courses including:
  - NTSB Academy
  - Transportation Disaster Response - Family Assistance
  - Managing Communications During and Aircraft Disaster
  - Mass Fatality Incidents for Medicolegal Professionals
  - Transportation Disaster Response Airport Preparedness Program
  - FBI Federal Family and Victim Assistance Operations (FBI ONLY)

Note: Please check the NTSB Academy website for new links, descriptions, etc.

- c. Publications: The NTSB has developed some helpful publications to explain transportation incident investigations for families of victims.

#### **See NTSB Publications ...**

- Information for Friends and Family Major Accident Investigations
  - Information for Family and Friends Regional Accident Investigations
  - APPENDIX F - Final Report, Task Force On Assistance To Families Of Aviation Disasters (1997)
  - Information For Survivors And Families Of Persons Involved In An Aviation Disaster
- d. Working with Airlines: Under the terms of the Bureau of Consular Affairs MOU with U.S. air carriers, CA works closely with DS to obtain security clearances for designated airline personnel who will then be able to work as liaison officers with the consular segment of a Department of State task force or working group. Similarly, CA provides a liaison to work in the U.S. carrier's crisis operation. In addition, CA/OCS personnel participate in airline disaster training conducted by U.S. air carriers. We encourage posts to develop similar relationships locally and to participate in disaster exercises.
  - e. Working with Airline Family Assistance Contractors: Many air carriers, including most U.S.-based commercial airlines, have ongoing contracts with specialized firms, (for example, with Kenyon International) to perform the above duties on behalf of the airline. Their representatives are generally well trained and capable. A good working relationship with them may be of major assistance to you in fulfilling your own obligations.

**See:**

- Kenyon International
- Family Enterprises Inc (FEI)
- BMS Catastrophe

**NOTE: DISCLAIMER: The Department of State assumes no responsibility or liability for the professional ability or reputation of, or the quality of services provided by these organizations.**

**7 FAM EXHIBIT 1830(A)  
CHECKLIST OF POST'S RESPONSIBILITIES  
IN AN AVIATION CRISIS**

(CT:CON-291; 04-07-2009)

**Summary of Post's Responsibilities in an Aviation Crisis**

1. Post's Initial Responsibilities: Post will usually be the first to know of a crisis in its area. Initial responsibilities include but are not limited to:
  - a. Post notifies the Department via the Operations Center 202-647-1512.
  - b. Post convenes post's Emergency Action Committee (EAC).
  - c. Post sends a consular officer or team to the scene or to a nearby location. (See 7 FAM 1880 At the Focal Point of the Disaster). This officer/team will:
    - (1) Establish contact with local officials.
    - (2) Determine the status of U.S. citizens involved.
    - (3) Help facilitate identification of victims and survivors, and their property.
    - (4) Help to set up medical evacuation and return of remains.
    - (5) Provide current information to the post's EAC.
    - (6) Ensure team is briefed on what to expect.
    - (7) On-Site progress meetings should be held daily to disseminate information obtained during the day's activities and discuss plans for subsequent activities.

NOTE: Aircraft wreckage sites may expose investigators to certain risks, including biohazards, airborne hazards, adverse terrain and adverse climatic conditions. Personnel involved in the recovery, examination and documentation of wreckage may be exposed to physical hazards from such things as hazardous cargo, flammable or toxic materials, vapors, sharp or heavy objects, pressurized equipment, and disease. Authorities responsible for the investigation should conduct on-scene safety assessments and provide protective equipment to participants. Consular officers do not perform these functions. See NTSB Aviation Investigation Manual (pages16-17), Major Team Investigations Appendix G On-Site Safety.

- d. Consular Fly Away Team Needs and NTSB Go Team Requests:
  - (1) After gauging the size of the crisis and assessing post resources, the EAC will decide whether to request a Consular Flyaway Team or TDY (temporary duty) support, and will keep the Department advised of events via frequent situation reports and phone conversations.
  - (2) If the host country requests assistance from the NTSB, one of the key requests the EAC may receive is for assistance in coordinating arrangements for accommodation and meeting rooms.
  - (3) It is preferred that the press briefing room not be adjacent to the Command Center or Family Assistance Center.

## 2. Establish Information Links with Foreign Authorities and Air Carrier

- a. Establish communication with airlines.
- b. Establish contacts with local civil aviation authorities government officials, hospitals, medical examiners, etc.
- c. Establish contact with CA, EB, the Desk, etc. (more information may be available, including manifest, etc.).
- d. Set up regular communication schedule with Department.

## 3. Key Issues

- a. Manifest: For some foreign carriers, a manifest may not be available or exist at all, but the point of departure for the flight may still have the boarding passes/ticket stubs. Post at departure point may be able to assist. This post should email/fax all available information to the Department.

NOTE: In many instances (foreign and domestic), a manifest does not exist in the immediate aftermath of an aviation disaster but is something that must be compiled. Who took an earlier flight? Who missed an en route connection? Were there infants (children under 2) on board who were not listed? In other words, there is almost always a difference between (1) who was scheduled to be on the plane and (2) who actually boarded.

- b. Consular Fly Away Team: Make contact with Fly Away/TDY Response Team upon arrival.
- c. U.S. Investigation Team: Will local authorities need assistance from the National Transportation Safety Board (NTSB) and Federal Aviation Administration (FAA) to investigate cause of accident and/or identification of remains? Post must have request from local authorities before United States can consider making such assistance available.

NOTE: U.S. interests do have the right, under the Chicago Convention, to participate in an investigation involving a U.S. manufactured aircraft, although the official invitation must still be made by the host government. Request should be relayed through Department task force which will communicate directly with NTSB and FAA. (See 12 FAH-1 Annex J Assistance to Host Country in a Major Accident or Disaster).

- d. Crowd Control: Arrangements should be made by local authorities or crowd control. Families of victims and survivors will be arriving unexpectedly and curious local people will also come simply to look at the crash site. This could impair identification of remains and property and impede any investigation into the cause of the crash.
- e. Death Certificates: Local authorities should consider what arrangements will be made for issuance of death certificates. Many families of victims will want the certificates as soon as possible, though positive identification of remains may be problematic, and almost always time consuming. One possible solution is to set up a temporary civil registry office at the morgue and issue the certificates as the remains are identified. Review local law regarding issuance of presumptive death certificate when identification is not possible.
- f. Morgue/Storage of Remains: Ascertain if adequate equipment is available for shipment/storage of remains.

## 4. Establish Post Site Command Center. (See 7 FAM 1880)

- a. Be Prepared for a Massive Record Keeping Effort. There is an enormous amount of paperwork that post will need to generate or track following a disaster. Post should request additional staffing to focus solely on this responsibility; maintaining lists of victims, NOK (next-of-kin) names and contact information, status of identification, disposition of effects, etc. We cannot stress this point too strongly. Start documentation as early as possible following the crisis, or you will not be able to recover. Assistance from systems staff will be critical in this regard. Establish an action/information log and assign someone

to maintain it. Keep a central list of contact names, phone numbers, and fax numbers. Department can also e-mail access and excel prototypes to Post.

- b. Prepare To Receive and Brief Families of U.S. Citizen Victims and Media Representatives at Site.
  - (1) Your briefing team should include officers assigned to meet incoming flights of family members, as well as officers who can provide information at the families' temporary quarters.
  - (2) A ranking officer (Ambassador, DCM, Consul General) should be present, if possible, for the initial meeting with families.
  - (3) There should be separate briefings for families and the media.

5. Immediate Action of Post Consular Team.

- a. Locating Victims
  - (1) Check local hospitals, morgues for victims (injured and uninjured survivors, and fatalities). Identify yourself to hospital/morgue officials, let them know that you are attempting to locate any U.S. citizens involved in the disaster, leave them your contact information, and ask that they alert you when they encounter a victim or survivor who may be a U.S. citizen.
  - (2) Remember that U.S. citizens include a wide variety of racial and ethnic groups. If you ask local authorities if there are any Americans involved, they may say no, thinking that all Americans are blond and blue-eyed. It may be necessary to go from bed to bed asking if anyone is a U.S. citizen.
- b. Survivors
  - (1) Personally interview survivors and make sure they are receiving adequate care and support. Make sure their NOK have been notified.
  - (2) Assess need for medical evacuation in consultation with local physicians and post medical team. (See 7 FAM 360).
- c. Injured Survivors
  - (1) All medical cases should receive primary attention.
  - (2) Advise Department whether survivors can be cared for adequately by local medical facilities.
  - (3) If not, what options are available for alternate care?
  - (4) Will the airline carrier pay for private air ambulance if needed?
  - (5) Is U.S. Air Force MEDEVAC necessary and possible? (The Department (CA) will coordinate on this issue. (See 7 FAM 360 and 7 FAM 364.5).
  - (6) Keep Department and family informed of diagnosis/prognosis.
- d. Uninjured Survivors
  - (1) Be aware that uninjured survivors will need support and attention, including psychological care.
  - (2) Community liaison officer or medical personnel at post may be helpful in locating clothing, lodging, etc., for uninjured survivors and coordinating counseling through local community.
- e. Deceased Victims
  - (1) Track the progress of remains removal for identification, disposition/shipment of remains, death certificate issuance, and identification and disposition of effects.
  - (2) Keep Department (CA/OCS) informed of progress.
  - (3) No Mass Burial: Convey to local authorities concern that no mass burial should take place until efforts to identify remains are completed, including DNA testing if necessary, and that families should be consulted before any disposition of unidentified remains.

NTSB Note: See ...

- Pan American Health Organization Publications
- Disaster Myths That Won't Die
- Infectious Disease Risk From Dead Bodies Following Natural Disasters
- Public Library of Science
- After the Tsunami: Legal Implications of Mass Burials of Unidentified Victims in Sri Lanka

f. Notification/Condolence Letters/Family Action Taskers

- (1) Notification of death should be done by telephone by Department or post task force depending on the disaster. Roles should be clearly established at the beginning of the task force. The airline may conduct the initial death notification. (See 7 FAM 200).
- (2) Condolence Letters: Death notification/condolence letters should be sent via express mail, as soon as possible. In a major incident, condolence letters should be signed by appropriate senior Embassy or Department official (Ambassador or CA Assistant Secretary). Again, this should be agreed upon between post and Department at the beginning of the task force. The Department (CA or post) should make every effort to provide this service, which will include the name, address and phone number of the case officer assigned to assist that family. This should be done even if the initial death notification was made by the airline. Sample letters are available on the CA/OCS Intranet page.

g. Coordination with Families, Airline and Local Authorities on Identification of Remains, Disposition of Personal Effects and Local Death Certificates/Consular Reports of Death:

- (1) Airline Family Assistance Plan: If the airline and/or its contractor (e.g., Kenyon International, BMS Catastrophe, etc.) will be facilitating identification of remains and disposition of personal effects not being controlled by local authorities as part of the accident investigation or any criminal investigation, the role of the post and the Department may be limited. CA will coordinate with post and families regarding issuance of the Consular Report of Death and Consular Mortuary Certificate. CA, in consultation with the Office of the Legal Adviser, will also coordinate with local authorities regarding issuance of presumptive death certificates and consular Reports of Presumptive Death. (See 7 FAM 200).
- (2) Criminal Investigation: If the aviation disaster involves a criminal investigation, procedures for identification of remains and disposition of personal effects may be defined by the criminal investigation team, or by local law. The Department and post(s) will coordinate closely to clarify the course of action we will take collectively to keep families informed in an effort to avoid duplication of effort. Even when the host government has a well-organized plan for this type of situation, it is important the U.S. Government provide appropriate assistance to our own citizens. CA will coordinate with the U.S. Department of Justice Office for Victims of Crime and the FBI Office of Victim Assistance and provide clear instructions to post(s). (See 7 FAM 1900).
- (3) No Airline Family Assistance Plan: In an aviation disaster involving a non U.S. air carrier serving the foreign domestic market or non-international flight, the post and the Department may have to play a major role. (Airlines departing from or landing in the United States are required by law to file Family Assistance Plans with the NTSB.) If there is no such plan, immediately after death notification, Department (CA) and/or post can provide families with the Family Assistance Brochure and Checklist along with supporting documents. The host country may have its own materials for the family to complete, or it may rely on consuls from countries whose citizens were aboard the flight to disseminate information to families.

h. Identifying Remains (See 7 FAM 1870 and 7 FAM 240)

**Note: For countries that are part of Interpol, a Disaster Victim Identification team from Interpol is available.**

- (1) The identification process is very deliberate and time-consuming. Consequently, you may have to caution family members and the media not to expect immediate identification of remains. In some cases, unfortunately, not all victims may be recovered or identified. From common sense to the technically complicated, there are many techniques involved with identification.
- (2) The process may start with documents found on the victim, as well as descriptions of clothing, jewelry, and other characteristics provided by family members. The forensic odontologist may ask family members to send in any available dental records and/or X-rays. FBI, Interpol, or local authorities may be able to confirm identity on the basis of fingerprint comparisons. Forensic pathologists and anthropologists can also assist by providing information on general age, gender, physical size, color of hair, color of eyes, and race of the victim. The medical examiner may be able to determine the identity of a victim based upon past medical information collected from family members, such as a previously broken bone or a surgical procedure. Collectively, all these findings must support one another before the medical examiner can make a positive identification.
- (3) Forensic authorities will probably need dental records, dental X-rays, fingerprints, photographs, physical description, description of jewelry usually worn. Remember that dental records may be useless for identification of people who never had any cavities. DNA tests based in comparison with blood samples provided by surviving family members may be recommended. It may be necessary to have the FBI obtain latent fingerprints from the victim's home to be compared against the fingerprints of all the victims.
- (4) Are local facilities capable of dealing with large number of remains? If not, one temporary solution may be to use freezer trucks to preserve the remains.
- (5) Do local authorities have the forensic capabilities to identify remains?
- (6) An officer from the Embassy/Consulate should be assigned to the morgue for liaison with local authorities. The officer can be helpful in coordinating requests for any technical assistance the local officials may require. A liaison officer stationed at the morgue can also be useful in dealing with families who arrive there and may want to help identify the remains of their loved one. A decision to allow access to the morgue rests with the local authorities. In any event, the family (or just one candidate of the family) should be briefed and prepared before viewing the remains.

i. Shipment of Remains

- (1) Who will pay? In an airline disaster, the carrier usually pays all costs for preparation and shipment of remains of victims.
- (2) Establish an early rapport with local funeral directors to ensure cooperation and timely disposition of remains.
- (3) Try to make official paperwork as simple as possible. Avoid creating complex questionnaires. Much of the information needed to complete consular documentation is available from PIERS (Passport Information Electronic Records System) records.
- (4) Ensure that Department knows exactly when and where the remains will arrive in the United States. It is particularly important that the airlines understand the sensitivity of the issue and that the family not be required to pick up the remains at the airport freight reception area in the United States. The Department may have offices in the city of the reception area (DS (Diplomatic Security), OFM (Office of Foreign Missions), or PPT (Passport Services) or send officers from Washington to be present.
- (5) Have an officer at the airport when the remains are shipped. In some cases confirmed reservations may not yet be available for remains being shipped to destinations beyond the U.S. port of entry.

An officer stationed at the airport's outbound cargo area will be able to obtain flight information and copies of the airway bills, which can then be forwarded to funeral homes in the United States. Also, when multiple caskets are being shipped to different destinations, this officer may be very useful in reducing or eliminating the possibility that a coffin is shipped to the wrong city.

- j. Reports of Death: Provide family members and other appropriate persons with as many gratis copies of Report of Death as they want. (See 7 FAM 200).
- k. Personal Effects:
  - (1) In an effort to prevent looting of property, discuss crash site control with Airline representatives and host government security as soon as possible after the event.
  - (2) Send a diplomatic note to the host government making clear the statutory consular responsibility in estate cases and the responsibility of the host government to prevent looting.
  - (3) The Department/post can obtain descriptions of personal belongings from families of victims.
  - (4) Families may arrive in the host country and wish to search for personal effects. The host country and/or airline family assistance service provider may establish procedures for identification of personal effects.
- l. Proof of Legal Entitlement to Personal Effects of Decedent
  - (1) If the host country or airline family assistance service provider is handling identification and distribution of personal effects, there may be limited or no consular role in establishing legal entitlement to personal effects.
  - (2) Local authorities may take the position that they will release to post, for subsequent distribution to families, only those personal effects that are positively identified or for which ownership is confirmed. For the sake of flexibility, and to speed the process of returning effects, post will be allowed to accept faxed copies, rather than originals, of affidavits from the NOK. The NOK should be instructed to send the original signed and notarized copies of affidavits to the Department (CA/OCS/ACS) for record-keeping purposes. The Department will then fax copies to post for inclusion with the file.
  - (3) If effects are extremely valuable, consult with Department regarding the need for letters testamentary or letters of administration.
  - (4) Establish a database for personal effects that will allow you to track their location, receipt of proof of entitlement, etc.
- m. Disposition of Personal Effects Instructions
  - (1) NOK should provide written confirmation of verbal instructions relating to the destruction or the return of any personal effects.
  - (2) The clothing and other personal effects may be damaged as a result of the disaster, and it may be very disturbing for the NOK to see them without close family or other support. In such cases, it may be prudent for post to offer to send the effects to a third party, such as an attorney or family friend, rather than directly to the family.
- n. Cleaning/ Decontaminating Effects:
  - (1) Are local authorities equipped to clean/decontaminate the personal effects?
  - (2) Are local authorities willing to release all effects, or do they propose to destroy contaminated property?
  - (3) Posts should request that families be consulted.

- o. Inventories of Personal Effects:
  - (1) If the personal effects are in the hands of local authorities, it is a good idea to assign one member of your staff permanently to the place where the effects are being identified and prepared for release to U.S. consular officials.
  - (2) If preliminary inventories are prepared by foreign authorities, unfamiliar with U.S. terms for articles of clothing, etc., be prepared for questions from families.
- p. Retention of Personal Effects by Authorities for Evidence: Local authorities will sometimes hold as evidence all baggage and personal effects, including items of jewelry, found on the remains of the deceased. Survivors and family members of the victims should be made aware that it may be several months before such items will be released. Host government laws relating to the retention of evidence in an on-going criminal case may prevent the immediate release of some of the personal effects to families. In some countries, the law may require that evidence in a criminal case be retained until the case is brought to trial and a verdict is issued. Post should liaise with local law enforcement officials in such cases, stress the importance of returning to the families the personal effects that are not critical to the investigation, and obtain a copy of the pertinent law for use by the Department/post in explaining to families why certain personal effects must be retained by host government investigators.
- q. Shipment of Property
  - (1) Decide on a dependable and safe system for shipping effects to the proper recipients, one which will enable you to track where the effects have gone. Try to use the fastest available method of shipment. Be prepared to send out the effects in several phases; identification and release of effects by local authorities can be an extended process.
  - (2) If you have to pack the personal effects for shipment, you will need to have a sufficient supply of boxes, gloves, coveralls and cleaning materials, and a secure place to store everything. If you need strong boxes which are not locally available, ask the Department for help.
  - (3) Post should include a letter from the Consul General conveying condolences. Do not enclose a "with the compliments of" card with effects returned to families.
  - (4) Local authorities may prefer to deliver personal effects to family members directly.
- r. Meeting and Briefing Families of Victims
  - (1) Meet and assist all known arriving U.S. citizens at the airport.
  - (2) Have a large sign that identifies the embassy/consulate representative and wear a name tag. If people don't know who you are, they will complain that you were "not there" in our experience.
  - (3) Advise persons acting on behalf of family members to have with them a notarized power of attorney.
  - (4) The officer assigned to the airport should be fully briefed about the current situation and capable of briefing families.
  - (5) A ranking embassy/ consulate official should meet families periodically at regularly scheduled times and locations (e.g. at the noon briefing at the hotel where the families are staying).
  - (6) A crisis room should also be available at the hotel, if appropriate depending on the size and scope of disaster, where family members can meet one another, pose questions to post officers, etc.
  - (7) It is helpful to have a separate room available should there be a need to convey information in a sensitive or private manner.

**7 FAM EXHIBIT 1830(B)**  
**DEPARTMENT OF STATE – NATIONAL TRANSPORTATION SAFETY BOARD (NTSB)**  
**MEMORANDUM OF UNDERSTANDING (MOU)**

(CT:CON-407; 06-29-2012)

**MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE DEPARTMENT OF STATE AND THE NATIONAL TRANSPORTATION SAFETY BOARD**

**This MOU was signed by Secretary of State Albright and NTSB Chairman Hall in June 1997. Copies of the signed document are available in CA/OCS/L.**

**PREAMBLE:** This Memorandum of Understanding defines and establishes guidelines for mutual cooperation and assistance by, and between, the Department of State and the National Transportation Safety Board (NTSB). Noting the distinction between air disasters occurring within the United States, and those occurring outside the United States, this Memorandum encompasses activities of each organization, primarily relating to assistance to families of victims, following an aviation disaster.

**AUTHORITIES:** This Memorandum is entered into in furtherance of the authority granted the NTSB under 49 USC 1113(b)(1)(C) to use, when appropriate, available services, equipment, personnel and facilities of a department, agency, or instrumentality of the United States Government on a reimbursable or other basis. This Memorandum also is entered in furtherance of the Aviation Disaster Family Assistance Act of 1996, Pub. L. 104-264, Title VII, 110 Stat. 3264-3269 (Oct. 9, 1996), and the Presidential Memorandum of September 9, 1996 designating the NTSB as the agency to coordinate the provision of Federal services to the families of victims. Additional authority is provided by the Economy Act, 31 USC 1535.

**OBLIGATIONS, ROLES, AND RESPONSIBILITIES:**

- (1) The NTSB is recognized as the lead federal agency in all instances involving an aviation disaster within the United States ("domestic crashes"), regardless of the nationality of airline, crew, passenger or the nationality of the aircraft manufacturer.
- (2) The Department is recognized as the lead federal agency with respect to assistance to families of U.S. citizen victims in all instances involving an aviation disaster outside the United States ("foreigncrashes").
- (3) In all circumstances involving an air disaster, the two parties shall maintain close liaison and coordination. Both parties shall ensure full and free access to their respective crises centers to the other when necessary to facilitate fulfillment of the liaison function. All necessary credentials and security clearances will be granted on an expeditious basis.
- (4) All public statements to any party, including the press, airlines and victims' families in a domestic accident are to be made solely by NTSB representative(s).
- (5) All public statements by either NTSB or Department of State following a foreign crash for which NTSB does not have primary investigative authority will be coordinated between NTSB and Department of State, which will coordinate as appropriate with the government in charge of the investigation.
- (6) The NTSB and the Department of State shall undertake to advise the other concerning the content and timing of such public statements, to the extent practicable.
- (7) In the event of a domestic accident, the Department of State agrees to assist the NTSB, upon request, subject to reimbursement for direct expenses incurred by the Department of State, when applicable, with services which include, but are not limited to, the following:
  - (a) Officially notifying any foreign government deemed to be involved by the Department of State.
  - (b) Promptly providing a liaison officer upon request by NTSB to assist with on-scene matters involving the responsibilities referenced in this Memorandum. Such a request would be made at the earliest opportunity to an official of the Department of State Operations Center.

- (c) Providing on a reimbursable basis interpreting and Translating assistance, subject to the availability of interpreters and translators and other demands as determined by the Department of State, to the NTSB when needed to facilitate communication with any interested parties.
  - (d) Assisting the entry into the U. S. of families of foreign victims through the issuance of visas, if necessary, to eligible applicants.
  - (e) Advising the appropriate parties, when necessary, of requirements pertinent to the transport of remains and personal effects, including associated and unassociated articles, into the country of destination.
  - (f) Assisting, as necessary, foreign government officials in obtaining death certificates for families of foreign victims.
  - (g) Providing logistical and communications support, to the extent practicable, in establishing contact with foreign authorities and individuals abroad to aid the NTSB in fulfilling its duties under the laws referenced above.
  - (h) Assisting NTSB in its oversight role as it relates to the responsibility of the airline in contacting next of kin not currently in the U. S.
- (8) In the event of a foreign crash, the Department of State agrees to assist the NTSB, upon request, subject to reimbursement for direct expenses incurred by the Department of State when applicable, by providing services which include, but are not limited to, the following:
- (a) Securing country clearance, as necessary, for NTSB entry to foreign countries to pursue investigations or, when requested by the Department of State, to assist the Department of State in providing assistance to victims' families.
  - (b) Making available consular and other personnel, consistent with other priorities as determined by the Department of State, to support the NTSB as necessary.
  - (c) Providing, consistent with usual practice, appropriate reports of death of U.S. citizens killed abroad in an air crash.
  - (d) Inviting, when judged appropriate by the Department of State, NTSB officials to participate as observers in any the Department of State response team sent to a foreign crash to augment efforts of the local U. S. embassy or

For the Department of State:  
 //s//  
 Madeline Albright

For the National Transportation Safety Board:  
 //s// 6-2-97  
 James S. Hall, Ch. 6-19-97

**7 FAM EXHIBIT 1830(C)**  
**BUREAU OF CONSULAR AFFAIRS**  
**MEMORANDUM OF UNDERSTANDING (MOU)**  
**OF BEST PRACTICES WITH AIRLINES**

(CT:CON-291; 04-07-2009)

**MEMORANDUM OF UNDERSTANDING REFLECTING BEST PRACTICES AND PROCEDURES**

Note: MOU signed by CA Assistant Secretary and U.S. Air Certain Carriers November 18, 1996. For original signed copies, see CA/OCS/ACS Crisis Management files.

Recognizing the need for cooperation and mutual assistance following aviation disasters outside the United States involving United States citizens, and mindful of the provisions of the Aviation Security Improvement Act of 1990 (Public Law 101-604); and with a view to addressing these important concerns, the signatory air carrier ("the Airline"), and the United States Department of State ("the Department"), also hereinafter referred to as "a Party" or "the Parties," will achieve the following:

## 1. Designation of Points of Contact

- A. Within two weeks of when this Memorandum has been signed by the Parties, the Parties will exchange information concerning their respective key personnel within each entity who would have decision-making, policy, operational, and implementing roles in the event of an aviation disaster outside the United States.
- B. The information exchanged should include an initial point of contact office, available 24-hours a day, seven days a week, which would be in a position to alert key operational officers to an incident.
- C. In addition to names and telephone numbers of key personnel, the Parties shall designate respective primary and alternate facsimile numbers available for the immediate receipt of important information.
- D. Each Party will provide the other with any toll-free number(s) it intends to make available for use by next-of-kin in a crisis situation.
- E. The Parties will exercise diligent efforts to continuously up-date, as necessary, the information specified in this segment.

## 2. Information Sharing

- A. Upon learning of a situation outside the United States that has affected the health and safety of U.S. citizen passengers, the Party receiving such information will alert the other Party at the earliest opportunity to allow both the Airline and the Department to begin preliminary actions to meet their responsibilities. A Party should exercise its good judgment in deciding whether the matter warrants advising the other. This provision creates no obligation to transmit information that has not been judged specific and credible.
- B. This alert should include the following information, if known:
  - (1) The air carrier and flight number;
  - (2) The flight's point of origin, destination, and any intermediate stops;
  - (3) The time, location, and nature of the incident; and
  - (4) The number of U. S. citizens passengers and any information on their condition.
- C. The Department will advise any U.S. embassy or consulate affected, unless it is the source of the information.

## 3. Exchange of Liaison Officers

- A. Within two hours of the initial notification of an aviation incident abroad, the Parties will confer regarding the feasibility and desirability of exchanging liaison officers between their respective crisis centers, in both the United States and at the site of the incident, to facilitate communications between them.
- B. The advisability of such an exchange will depend upon the nature, duration, and severity of the aviation incident abroad.
- C. In instances when the Parties agree that it is not necessary to physically locate liaison officers in each other's crisis centers, each nonetheless should assign one of its employees on-site in its crisis center to serve as liaison officer with the other.
- D. Within thirty days after this Memorandum has been signed by both Parties, the Parties will advise each other of the names of the persons designated to serve in the role of liaison officer so that efforts can be made to provide these individuals with information and training to familiarize them with the internal procedures of the other Party's organization.

## 4. Duties of Liaison Officers

- A. The general duties of respective liaison officers are: (1) to apprise the Party to whom he/she is liaison of significant actions being taken by the Party whom he/she represents; (2) to keep the Party whom he/she

represents informed of steps being taken by the Party to whom he/she is liaison; and (3) to ensure adequate prior consultation between both Parties regarding decisions which have the potential to affect both.

- B. The liaison officer at all times should be provided sufficient information from the Party whom he/she represents to be able to brief key personnel of the Party to whom he/she is liaison.
  - C. The liaison officer should serve as the main conduit from whom and to whom all information is passed between the Parties.
  - D. When the Parties confer directly concerning matters of mutual interest, the liaison officer should participate in, or at least be aware of, the content of those discussions.
  - E. The liaison officer should provide the Party to whom he/she is liaison with copies of all statements issued publicly by the Party whom he/she represents so that both Parties are familiar with information being provided to the media. When at all possible, such statements should be made available prior to their public dissemination.
  - F. The liaison officers should exchange information enabling both Parties to provide consistent and accurate updates to affected family members.
  - G. The liaison officer should provide the Party whom he/she represents with summaries prepared by the Party to whom he/she is liaison describing the current state of affairs as it pertains to the Party's efforts to deal with the situation. The Department liaison officer will provide reports consistent with applicable security regulations governing classified material and laws and regulations on personal privacy.
  - H. The liaison officer immediately should establish procedures to identify and handle high priority calls, e.g., those received from persons apparently related to passengers on the flight in question.
  - I. The liaison officers should work with the Parties' respective on-site representatives to promote effective consultations at the site on matters such as (1) coordination with foreign officials; (2) the recovery and transport of remains; and (3) the handling of personal effects.
5. Cross-Training
- A. (a) Each Party will conduct sessions to familiarize the other with its crisis management procedures and facilities, including simulation exercises to assess the practicality of the steps outlined above.
  - B. (b) Each Party will make efforts to participate in each other's training exercises to gain an appreciation of the other methods and procedures.
6. Passenger Manifests
- A. Consistent with the purposes of Sec. 203 of the Aviation Security Improvement Act, the Parties will work for the exchange of timely and accurate passenger manifest information.
  - B. Accordingly, the Airline shall transmit to the Department the names of passengers and any additional information consistent with that outlined in Sec. 203 of the Aviation Security Improvement Act of 1990 to assist in identifying a point of contact for each passenger. The Airline will provide an unverified manifest within three hours of the Airline's (should this be Airline?) being notified of an event.
  - C. The Airline will update the information referred to above as it becomes available.
  - D. Each page of a manifest transmitted should bear the notation: "Manifest of (Date/Time) - Subject to Refinement - Not for Public Dissemination."
  - E. The Department shall treat passenger manifest information it receives from the Airline as privacy protected under the relevant statutory authority and not disclose such information by any method (written, oral, or electronic) unless such disclosure is authorized by law. Information provided to the Airline by the Department will be shared within the Airline only on a need-to-know basis and will not be disclosed otherwise without Department approval.

- F. Upon receipt of passenger manifests, if necessary, the Department will initiate an internal review of the passport records of the individuals listed to attempt to gather information identifying next-of-kin or other representatives. As stated in the Notice published in the Federal Register of August 2, 1995, such information can and will be made available to the Airline, upon request, to assist in identifying next-of-kin should this become necessary.
  - G. In consultation with the liaison officer of the Airline, the passenger manifest may be used to assist in identifying high priority incoming calls, i.e., those calls from persons who appear related to a passenger whose name is listed on the passenger manifest.
  - H. The Department will fulfill the responsibility assigned to it by Sec.204 of the Aviation Security Improvement Act "to directly and promptly notify the families of victims of aviation disasters abroad concerning citizens of the United States directly affected by such a disaster, including timely written notice, notwithstanding notification by any other person." The Department will ensure that such notification occurs notwithstanding best efforts by the Airline to make prior notification.
7. General Provisions:
- A. Nothing in this Memorandum is intended to alter or supersede the provisions of any current or subsequent regulations implementing the provisions of the Aviation Security Improvement Act of 1990 (Public Law 101-604).
  - B. This Memorandum may be amended by agreement of the Parties. It shall remain in force until terminated by 30 days written notice.

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<https://www.foxrothschild.com/aviation-industries/>

For immediate assistance with aviation-related incidents or concerns, please contact  
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