



U.S. OFFICE OF SPECIAL COUNSEL
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The Special Counsel

April 29, 2021

The Honorable Pete Buttigieg
Secretary
Department of Transportation
1200 New Jersey Ave., S.E.
Washington, D.C. 20590

Re: OSC File No. DI-21-000392
Referral for Investigation--5 U.S.C. § 1213(c)

Dear Mr. Secretary:

I am referring to you for investigation a whistleblower disclosure that officials at the Department of Transportation, Federal Aviation Administration (FAA), Southwest Airlines (SWA) Certificate Management Office (CMO), Irving, Texas, and FAA Headquarters, Washington, D.C. engaged in actions that constitute a violation of law, rule, or regulation; gross mismanagement; an abuse of authority; and a substantial and specific danger to public safety. A report of your investigation of these allegations and any related matters is due to the Office of Special Counsel (OSC) on June 28, 2021.

[REDACTED], an Aviation Safety Inspector, who consented to the release of his name, disclosed that FAA officials have prevented employees from taking appropriate enforcement actions against SWA. The allegations to be investigated include:

- FAA officials failed to require SWA to comply with Federal regulations and mandatory agency safety policies and improperly intervened to close a safety-related enforcement action against SWA;
- FAA officials permitted SWA to implement a system that requires FAA inspectors to submit a request before receiving SWA records that must be made available by regulation, which interferes with FAA's enforcement authority and delays airworthiness determinations;
- These actions inhibit FAA's ability to ensure public safety ; and
- Any additional, related allegations of wrongdoing discovered during the investigation of the foregoing allegations.

[REDACTED] disclosed that on May 9, 2019, SWA submitted a report through FAA's Voluntary Disclosure Reporting Program (VDRP) notifying the SWA CMO of noncompliance with FAA Airworthiness Directive (AD) 2007-25-03, which requires repetitive inspections of the

aft pressure bulkhead in certain Boeing aircraft to identify oil can damage.¹ The AD at paragraph (h) requires the operator to ground the airplane until repairs are completed.² SWA's VDRP submission indicated that it had identified oil can damage on one of its aircraft but it did not ground the plane for repairs. Because SWA continued to operate the aircraft in revenue service in violation of the requirements of the AD, FAA Principal Maintenance Inspector [REDACTED] rejected the VDRP and issued an enforcement against SWA.³ FAA Inspector [REDACTED], who conducted the enforcement investigation, indicated to [REDACTED] that SWA had, in fact, flown at least seven aircraft in violation of the AD. Upon completion, the investigation was forwarded to SWA CMO management, where it languished for several months until it was forwarded for legal review as a violation pending a civil penalty. On August 26, 2020—over a year later—FAA management allegedly directed [REDACTED] to close the case without further action.

According to [REDACTED], FAA management forwarded the case to an FAA attorney in the Northwest Mountain Region. The attorney produced a memorandum, which was provided to [REDACTED], determining that an enforcement action was not warranted because SWA did not have a history of noncompliance and that FAA's subsequent issuance to SWA of an Alternative Method of Compliance (AMOC)⁴ on May 13, 2019, indicated that there was no serious safety concern. [REDACTED] disclosed that it is highly unusual for management to request a legal opinion from an attorney in another region when local attorneys are available, but he noted that in this instance, local attorneys indicated they would have pursued the enforcement action against SWA. [REDACTED] also stated that the AMOC was not retroactive to the date SWA discovered the noncompliance and alleged that there is no precedent for permitting an operator to avoid enforcement based on a speculative retroactive application of repair. [REDACTED] further emphasized that between May 9 and May 13, 2019, SWA continued to operate the aircraft in revenue service, in violation of the AD and Federal regulations, with FAA's knowledge. In addition, [REDACTED] disclosed that SWA has a long history of noncompliance with AD requirements, reaching back to 2008, including many examples of SWA using the VDRP program improperly to continue flying noncompliance aircraft. Thus, [REDACTED] alleged that there was no legitimate basis for management's failure to take enforcement action against SWA and that doing so disincentivizes SWA from complying with ADs, despite the serious safety implications of noncompliance.

[REDACTED] further alleged that FAA officials, including Office of Audit and Evaluation (AAE) Investigator [REDACTED], have permitted SWA to implement an onerous process for inspectors who request aircraft documentation, which operators are required to provide to FAA by regulation.⁵ According to [REDACTED], after he requested documentation related to SWA's

¹The AD notes at paragraph (d) Unsafe Condition that the AD attempts to detect and correct oil can damage that could lead to web cracks resulting in rapid decompression of the airplane. This reflects Mr. Boutris' contention that violations of the AD can lead to unsafe conditions.

²14 C.F.R. § 39.11 states that operators must comply with all AD requirements. Failure to comply with AD requirements constitutes a violation of § 39.7.

³Investigation No. 2019SW290003.

⁴An AMOC that provides an acceptable level of safety may be used for any repair required by the AD if it has appropriate approvals.

⁵14 C.F.R. § 119.59(c) "Each employee of, or person used by, the certificate holder who is responsible for maintaining the certificate holder's records must make those records available to the Administrator."; 14 C.F.R. §

“Skyline” aircraft,⁶ SWA agreed to provide documents to FAA to ascertain the airworthiness of the aircraft. However, in March 2020, SWA abruptly refused to provide requested documents to FAA, instead requiring FAA inspectors to submit a Request for Information (RFI) to SWA to obtain inspection and maintenance documents. [REDACTED] alleged that SWA frequently takes days to review and fulfill these requests and, in instances where an immediate airworthiness determination should be made, this unnecessary delay could lead to an avoidable threat to safety. [REDACTED] raised his concerns regarding the RFI process to [REDACTED] and AAE Director [REDACTED]. [REDACTED] stated to [REDACTED] that he and [REDACTED] informally investigated the matter and determined that SWA’s request process was permissible because there is no guidance prohibiting a request process. [REDACTED] alleged that there is no regulatory basis for the process, that AAE officials improperly intervened to permit SWA to implement the process, and that the process itself poses a threat to public safety by delaying the production of necessary inspection and maintenance documents.

I have concluded that there is a substantial likelihood that the information 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. Please note that specific allegations and references to specific violations of law, rule or regulation are not intended to be exclusive. As previously noted, your agency must conduct an investigation of these matters, and I will review the report for sufficiency and reasonableness before sending copies of the agency report along with the whistleblower’s comments and any comments or recommendations I may have, to the President and congressional oversight committees and making these documents publicly available.

Additional important requirements and guidance on the agency report are included in the attached Appendix, which can also be accessed at <https://osc.gov/Services/Pages/DU-Resources.aspx>. If your investigators have questions regarding the statutory process or the report required under 5 U.S.C. §1213, please contact Catherine A. McMullen, Chief, Disclosure Unit, at (202) 804-7088 for assistance. I am also available for any questions you may have.

Sincerely,



Henry J. Kerner
Special Counsel

Enclosure

cc: The Honorable Eric J. Soskin, Inspector General

121.380(d) “The certificate holder shall make all maintenance records required to be kept by this section available for inspection by the Administrator...”

⁶The maintenance records for the Skyline aircraft—88 aircraft purchased by SWA from foreign operators—contained discrepancies that SWA was unable to address in a timely manner, leading to an enforcement action initiated by Mr. Boutris. The Skyline aircraft have been the subject of several investigations, including two pending OSC referrals. See OSC File Nos. DI-20-000479 et al. and DI-20-000577 et al.

APPENDIX

AGENCY REPORTS UNDER 5 U.S.C. § 1213

GUIDANCE ON 1213 REPORT

- OSC requires that your investigators interview the whistleblower at the beginning of the agency investigation when the whistleblower consents to the disclosure of his or her name.
- Should the agency head delegate the authority to review and sign the report, the delegation must be specifically stated and include the authority to take the actions necessary under 5 U.S.C. § 1213(d)(5).
- OSC will consider extension requests in 60-day increments when an agency evidences that it is conducting a good faith investigation that will require more time to complete.
- Identify agency employees by position title in the report and attach a key identifying the employees by both name and position. The key identifying employees will be used by OSC in its review and evaluation of the report. OSC will place the report without the employee identification key in its public file.
- Do not include in the report personally identifiable information, such as social security numbers, home addresses and telephone numbers, personal e-mails, dates and places of birth, and personal financial information.
- Include information about actual or projected financial savings as a result of the investigation as well as any policy changes related to the financial savings.
- Reports previously provided to OSC may be reviewed through OSC's public file, which is available here: <https://osc.gov/Pages/Resources-PublicFiles.aspx>. Please refer to our file number in any correspondence on this matter.

RETALIATION AGAINST WHISTLEBLOWERS

In some cases, whistleblowers who have made disclosures to OSC that are referred for investigation pursuant to 5 U.S.C. § 1213 also allege retaliation for whistleblowing once the agency is on notice of their allegations. The Special Counsel strongly recommends the agency take all appropriate measures to protect individuals from retaliation and other prohibited personnel practices.

EXCEPTIONS TO PUBLIC FILE REQUIREMENT

OSC will place a copy of the agency report in its public file unless it is classified or prohibited from release by law or by Executive Order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs. 5 U.S.C. § 1219(a).

EVIDENCE OF CRIMINAL CONDUCT

If the agency discovers evidence of a criminal violation during the course of its investigation and refers the evidence to the Attorney General, the agency must notify the Office of Personnel Management and the Office of Management and Budget. 5 U.S.C. § 1213(f). In such cases, the agency must still submit its report to OSC, but OSC must not share the report with the whistleblower or make it publicly available. See 5 U.S.C. §§ 1213(f), 1219(a)(1).