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The Special Counsel

December 12, 2012

The President  
The White House  
Washington, D.C. 20500

Re: OSC File No. DI-10-2602

Dear Mr. President:

On May 8, 2012, pursuant to 5 U.S.C. § 1213(e)(3), I sent to you seven reports prepared by the Department of Transportation (DOT) based on whistleblower disclosures regarding various safety lapses at major airports and Federal Aviation Administration (FAA) facilities. I consolidated those reports because of their close proximity in time and to highlight FAA's pattern of insufficient responses to safety concerns. As noted in my May 8 letter, I requested that DOT provide updates on the corrective actions outlined in the reports in several of those matters.<sup>1</sup> I have received two updates from DOT regarding its progress in correcting unsafe modifications to night vision equipment on emergency medical service helicopters. These problems were disclosed to me by Rand Foster, an Aviation Safety Inspector with the FAA's Flight Standards Service, Northwest Mountain Region in Renton, Washington. I am enclosing copies of DOT's updates, dated July 27, 2012, and December 5, 2012. See Enclosures A and B. Mr. Foster declined to provide comments on the updates.

**DOT's updates reflect that all of the 37 action plan items were complete as of September 2012. According to the updates, audit results "indicate a high degree of continued operational safety and compliance." It appears that the corrective actions initiated by DOT and FAA are proceeding as planned and that audit findings suggest that the modifications to emergency medical service helicopters are safe. Based on the representations in these updates, I am satisfied with the actions taken to correct safety problems.**

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 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).

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<sup>1</sup> We have received all of the updates requested from DOT in my May 8, 2012 letter to you. I have transmitted one of the updates to you, in OSC File No. DI-11-0747, concerning Foreign Facility Deviations in Puerto Rico. The remaining updates are under review by OSC.

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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).

In 2008, and again in 2010, Mr. Foster disclosed that modifications to hundreds of emergency medical service helicopters for a night vision imaging system did not comply with required specifications, making the instrumentation potentially difficult to read under certain conditions, both during daytime and nighttime operations. These helicopters are used nationwide by first responders. Further, Mr. Foster disclosed that when FAA learned of the problem, it still failed to implement a formal process to ensure that the helicopters were brought into compliance.

In 2008, Mr. Foster first reported to OSC the lack of FAA action on incorrect modifications. OSC referred the disclosures to then-DOT Secretary Mary E. Peters. An investigative report was due within 60 days; OSC granted DOT five extensions totaling more than one year, yet did not receive an investigative report. Given the serious nature of the safety allegations and the length of time that had passed, OSC transmitted the first disclosure to you and Congressional oversight committees in 2009, noting the Secretary's failure to submit a report.

Mr. Foster then reported to OSC in 2010 that FAA had still failed to adequately bring the helicopters into compliance. Mr. Foster disclosed that the modifications included filters that were improperly installed on instruments and radios in the helicopters, some of which significantly impaired the pilot's ability to read the instruments during daylight as well as night operations without night vision goggles. The installations also had reflections and incompatible light sources that interfered with the pilot's vision while using the goggles under emergency operation conditions.

The agency's report to OSC in response to the 2010 disclosures found that the helicopters were returned to service contrary to FAA policy and that there were "possible impacts to safety," with more than 50 erroneous field approvals performed by an FAA Aviation Safety Inspector. Moreover, of the 29 aircraft inspected as of the date of the report, all had non-compliances and/or non-conformances. Of the 278 findings of non-compliance, 51 (18%) were potential safety concerns. Notably, between the time of Mr. Foster's 2008 allegations to OSC and the subsequent re-referral of his disclosures in 2010, the number of helicopters returned to service with potentially non-compliant modifications more than doubled. As a result of the investigation following Mr. Foster's second disclosure in 2010, FAA put into place a comprehensive corrective action plan to address all night vision modified aircraft.

DOT provided the enclosed updates dated July 27, 2012, and December 5, 2012. The July update reports on FAA's progress in completing action items identified in the comprehensive corrective action plan. The update reflected that a total of 34 of the 37 action plan items were complete. Further, the Northwest Mountain Region and the Aircraft

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Certification Service Transport Airplane Directorate were coordinating a risk-based approach to guide completion of the three remaining interdependent action plan items. Additional monitoring and evaluation of the installer's performance was implemented to ensure successful completion of the remaining action items. To assess performance, a subset of supplemental type certificate projects was assigned to designees and audited by FAA personnel. The update states that "results to date assure continued operational safety." The December 5, 2012 update confirmed the initial audit results and indicated a "high degree of operational safety and compliance."

As stated in my May 8 letter, by law, I am charged with providing you and Congress a report on the resolution of disclosures. In this case, it appears that the corrective actions initiated by DOT and FAA are complete and audit findings suggest that the modifications to emergency medical service helicopters are safe. I am satisfied with actions taken to correct safety problems. OSC does not have a formal continuous oversight role; any further oversight action rests with the White House and Congress.

As required by law, 5 U.S.C. § 1213(e)(3), we have sent copies of DOT's updates to the Chairman and Ranking Member of the House Committee on Transportation and Infrastructure and the Chairman and Ranking Member of the Senate Committee on Commerce, Science and Transportation. We have also placed the updates and this letter in our public file, which is available online at [www.osc.gov](http://www.osc.gov), and closed our file in this matter.

Respectfully,



Carolyn N. Lerner

Enclosures