U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505
202-254-3600

July 30, 2009

The President
The White House
Washington, D.C. 20510-1102

Re: OSC File No. DI-08-1904

Dear Mr. President:

In accordance with 5 U.S.C. § 1213(e)(4), I am transmitting information concerning a whistleblower disclosure that was referred to the Honorable Mary E. Peters, former Secretary of Transportation, on July 8, 2008, pursuant to 5 U.S.C. § 1213(c). The referral sets forth serious allegations made by Rand Foster, an Aviation Safety Inspector and Airworthiness Technical Specialist with the Department of Transportation's (DOT) Federal Aviation Administration (FAA), concerning non-compliant and potentially unsafe modifications made to hundreds of emergency service helicopters operating across the country, and FAA's alleged failure to appropriately address this problem. Based on Mr. Foster's disclosures, we found a substantial likelihood that FAA officials and employees engaged in a violation of law, rule, or regulation, gross mismanagement, and an abuse of authority, all of which contributed to a substantial and specific danger to public safety.

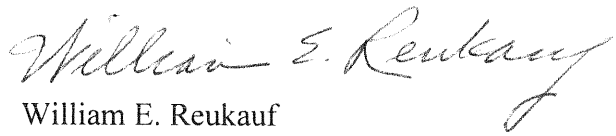
Mr. Foster disclosed that more than 300 emergency service helicopters were modified with a night vision imaging system (NVIS) to allow the use of night vision goggles. After FAA discovered that the modifications did not comply with required specifications, and in many instances created a safety hazard, FAA prepared a Notice of National Policy declaring the helicopters' airworthiness certificates invalid and establishing procedures to bring the aircraft into compliance. Mr. Foster reported, however, that following the negative publicity in April 2008 about alleged safety problems with the Southwest Airlines and American Airlines fleets, FAA officials decided against issuing the Notice. Although the helicopter operators were advised of the technical non-compliance issues, FAA allegedly failed to address the potential safety hazards relating to the NVIS modifications. Mr. Foster contended that FAA, in an effort to avoid scrutiny, failed to implement a formal process to ensure that the helicopters were brought into compliance in a timely and coordinated manner, allowing aircraft with invalid airworthiness certificates and potential safety hazards to remain in service.

Under 5 U.S.C § 1213(c), the Secretary of Transportation was required to conduct an investigation of the allegations and submit a written report to OSC within 60 days of OSC's transmittal or within any longer period of time agreed to by OSC, setting forth DOT's findings and any corrective action taken. OSC granted DOT five extensions of time over a period of more than twelve months. During this time, OSC was advised by DOT that FAA completed an

initial investigation in August 2008 and provided a report to DOT's Office of Inspector General (OIG) for review in September 2008. In October 2008, we understand OIG responded to FAA with a report outlining OIG's questions, concerns and recommendations for further investigation by FAA. We also understand that late last month, FAA submitted a supplemental report to OIG. Despite the extensions granted, and OSC's notice to DOT that the fifth extension would be final, the Secretary has not submitted the required report. Rather, after the close of business on July 20, 2009, the final due date of the report, DOT's Office of General Counsel requested an additional 60-day extension of time to file the report. In light of the serious nature of the safety allegations and the length of time that has passed, I have concluded that it is no longer in the public interest for OSC to grant further extensions of time in this matter.

Accordingly, we are transmitting this disclosure matter to you without DOT's report in accordance with 5 U.S.C. § 1213(e)(4). As further required by section 1213(e)(4), we have transmitted this information to the Chairmen of the Senate Committee on Commerce, Science and Transportation and the House Committee on Transportation and Infrastructure. We have also sent copies to the Ranking Member of each Committee. In addition, we have filed a copy of this transmittal in our public file and have concluded our involvement in this matter.

Respectfully,



William E. Reukauf
Associate Special Counsel

Enclosure

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

The Special Counsel

July 8, 2008

The Honorable Mary E. Peters
Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Re: OSC File No. DI-08-1904

Dear Madam Secretary:

There are approximately 750 emergency medical service helicopters operating in the U.S. today. These emergency aircraft serve a vital role in saving lives, and the Federal Aviation Administration (FAA) has recognized the importance of improving the safety of their operations.[1] Serious allegations concerning non-compliant and potentially unsafe modifications made to hundreds of emergency service helicopters, and FAA's failure to appropriately address the problem, have been filed with my office. Thus, pursuant to my responsibilities as Special Counsel, I am referring to you for investigation whistleblower disclosures that FAA employees in the Rotorcraft Directorate, Southwest Region, the Flight Standards Division, Northwest Mountain Region, and FAA Headquarters are engaging in conduct which constitutes a violation of law, rule or regulation, gross mismanagement, and an abuse of authority, all of which has contributed to a substantial and specific danger to public safety.

Mr. Rand Foster, who has consented to the release of his name, is an Aviation Safety Inspector (ASI) and Airworthiness Technical Specialist with FAA. He discloses that more than 300 emergency service helicopters were modified with a night vision imaging system (NVIS) to allow the use of night vision goggles. After FAA discovered that the modifications did not comply with required specifications, and in many instances created a serious safety hazard, FAA prepared a Notice of National Policy declaring the helicopters' airworthiness certificates invalid and establishing procedures to bring the aircraft into compliance. Mr. Foster reports, however, that following the negative publicity regarding Southwest Airlines and American Airlines in April 2008, FAA officials decided against issuing the Notice. Although the helicopter operators have been advised of the technical non-compliance issues, FAA has failed to address the potential safety hazards relating to the NVIS modifications. Mr. Foster contends that FAA, in an effort to conceal this issue from the public and avoid scrutiny, has failed to implement a formal process to ensure that the helicopters are brought into compliance in a timely and coordinated manner, allowing aircraft with invalid airworthiness certificates and potential safety hazards to remain in service. Mr. Foster contends that the lack of a coordinated plan may result in unnecessary and sporadic groundings of emergency medical service helicopters, putting at risk

[1] FAA Fact Sheet, EMS Helicopter Safety, May 13, 2008.

emergency response crews and trauma patients whose lives depend on their availability. The information disclosed by Mr. Foster reveals a substantial likelihood of wrongdoing and raises concerns regarding the airworthiness of hundreds of emergency medical service helicopters.

The allegations are detailed in the enclosed Report of Disclosures, incorporated herein by reference. As the attached report demonstrates, it appears that FAA has engaged in a pattern of suppression of actions by its safety inspectors to bring aircraft into airworthy and safe flying conditions. FAA has covered up another instance of airworthiness non-compliance.

The U.S. Office of Special Counsel (OSC) is authorized by law to receive disclosures of information from federal employees alleging violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 1213(a) and (b). As Special Counsel, if I find, on the basis of the information disclosed, that there is a substantial likelihood that one of these conditions exists, I am required to advise the appropriate agency head of my findings, and the agency head is required to conduct an investigation of the allegations and prepare a report. 5 U.S.C. § 1213(c) and (g).

I have concluded that there is a substantial likelihood that the information the whistleblower provided to OSC discloses a violation of law, rule or regulation, gross mismanagement, an abuse of authority, and a substantial and specific danger to public safety. As previously stated, I am referring this information to you for an investigation of the whistleblower's allegations and a report of your findings within 60 days of your receipt of this letter. By law, the report must be reviewed and signed by you personally. Should you delegate your authority to review and sign the report to the Inspector General, or any other official, the delegation must be specifically stated and must include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5). Without this information, I would hasten to add that the report may be found deficient. The requirements of the report are set forth at 5 U.S.C. § 1213(c) and (d). A summary of § 1213(d) is enclosed. As a matter of policy, OSC also requires that your investigators interview the whistleblower as part of the agency investigation.

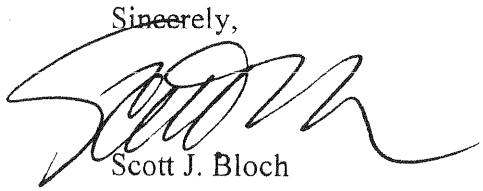
In the event it is not possible to report on the matter within the 60-day time limit under the statute, you may request in writing an extension of time not to exceed 60 days. Please be advised that an extension of time is normally not granted automatically, but only upon a showing of good cause. Accordingly, in the written request for an extension of time, please state specifically the reasons the additional time is needed. I must approve any additional requests for an extension of time.

After making the determinations required by 5 U.S.C. § 1213(e)(2), copies of the report, along with any comments on the report from the person making the disclosure and any comments or recommendations by this office will be sent to the President and the appropriate oversight committees in the Senate and House of Representatives. 5 U.S.C. § 1213(e)(3). Unless classified or prohibited from release by law or by Executive Order requiring that

information be kept secret in the interest of the national defense or the conduct of foreign affairs, a copy of the report and any comments will be placed in a public file in accordance with 5 U.S.C. § 1219(a).

Please refer to our file number in any correspondence on this matter. If you need further information, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 254-3604. I am also available for any questions you may have.

Sincerely,



Scott J. Bloch

Enclosures

Enclosure

Requirements of 5 U.S.C. § 1213(d)

Any report required under subsection (c) shall be reviewed and signed by the head of the agency[1] and shall include:

(1) a summary of the information with respect to which the investigation was initiated;

(2) a description of the conduct of the investigation;

(3) a summary of any evidence obtained from the investigation;

(4) a listing of any violation or apparent violation of law, rule or regulation; and

(5) a description of any action taken or planned as a result of the investigation, such as:

(A) changes in agency rules, regulations or practices;

(B) the restoration of any aggrieved employee;

(C) disciplinary action against any employee; and

(D) referral to the Attorney General of any evidence of criminal violation.

In addition, we are interested in learning of any dollar savings, or projected savings, and any management initiatives that may result from this review.

[1] Should you decide to delegate authority to another official to review and sign the report, your delegation must be specifically stated.

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REPORT OF DISCLOSURES REFERRED FOR INVESTIGATION
OSC FILE NO. DI-08-1904

I. SUMMARY

Mr. Rand Foster, an Aviation Safety Inspector (ASI) with the Federal Aviation Administration (FAA), discloses serious allegations concerning non-compliant and unsafe modifications made to hundreds of emergency service helicopters, and FAA's failure to appropriately address the problem. He alleges that FAA employees in the Rotorcraft Directorate, Southwest Region, the Flight Standards Division, Northwest Mountain Region, and FAA Headquarters are engaging in conduct which constitutes a violation of law, rule or regulation, gross mismanagement, and an abuse of authority, all of which has contributed to a substantial and specific danger to public safety.

Mr. Foster discloses that more than 300 emergency service helicopters were modified with equipment to allow the use of night vision goggles. After FAA discovered that the modifications did not comply with required specifications, and in many instances created a safety hazard, FAA prepared a Notice of National Policy declaring the helicopters' airworthiness certificates invalid and establishing procedures and deadlines to bring them into compliance. Following the negative publicity regarding Southwest Airlines and American Airlines in April 2008, however, FAA officials decided against issuing the Notice. According to Mr. Foster, the helicopter operators have been advised of the technical non-compliance issues; however, FAA has failed to address the potential safety hazards relating to the NVIS modifications. He contends that in an effort to conceal this issue from the public and avoid scrutiny, FAA has failed to implement a formal process to ensure that the helicopters are brought into compliance in a timely and coordinated manner, allowing aircraft with invalid airworthiness certificates and potential safety hazards to remain in service. Mr. Foster contends that the lack of a coordinated plan may result in unnecessary and sporadic groundings of emergency medical service helicopters, putting at risk the lives of patients who depend on their service.

II. INFORMATION DISCLOSED

Mr. Foster, who has consented to the release of his name, is an ASI and an Airworthiness Technical Specialist assigned to the Flight Standards Division, Northwest Mountain Region, Technical Standards Branch. He is currently detailed to the Special Emphasis Investigations Team (SEIT), Southwest Region, Fort Worth, Texas. Mr. Foster has been employed by FAA for thirteen years and, among other roles, he previously served as Principal Maintenance Inspector in three different Flight Standards District Offices (FSDOs). He has over thirty years of experience in the aviation industry.

In August 2007, Mr. Foster identified approximately 250 U.S. registered emergency service helicopters that had received non-compliant modifications to install a night vision imaging system (NVIS), a supplemental lighting system to allow the use of night vision goggles

(NVGs). The vast majority of these helicopters are used by hospitals, fire departments and paramedic companies to transport patients for emergency medical services, while others are used by sheriff, police and fire departments for public safety. The modifications on these helicopters were performed by a repair station operated by Aviation Specialties Unlimited, Inc. (ASU), of Boise, Idaho, pursuant to several Supplemental Type Certificates (STCs) issued to ASU for the NVIS modifications.[1] The STCs for the NVIS modifications were issued by FAA's Aircraft Certification Office, Seattle, Washington (SACO). Because of variations in the configuration of the cockpits and patient transport areas of different helicopters, the STCs that were issued were specific to the particular make, model, series and serial number of the various helicopters. Thus, the NVIS modifications had to conform to the data, specifications and drawings contained in the STC issued for that particular aircraft.

Mr. Foster explains that he coordinated with the Rotorcraft Directorate, Fort Worth, Texas, to conduct follow-up surveys on the modified helicopters, which identified safety issues relating to the NVIS installations. In particular, some of the filters were improperly installed on instruments and radios in the helicopters, and the placement of these filters significantly impaired the pilot's ability to read the instruments during daylight and night operations without night vision goggles. The Rotorcraft Directorate determined that most of the NVIS modifications were made by ASU without "approved data" – *i.e.*, the modifications did not conform to the data, specifications and drawings contained in the STC issued for a particular type of helicopter.

In addition, many of the helicopters were returned to service following modification with field approvals by an ASI in the Boise FSDO, contrary to FAA policy. FAA Order 8300.10, now incorporated into FAA Order 8900.1, Volume 4, Chapter 9, requires inspection and approval by the ACO that issued the STC, in this case SACO. It was initially determined that approximately 140 helicopters were returned to service with approvals inaccurately indicating that the NVIS modifications conformed to the specifications of the STC. Mr. Foster indicates that through additional collection of information, the number of helicopters modified for NVIS by ASU increased from 250 to more than 300. It was further determined that approximately 90% of the modifications did not conform to the applicable STCs. The number of helicopters returned to service with improper field inspections increased, as well.

In response to these findings, Mr. Foster drafted a proposed corrective action plan to resolve the NVIS modification issues, which he submitted to his superiors on August 3, 2007. The plan set forth procedures to ensure that all NVIS modified helicopters were properly inspected, that the modifications were brought into conformity with the applicable STC or dismantled, and that the helicopters were in airworthy condition.[2] He explains that a coordinated

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[1] A STC is a Type Certificate (TC) -- a design approval containing data, specifications and drawings -- issued by FAA to modify an aircraft from its original design. The STC, which incorporates by reference the related TC, approves not only the modification but also how that modification affects the original design.

[2] In November 2007, Mr. Foster initiated enforcement actions against ASU and its Director of Maintenance, Kip McDermott. ASU relinquished its repair station certificate for revocation based on falsification of maintenance records. ASU has since applied for and received a new certificate. Mr. McDermott's certificate has been revoked

plan for bringing the aircraft into compliance in a timely and systematic manner was critical, in order to ensure the airworthiness of the aircraft while preventing unnecessary and/or mass groundings of emergency medical service helicopters. In his proposal, he explained that in instances where a helicopter may be found technically unairworthy (*e.g.*, the NVIS modification did not strictly conform to the STC but there were no safety issues), grounding of the emergency aircraft would be unreasonable and could potentially jeopardize the lives of patients in need of their service. However, in instances where the helicopter is not airworthy due to the unknown condition of the NVIS installation and/or the NVG system, then the aircraft should immediately be removed from authorization to use the NVG system until the situation is resolved.

Between August 2007 and May 2008, Mr. Foster participated in meetings with Bradley Pearson, Manager, and Rick Domingo, then Assistant Manager, Flight Standards Division, Northwest Mountain Region; David Downey, Manager, Rotorcraft Directorate; Richard McCauley, Manager, SACO, and others regarding the NVIS modification issues. In November and December 2007, Mr. Foster reviewed and provided input on a draft Formal Notice of National Policy, N8900.nn (the Notice), alerting various FAA components and aircraft operators of the non-compliance of the NVIS modifications made by ASU. The Notice, which was to be signed by James Ballough, Director, Flight Standards Service, was directed to all Flight Standards Field Office Airworthiness ASIs who have certificate management and oversight responsibilities of carriers with aircraft that received the NVIS modifications. However, it was to be widely disseminated to the Flight Standards branches and divisions in the regions and Headquarters, and posted on FAA's website for access by operators and the public.

The Notice explained that the NVIS modifications were made by ASU on "more than 50% of the total non-military aircraft capable of NVG use in the United States today." Critically, it stated that "[m]any of these aircraft were inappropriately returned to service through a field approval . . .Others may not conform to the STC under which they were modified. In either case, the airworthiness certificate is invalid." As stated in the Notice, 14 C.F.R. § 91.203(a)(1) prohibits the operation of an aircraft without an appropriate and current airworthiness certificate, and 14 C.F.R. § 91.7 prohibits anyone from operating an aircraft unless it is in an airworthy condition. The Notice further explained that in order to receive an airworthiness certificate, an aircraft must conform to its TC, including any STC, and must be in a condition safe for operation.[3]

The Notice identified the affected aircraft and provided instructions to Principal Maintenance Inspectors (PMIs) and Principal Avionics Inspectors (PAIs) to notify the operators of these aircraft. Operators would then be given ten days from receipt of notice to "validate the status" of each ASU NVIS modified aircraft and report the results back to the PMIs and PAIs. If

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based on falsification of maintenance records. Mr. Foster has indicated to OSC that his disclosure does not pertain to allegations of wrongdoing by ASU and Mr. McDermott, which have been addressed by FAA.

[3] The Notice further explained that an aircraft conforms to its TC "when its configuration and the components installed are as described in the drawings, specifications, and other data that are part of the TC, which includes any STC, airworthiness directives, and field approved alterations incorporated into the product."

the operator was unable to verify conformity of the aircraft to the applicable SCT, then the aircraft's airworthiness certificate would be deemed invalid. The Notice also established procedures for inspections of the STC data packages in comparison with the actual aircraft by the PMIs and PAIs, and established a system for documenting and tracking all conformity and safety discrepancies and disposition of the affected aircraft.

Critically, however, Mr. Foster reports that the Notice was never issued and a formal action plan has not been implemented to bring the helicopters into compliance. He explains that around the time when the final draft of the Notice was circulated in early April 2008, the safety issues relating to the inspection and maintenance programs for the Southwest Airlines and American Airlines Certificate Management Offices began receiving wide and negative publicity. In light of the sharp criticism and scrutiny FAA was receiving with respect to those issues, FAA management in Headquarters made the decision not to issue the Notice regarding the non-compliance of the ASU NVIS modifications.

On May 1, 2008, Mr. Foster spoke with Rick Domingo to discuss the status of the corrective action plan and Notice. According to Mr. Foster, Mr. Domingo suggested to him that Headquarters management was concerned that publishing the Notice in the wake of the Southwest Airlines and American Airlines problems would result in widespread aircraft groundings and more negative publicity. He further explained that management reasoned that because NVG use and the likelihood of an accident would be reduced during the summer months, when the weather was better, it was not critical that they issue the Notice at that time. Mr. Domingo further advised that management set a target date of October 1, 2008, to bring all of the aircraft into compliance. Depending on the number of aircraft that are still non-compliant as of August 31, 2008, management will determine whether it is necessary to issue the Notice at that time to force the operators to come into compliance or ground their helicopters. On May 2, 2008, Mr. Foster met with Mr. Pearson, his Assistant, Herman Ross, Mr. McCauley, and others regarding this course of action, and he expressed his disagreement with the decision not to publish the Notice and implement a formal process.

According to Mr. Foster, all of the operators of helicopters that received the NVIS modifications have been advised by ASU of the non-conforming modifications, and SACO is working with ASU to bring the aircraft into conformity. He contends, however, that this informal process fails to adequately address the problem. First, the operators have not been advised of the potential safety hazard relating to the NVIS modifications, as the informal notification only indicated a technical non-conformity issue with data. Further, many of the helicopter operators have held off taking steps to bring their aircraft into conformity because they are awaiting formal action by FAA, directing them to do so. In addition, Mr. Foster alleges that SACO is engaging in a process of "rubber-stamping" drawings of NVIS-modified helicopter configurations submitted by ASU, which are based on photographs of the aircraft, in order to retroactively approve the data in the STCs for those aircraft. He asserts that neither SACO nor ASU is properly inspecting the aircraft in accordance with FAA regulatory requirements to ensure readability of the instruments, warning lights and radios, and to maintain the enhanced level of safety requirements for air ambulance operations under 14 C.F.R. Part 135. He contends

that this retroactive approval process fails to address the identified safety hazard relating to the installation of the filters. While these helicopters may now be deemed to conform to their STCs, they have not been physically evaluated to determine whether lights and filters previously installed without approved data are correctly positioned, are compatible with NVG use, and do not impede the pilot's ability to see the instruments and radios in normal night and day situations.

Thus, Mr. Foster contends that FAA has allowed aircraft with invalid airworthiness certificates, and potentially hazardous NVIS modifications, to remain in service. He asserts that without a systematic approach to ensuring conformity and airworthiness, the result will be continued operation of unairworthy aircraft that were not properly evaluated, and the potential for sporadic groundings of emergency medical service helicopters that are waiting for approved data, putting at risk emergency response crews and trauma patients whose lives depend on their availability. As an example, Mr. Foster indicated that in late April 2008, nine medivac helicopters located in California were voluntarily grounded by their operators due to the faulty NVIS filters installed in the aircraft. He contends that removal of this many emergency helicopters from service at one time creates a substantial risk of harm to the public.[4]

III. THE SPECIAL COUNSEL'S FINDINGS

Mr. Foster has presented serious allegations that reveal that FAA, in an effort to avoid scrutiny, has failed to ensure that hundreds of emergency service helicopters with non-conforming and potentially hazardous modifications are brought into compliance and airworthy status. Given the apparent expertise of the whistleblower regarding the matter disclosed, the detail provided, and his first-hand knowledge of the issues described, I have concluded that there is a substantial likelihood that the information provided to the Office of Special Counsel discloses violations of law, rule, or regulation, gross mismanagement, an abuse of authority, and a substantial and specific danger to public safety.

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[4] On May 3, 2008, Mr. Foster reported his allegations to the DOT Office of Inspector General (OIG), which opened a case file (Case No. 08IH-B-66-I-000) and referred the matter to FAA for investigation. Mr. Foster has advised OSC that he has not been contacted by FAA or OIG regarding his allegations.