



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

October 24, 2014

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

Re: OSC File No. DI-14-2176

Dear Mr. President:

Pursuant to 5 U.S.C. § 1213 (e)(3), enclosed please find an agency report based on disclosures filed by a whistleblower at the Federal Aviation Administration (FAA), Unmanned Aircraft Systems Integration Office (UASIO), in Washington, D.C. The whistleblower, who chose to remain anonymous, alleged that FAA management in the UASIO office engaged in conduct that constituted a violation of law, rule, or regulation, gross mismanagement, an abuse of authority, and a substantial and specific danger to public safety. Specifically, the whistleblower alleged that FAA management instituted a review process for Department of Defense (DoD) Unmanned Aircraft Systems (UAS) that contravened existing agency regulations.

The agency did not substantiate the whistleblower's allegations. Pursuant to 10 U.S.C. § 113, FAA does not have the authority to certify or regulate DoD UAS vehicles. The agency determined, therefore, that no air safety inspections were required for the UAS approvals at issue, and all necessary operational reviews were conducted. Notwithstanding this, the agency acknowledged that this information was omitted from guidance documents used by air safety inspectors reviewing UAS applications. As a result, inspectors believed they held authority to review UAS applications for airworthiness. Based on this finding, the agency determined that FAA Notice 8900.227 should be amended to properly reflect this exemption. I have determined that the FAA's investigative report contains all the information required by statute and the findings appear to be reasonable.

The whistleblower's allegations were referred to Secretary of Transportation Anthony Foxx to conduct an investigation pursuant to 5 U.S.C. § 1213(c) and (d). Review of the matter was delegated to the Office of Audit and Evaluation to conduct an investigation. On August 10, 2014, Secretary Foxx submitted the agency's report to Office of Special Counsel. Pursuant to 5 U.S.C. § 1213(e)(1), the whistleblower provided comments on the agency report. As required by, 5 U.S.C. § 1213(e)(3), I am now transmitting the report to you.¹

¹ The 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 and safety. 5 U.S.C. § 1213(a) and (b). OSC does not have the authority to investigate a whistleblower's disclosure; rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency

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I. The Whistleblower's Disclosures

The whistleblower alleged that FAA management in the UASIO office instituted a review process for Department of Defense (DoD) Unmanned Aircraft Systems (UAS) that disregarded agency regulations. According to the whistleblower, in March 2014, Air Traffic Operations (ATO), a branch within UASIO, violated FAA notices by instituting an approval process for DoD UAS operations that did not include a complete safety review procedure. According to the whistleblower, since this process was implemented, nine DoD UAS operations were approved without a proper flight safety review.

The whistleblower asserted that unmanned aircraft that have not undergone a Flight Standards Service (AFS) flight safety review could pose a substantial and specific danger to public safety, as their airworthiness and proposed operations have not been properly vetted. The whistleblower further alleged that without AFS review, there was no risk assessment of the operational environment, design of the vehicle, components of the aircraft, crew qualifications, visual observer positions, or the proximity to populated areas and adjoining airspace created by the flight.

Background

Beginning in 2007, the increased frequency of UAS operations prompted the FAA to require the DoD to obtain a Certificate of Waiver or Authorization (Certificate) for UAS operations that occur outside restricted military airspace or enter the National Air Space (NAS). *See* FAA Joint Order 7610.4N. Certificates require applicants such as DoD and other government agencies to submit extensive documentation to ensure the safe operation of these aircraft within the NAS. This documentation includes, but is not limited to, operational and system descriptions, aircraft airworthiness attestations, technical information, crew information, visual observer information, and flight operation and air traffic control plans.

UASIO was established in March 2012 for the purpose of coordinating and overseeing all UAS operations in the NAS. UASIO operates under the agency level Flight Standards Service office and features two distinct internal branches that share responsibility for reviewing relevant safety and risk information before issuing Certificates. *See* FAA Notice 8900.227 and Joint Order 7210.846. ATO is responsible for planning and coordination of services involving the operational components of UAS activities, while Flight Standards Services (AFS) is responsible for reviewing and evaluating the safety and interoperability of the proposed operations.

head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c). Upon receipt, the Special Counsel reviews the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). The Special Counsel will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

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ATO's assessment involves reviewing proposed processes, operating areas, pilots, communications, and the air traffic control components of Certificate applications. ATO is also vested with the authority to issue the final approved Certificate after an application has been completely reviewed by both UASIO units. An AFS flight safety review makes a safety risk assessment of the proposed operational environment. The risk review also includes the design of the vehicle, the components of the aircraft, the visual observer positions, as well as the proximity to populated areas and adjoining airspace created by the flight. AFS is responsible for ensuring the proposed operations can be conducted safely and responsibly, and may impose limitations and conditions on UAS flights to ensure the safety of the National Air Space.

Alleged Violations of FAA Policies and Notices

The whistleblower explained that FAA Notice 8900.227 detailed agency policy with respect to the review and evaluation of UAS systems. Pursuant to this notice, AFS must issue a safety memorandum to ATO detailing the safety risk assessment of proposed operations. The memorandum may recommend limitations or conditions for the Certificate. The notice updated a prior notice (published in January 2013) addressing the increasing frequency of UAS operations in the National Air Space. *See* FAA Notice 8900.207. It applied to all operations within the United States conducted by public, civil, or commercial entities. FAA policy specifically notes that the term "public" encompasses entities such as DoD, other government agencies, and state and local governments. *See* 14 C.F.R. Part 91 Docket No. FAA-2006-25714; Notice No. 07-01. The notice required that Certificate applicants undergo a safety risk management process to identify hazards and possible mitigation strategies associated with proposed UAS operations. AFS is responsible for conducting this review and as noted above, can recommend that controls or restrictions be placed on approved Certificates.

The whistleblower asserted that during the 2013 government shutdown, ATO issued Certificates without conducting proper safety reviews. The whistleblower explained that two Certificates were issued to public applicants without AFS examining any information concerning the flight safety components of the proposed operations. Employees within AFS filed a complaint with FAA management, which responded by directing a full retroactive flight safety review of these proposed operations, in accordance with standing FAA notices and policies. The whistleblower alleged that this retroactive flight review reflected the agency's acknowledgement of the standing policy that UAS operations must undergo required safety and risk assessments.

The whistleblower explained that on March 7, 2014, ATO management issued a memorandum to AFS management stating, "ATO will no longer require DoD UAS to go through the AFS safety review procedure associated with" the Certificate process. The memo explained that the statutory authority and responsibility for safety oversight of DoD UAS operations resides with DoD. However, the memo did not provide a citation to any rule or

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regulation that gives DoD this authority, nor did it offer an explanation of the reason for the change.

In an accompanying email, James Ryan, the manager of tactical flight operations within UASIO, referenced the authority of DoD under Title 10 of the United States Code as the legal foundation for DoD's safety oversight of its own UAS operations, and its exemption from FAA AFS flight safety review.

However, the DoD UAS Airspace Integration Plan (the Plan), issued in 2011, states that while Title 10 establishes that DoD is "responsible for establishing airworthiness and pilot training qualifications and ensuring military standards are satisfied," DoD still must comply with "applicable FAA rules and regulations." *See* DoD Airspace Integration Plan §1. The Plan states that DoD UAS operations are not exempt from the FAA Certificate application process. In addition the Plan indicates that Title 10 does not exempt DoD UAS operations from a flight safety review for operations in the National Air Space.

With respect to the Certificate process, FAA notices and policies indicate that AFS reviews of flight safety are required before the issuance of a Certificate. According to the whistleblower, based on these standards, it appears the March 2014 ATO memo contravenes agency policy and would result in DoD Certificate approvals that violate standing FAA directives and policy. The whistleblower alleged that after the ATO memo was issued, nine DoD Certificates were approved without undergoing AFS safety reviews.

II. The Agency's Report

The report did not substantiate the whistleblower's allegations concerning the approval of DoD UAS. The report explained that the FAA does not have the authority to certify or exercise regulatory oversight of United States military aircraft. It noted that DoD alone maintains the statutory authority to certify, regulate, support, equip, maintain, and train all aircraft in the DoD inventory. *See* 10 U.S.C § 113. As a result, the report explained that FAA had no authority to conduct airworthiness reviews of either manned or unmanned military aircraft.

The report noted that FAA does have the authority to ensure that all aircraft operating in civilian controlled airspace, including military aircraft, conform with the requirements of 14 C.F.R. § 91.113, which requires that an aircraft see and avoid other aircraft operating in the NAS. Because a UAS is unmanned, to comply with this requirement, either ground based observers or an observer in a chase aircraft is used to see and avoid other aircraft that may conflict with the UAS. This method requires a Certificate from ATO in accordance with FAA Order 7210.3X, Part 6, Chapter 18, *Waivers and Authorizations*.

Under this framework, the DoD submits an application requesting a Certificate. The ATO personnel within UASIO then conduct a comprehensive operational review, including reviewing how the UAS intends to operate within the NAS, and what measures will be taken to comply with 14 C.F.R. § 91.113.

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The report explained that prior to March 2014, the waiver review also included an airworthiness technical review by FAA aviation safety inspectors, despite FAA's lack of statutory authority to do so. The report stated that inspectors believed they held such authority due to FAA Notice 8900.227, effective July 2013. FAA Notice 8900.227 articulated a broad range of requirements for FAA inspectors to verify pilot training, certification, and airworthiness standards.

The agency report noted that Notice 8900.227 improperly omitted exceptions for DoD UAS under 10 U.S.C § 113. The report further acknowledged that DoD failed to coordinate with FAA military liaisons concerning these issues and, as a result, Notice 8900.227 was accepted as written. In March 2014, after repeated complaints from FAA military liaisons regarding FAA's lack of statutory authority to regulate military aircraft, the FAA recognized the deficiencies in Notice 8900.227 and immediately terminated regulatory reviews of DoD UAS platforms.

The report explained that Notice 8900.227 is being corrected to indicate that the airworthiness, certification, training, and maintenance requirements contained in the order are not applicable to DoD UAS. As the result of this exempt status, the report noted that the nine DoD UAS Certificates issued since the policy change were not in violation of any law, rule, or regulation, nor did they represent a risk to public safety. Appropriate operational reviews were conducted prior to granting the Certificates.

In regards to the whistleblower's allegations concerning the issuance of Certificates during the government shutdown, the report explained that the UASIO executive conducted reviews on behalf of AFS during the shutdown, prior to Certificate issuance, and followed up with a retroactive review after employees returned to work. This retroactive review was attributed to confusion arising from the shutdown and ongoing discussions regarding FAA's regulatory authority over the airworthiness requirements of DoD UAS.

III. The Whistleblower's Comments

The whistleblower disagreed with the report and remained concerned about the safety of UAS platforms. The whistleblower challenged the agency's assertion that FAA never maintained authority and regulatory oversight over U.S. military aircraft. The whistleblower noted that two distinct waiver evaluation processes are required because ATC personnel are not trained or qualified to assess the interoperability and safety of UAS, and AFS is not qualified or trained in the ATC application, planning coordination and services. The whistleblower then asserted that the FAA's reliance on 10 U.S.C § 113 was misguided and did not support the conclusions contained in the report. Finally, the whistleblower noted that the agency's conclusions in this matter were dismissive when viewed in light of a June 26, 2014 Department of Transportation Office of the Inspector General report and a letter transmitted to the FAA Administrator by Senator Dianne Feinstein. The Inspector General's report noted the need for better integration of UAS into the NAS, and Senator Feinstein's letter requested a review of the certification process.

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IV. The Special Counsel's Findings

I have reviewed the original disclosure, the agency report, and the whistleblower's comments. The agency's report sufficiently address why AFS employees believed UAS safety reviews were necessary, attributing this confusion to the omission of language from documents used by AFS officials during UAS reviews. The report noted the agency is taking actions to resolve this apparent misunderstanding by adding details regarding the DoD exception to relevant agency policies and procedures. Based on this review, I have determined that the report contains all of the information required by statute and that the findings appear to be reasonable.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the agency report and the whistleblower's comments to the Chairman and Ranking Member of the Senate Committee on Commerce, Science, and Transportation and the Chairman and Ranking Member of the House Committee on Transportation and Infrastructure. I have also filed copies of the agency report and whistleblower's comments in OSC's public file, which is available online at www.osc.gov. This matter is now closed.

Respectfully,



Carolyn N. Lerner

Enclosures