

FAA Implements Voluntary Safety Reporting Program to Address Concerns about Industry Influence

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On June 21, 2021, the U.S. Department of Transportation Federal Aviation Administration (“FAA” or “the Agency”) announced a new Voluntary Safety Reporting Program (“the Program”) to enable the more than 7,000 professionals in its Aviation Safety office to report safety-related concerns confidentially and without fear of disciplinary or enforcement action. The Program aims to address the troubling results of an employee survey in the wake of the Boeing 737 MAX crashes in late 2018 and early 2019. According to the FAA, the Program will help improve safety awareness by “identify[ing] leading indicators and significant aviation safety issues, operational deficiencies, noncompliance with regulations, and deviations from policies and procedures” by Boeing and other major players in the industry based on input from those who know them best—Aviation Safety employees.

The first of the two fatal 737 MAX crashes occurred on October 29, 2018, when a Lion Air flight plummeted into the Java Sea 11 minutes after taking off from Jakarta, Indonesia. Fewer than five months later, on March 10, 2019, an Ethiopian Airlines flight crashed to the ground near Bishoftu, Ethiopia, about six minutes after taking off from Addis Ababa. Investigators zeroed in on the two planes’ Maneuvering Characteristics Augmentation System (“MCAS”), an automated system designed to help avoid stalls by nudging down the nose of the plane, as the cause of the crashes. In both the Lion Air and Ethiopian Airlines crashes, the MCAS sensor malfunctioned, causing the planes to nosedive unexpectedly.

Subsequent investigation into the crashes revealed the FAA had not conducted a safety assessment of the version of MCAS present in both the Lion Air and Ethiopian Airlines planes. Instead, under Agency rules adopted in 2005, the FAA had delegated authority over much of the 737 MAX certification process to engineers at Boeing, itself, and the company had relied on its own safety assessment of the final version of the automated system. Although Boeing presented early iterations of MCAS to the FAA, it was not required to, and did not, present later iterations of the system, even though they created substantially more risk to passengers and pilots. Appropriate FAA personnel were not made aware of the late-stage changes to MCAS until after the Lion Air crash.

In October 2019, a multi-agency task force convened after the crashes issued a report finding, in part, that the FAA had “inadequate awareness” of the MCAS function and “limited involvement” in the 737 MAX certification process, even though FAA officials were supposed to be conducting

oversight of the Boeing engineers designated to carry out that process. Together, these factors precluded the FAA from making the appropriate “independent assessment” of MCAS prior to certifying the aircraft. The task force also found Boeing engineers faced “undue pressure” from Boeing executives when making certification decisions on behalf of the FAA.

Later that year, a third-party firm conducted an independent survey of Agency employees to find out more about the culture of safety at the FAA. In the survey, FAA employees reported facing “strong” pressure from the aviation industry, including Boeing. One employee even told interviewers the message they received from their supervisors was, “‘Don’t rock the boat’ with Boeing.” When the Agency turned over the results of the survey to Congress in 2020, it faced intense backlash for its perceived “cozy relationship” with Boeing, which many believed had contributed to the Agency’s lax oversight of the 737 MAX certification process. The FAA announced its plans to stand up the Program to combat these concerns shortly thereafter.

Submitting Safety-Related Complaints Through the FAA’s Voluntary Safety Reporting Program

As the FAA stated in June, the Program “allows the [A]gency to address safety sensitive issues that may otherwise have gone unnoticed due to fear of repercussion,” such as those fears reported by employees in the survey. According to the [order](#) establishing the Program, Aviation Safety employees can submit safety-related complaints through the Program online. Complaints are reviewed by the Program’s Event Review Team (“ERT”) and either accepted for investigation or, if the complaint is outside the Program’s purview, referred to the appropriate FAA office for further handling. At the conclusion of its investigation, the ERT can (1) issue a Corrective Action Request to the appropriate office providing recommendations for resolving the matter; (2) in instances where a report “highlights the need for...training...to resolve proficiency issues,” assign individualized training to the complainant; or (3) decline to take corrective action. The ERT may reconsider a decision to decline corrective action if additional information becomes available that either increases the risk reported or identifies the matter as “systemic.”

Protecting Aviation Whistleblowers from Retaliation

As the FAA acknowledged in the order establishing the Program, the Program’s success “depends on its ability to maintain confidentiality”: if employees fear retaliation, they will not come forward. Employees’ names and other identifying information are redacted from complaints prior to review by the ERT, subject matter experts, and Executive Board or posting to the Program’s website. Redacted information will be shared only when required to gather additional contextual information, and in that case limited to those who have a “need-to-know.” ERT members, analysts, and any other individuals with access to confidential Program information also are required to sign confidentiality and non-disclosure agreements obligating them to keep that information confidential.

Unfortunately, whistleblowers do not always remain anonymous, and those whose identities are revealed during or after an investigation may face job-related retaliation because of their reports. But FAA employees who experience retaliation for reports they make through the Program may be entitled to relief. For example, they can file a complaint for retaliation with the U.S. Office of Special Counsel (“OSC”) and, if OSC has reasonable grounds to believe an adverse personnel action is retaliatory, it can delay the action. If OSC concludes after an investigation that the action was retaliatory, it can seek corrective or disciplinary action on behalf of the employee. FAA employees who experience retaliation for reports they make through the Program also may hold legal claims

under the federal Whistleblower Protection Act, 5 U.S.C. § 2302 et seq., which provides for monetary relief including back pay and compensatory damages for emotional distress. FAA employees experiencing retaliation should consult with an employment attorney to learn more about filing a complaint with OSC or seeking monetary relief under the Whistleblower Protection Act.

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