



*International Civil Aviation Organization*  
**Twelfth Meeting of the Regional Aviation Safety Group**  
**– Pan America (RASG-PA) Executive Steering Committee**  
**RASG-PA ESC/12**



Montego Bay, Jamaica, 14 to 15 March 2012

**Agenda Item 3: Status/update of RASG-PA Working Groups and Projects**  
**3.4 RASG-PA GSI-3 Protection of Safety Information**

**PROPOSAL FOR AMENDMENT TO THE AERONAUTICAL  
LEGISLATION IN ORDER TO PROTECT SAFETY INFORMATION SOURCES**

(Presented by the Secretariat)

SUMMARY	
This working paper presents background information and the status of the RASG-PA Project GSI-3.	
References:	
<ul style="list-style-type: none"><li>• ICAO Global Aviation Safety Plan (GSI-3) Efficient Reporting of Errors and Incidents</li><li>• ISSG Global Aviation Safety Roadmap (Focus Area 3) Impediments to Reporting of Errors and Incidents</li><li>• Draft RASG-PA GSI-3 Document: Proposal for Amendment to the Aeronautical Legislation in order to protect safety information sources</li></ul>	
<i>Strategic Objective</i>	<i>This working paper is related to Strategic Objective A: Safety</i>

**1. History**

1.1 As the result of a gap analysis completed in 2008 for the Pan American region, RASG-PA developed a project to focus on the Global Aviation Safety Plan, Global Safety Initiative #3 **“Effective Errors and Incidents Reporting.”** This RASG-PA project was initially titled GSI/3: **“Effective Flow of Hazard Information,”** and was established during the first RASG-PA meeting in Puntarenas, Costa Rica, November 2008. The project was later re-titled RASG-PA GSI/3, **“Protection of Safety Information.”**

1.2 The work programme that was developed included identification of legislative gaps, development of a model legislation framework, and conducting a workshop for regulators, industry and other institutions within States that could support the approval of legislative changes.

1.3 The initial stages of this project were made possible through RASG-PA funding received from the Boeing Company as well as in-kind support from COCESNA/ACSA, the Jamaican Civil Aviation Authority and IFALPA, who provided legal experts to develop the framework for the legislative model.

1.4 One of the strategies of GSI/3 urges States to introduce regulatory changes in their primary aviation legislation in order to support a “JUST CULTURE” promoting a voluntary reporting system and protecting the data collected for the purpose of improving safety.

1.5 RASG-PA agreed that developing a “**Model Proposal of Amendment to National Legislation**” would be one of the main initiatives of the GSI/3 project as a way of supporting States with the development of their own legislative changes.

## **2. Proposal for Amendment to the Aeronautical Legislation in Order to Protect Safety Information Sources**

2.1 Beginning in June of 2009, legal experts provided by COCESNA/ACSA, Jamaica and IFALPA began to draft a document titled, “Proposal of Amendment to Aeronautical Legislation in Order to Protect Safety Information Sources” as part of the RASG-PA GSI/3 project

2.2 In March of 2010, this draft document was distributed to States for review, and they were also asked to provide the status of its activities as agreed to during the RASG-PA/02 Meeting in November 2009, held in Bogota, Colombia.

2.3 The replies were limited but it was evident that many States had not progressed very far with regard to complying with the GASP GSI/3 initiative.

2.4 In June of 2010, as a result of comments from the RASG-PA ESC and conclusions from the ICAO High Level Safety Conference (HLSC), the “Proposal for amendment to the aeronautical legislation” was reviewed to improve the document and also to determine whether differences between information and data had been considered in the initial document.

2.5 The revised document was presented during the RASG-PA/03 Meeting in Punta Cana, Dominican Republic, October 2010. The Meeting agreed that additional time was required for additional stakeholder comment and it was agreed that comments would be accepted until January 2011.

2.6 During this comment period, several stakeholders advised that the review would take much longer than initially agreed to because of the complexity of the issues involved. The ESC agreed to extend the time frame until the parties could meet and discuss the project with respective legal representatives.

2.7 During the RASG-PA ESC/08 Meeting in Lima, Peru, March 2011, the ESC was advised by several ESC members that their respective legal departments had reviewed the document and could not support it in its current form. They supported the concept of the initiative, but in order to move forward they proposed an additional meeting with their legal department representatives and the drafters of the original document in order to create a draft that they could support.

2.8 The ESC supported this proposal, and the Secretary agreed to coordinate the meeting between Boeing, Airbus, IATA representatives and the original drafters of the document to review and modify the report as necessary. It was agreed that a clear agenda, expectations and timeline be established by all parties concerned prior to the meeting. The RASG-PA Secretary would coordinate a meeting between Boeing, Airbus and IATA representatives and project GSI/3 legal experts to redraft the legal framework guidance document for States, and Boeing, Airbus and IATA would provide specific comments/concerns and proposals for amendments to the legal framework guidance document.

2.9 During the July 2011 RASG-PA ESC teleconference the ESC representative for Boeing advised the ESC that the attorney who was reviewing the document had taken a leave of absence due to illness and that further review would be delayed until another attorney could be assigned.

2.10 During the RASG-PA ESC/11 Meeting in October 2011, the ESC requested that a timetable be developed indicating when the final review could be completed and requested that a final draft of the document be provided no later than March 2012.

2.11 On 23 February 2012, Airbus and Boeing legal representatives met at the ICAO NACC office, Mexico City, Mexico, with legal experts from RASG-PA GSI-3 project and ICAO RASG-PA representatives. The participants are listed in the summary of discussion (**Appendix A**). The purpose of the meeting was to discuss the “**Proposal for Amendment to the Aeronautical Legislation in Order to Protect Safety Information Sources.**”

2.12 Airbus and Boeing had provided comments (**Appendix B**) a few days prior to the meeting that highlighted their areas of concern and recommendations to enhance the document so all stakeholders could support a final version.

2.13 At the conclusion of the meeting all parties concurred with the comments provided and agreed to work on a timetable to revise and provide additional feedback to finalize the document.

2.14 It was agreed that the all parties would set the tentative date of 19 June 2012 to finalize the document and present a final version during the RASG-PA ESC/13 Meeting in Bogota, Colombia.

### **3. Next Steps**

3.1 RASG-PA legal representatives estimated that it would take a minimum of two weeks’ worth of work, including several conference calls with Airbus and Boeing legal representatives, to complete the review and revision of the project GSI-3 document. This does not include the time required for Airbus and Boeing legal representatives to provide additional comments.

3.2 The comments provided by Airbus and Boeing were very thorough and constructive in the manner of their proposed changes. However, due to the possible complexities of revising the document, the GSI-3 lead has requested that the review and revision be completed by all of the original drafters of the document. The RASG-PA legal expert from IFALPA has committed to working on the project but cannot travel outside of Mexico at this time.

3.3 The parties discussed the activities of the Safety Information Protection – Task Force (SIP-TF) of ICAO, and felt that it was very important that due to the scope of the work within the SIP-TF, and its possible impact on the GSI-3 project, RASG-PA remain involved as a member.

**4. Suggested Action**

4.1 The Twelfth Regional Aviation Safety Group – Pan America Executive Steering Committee Meeting is requested to:

- a) take note and comment on the information provided in this working paper;
- b) support the activity by approving the allocation of funding for the completion of the GSI-3 project; and
- c) approve the allocation of funding for the RASG-PA representation in the SIP TF of ICAO.

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## APPENDIX A



*International Civil Aviation Organization*  
Regional Aviation Safety Group – Pan America (RASG-PA)



**GSI-3 Project Meeting**  
ICAO NACC Regional Office  
23 February 2012

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### Summary of Discussion

#### **In Attendance:**

Mrs. Loretta Martin, ICAO NACC Regional Director and RASG-PA Secretary; Mr. Oscar Quesada, ICAO SAM Deputy Director; Mr. Eduardo Chacin, ICAO NACC Safety Officer; Mr. Adolfo Zavala, ICAO NACC ATM Officer; Ms. Sagrario Padilla, COCESNA/ACSA; Mr. Fernando Perfecto, IFALPA; Ms. Marva Gordon, Jamaica CAA General Counsel; Airbus: Mr. Bill Bozin, Mr. Todd Ptak and Chris Odell; Boeing: Tom McLaughlin and Ms. Allison Kendrick.

#### **Agenda Item 1: Opening**

1.1 Mrs. Loretta Martin opened the meeting by thanking all participants for their continued involvement in the RASG-PA GSI/3 project. Mrs. Martin noted that the commitment of the stakeholders to meet in the ICAO NACC Office, Mexico City, Mexico, reflected the commitment to enhance and finalize the model law document that has been prepared through the RASG-PA GSI/3 project.

1.2 Mrs. Martin requested that to the extent possible, participants focus on clarifying and resolving the comments provided by Airbus and Boeing, and develop a timeframe to complete the project and present to the RASG-PA ESC during June 2012 meeting.

#### **Agenda Item 2: Participant Introductions**

2.1 The meeting participants introduced themselves and their current and future involvement in the project.

#### **Agenda Item 3: Summary of Project – Status**

3.1 The participants were given a summary of how the project was developed, background of the project members, objectives and current status. As mentioned by the RASG-PA Secretary, emphasis was focused on completing the project in the shortest possible timeframe.

#### **Agenda Item 4: Stakeholder Input/Discussion**

4.1 Previous to the meeting, Airbus and Boeing provided specific comments on several issues that needed to be clarified in the model law document, along with specific resolutions for each issue. The participants discussed the comments, which included the following points:

- a) Distinction between accident investigation covered by the ICAO Annex 13 and routine use of safety information covered by the model law.
- b) Definition of the information subject to the model law
- c) Definition of the entities covered by the model law
- d) Exceptions allowing disclosure of safety information
- e) Comments on specific model law provisions

4.2 During the discussion of the comments provided, the participants agreed that the language in the document should use and maintain the same ICAO language as used in ICAO annexes to protect safety information. There was also agreement that the document was a little too broad and needed to be re-worded in several areas to narrow the scope to clarify the intent and to protect existing Annex rules.

4.3 At the conclusion of the meeting the participants were in agreement that the issues and points raised could be clarified in the model law and a new version could be drafted incorporating the suggested revisions and clarifications.

#### **Agenda Item 5: Project Next Steps – Timeline for Completion**

5.1 The parties agreed to a tentative timeline to redraft the model law and have a new draft completed and ready to be presented during the ESC meeting in Bogota, Colombia, during the third annual aviation safety summit

#### **Agenda Item 6: Other Matters**

6.1 The parties agreed to continue to collaborate in order to develop a new enhanced version of the model law.

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**Written Comments of Boeing and Airbus for  
RASG-PA GSI-3 Project Meeting on February 23-24, 2012**

Boeing and Airbus thank the ICAO Regional Aviation Safety Group – Pan America (“RASG-PA”) for the opportunity to provide input on the Report of the RASG-PA GSI/3.A Project, which includes a draft model law relating to the protection of safety information. We have identified four initial issues that need to be clarified in the model law. These issues are discussed below, as well as our recommended resolution of each. As we discuss the issues set forth below with you, Boeing, Airbus, or the RASG-PA may identify additional aspects of the law that require discussion, and we anticipate that the parties will work through such issues as they are identified.

**1. Distinction Between Accident Investigations Covered by ICAO Annex 13 and Routine Use of Safety Information Covered by the Model Law**

We support the current Annex 13 system relating to the disclosure of information collected or generated during the course of investigating accidents and serious incidents. This system is intended to allow investigators to collect the information necessary to identify the probable causes of an accident. We believe that accident investigators should be provided access to all information, whether safety information or otherwise, necessary to determine the probable causes of an accident. We would not support a model law that alters the current Annex 13 processes.

Although we understand that the intent of the authors of the model law was not to alter the existing Annex 13 rules, the model law could be read expansively to restrict the disclosure of safety information in accident or serious incident investigations. For instance, Article 11 of the model law could be read to relate to FDR data collected by Annex 13 investigators regarding an accident flight and to restrict its disclosure beyond the conditions set forth under Annex 13.

Therefore, we recommend that the model law explicitly exclude from its scope information collected in connection with accident and incident investigations conducted under ICAO Annex 13 or by States’ official investigation agencies (e.g., the United States National Transportation Safety Board).

**2. Definition of the Information Subject to the Model Law**

As currently written, the draft model law lacks clear definition of the information that is covered by the law and the information that is outside the scope of the law. Appropriately defining the material covered by the model law is a critical step in allowing us to understand and hopefully support the model law’s provisions. As a preliminary matter, the model law currently attempts to distinguish between information and data. (*See, e.g.*, p. 10, ¶ 5.3). This distinction is confusing and does not aid in clarifying what the model law is intended to accomplish. ICAO uses the term “safety information” in both Appendix E of Annex 13 and Resolution A 36-9. In these comments, we have used the ICAO terminology of safety information and we recommend that the model law do the same.

Also, it is important to define the types of safety information covered by the model law because, in our view, different types of information should be protected differently. This position is in accordance with ICAO guidance. Paragraph 3.2 of Appendix E of Annex 13 provides, “The

protection should be specific for each [safety data collection and processing system], based upon the nature of the safety information it contains.”

We recommend that the model law cover information from all forms of safety data collection and processing systems, including Safety Management Systems (“SMS”) and State Safety Programs (“SSP”), whether the information originates with operators, regulators, manufacturers, air traffic control agencies, or other actors in the aviation industry.

The current draft of the model law only seems to address safety information originating from operators and perhaps certain other entities, though this is inconsistent in the current text. Articles 5, 13, and 14 of the draft law all refer to operators. Article 5 also refers to “aeronautical service providers” participating in a SMS program accepted by the state, but the term is undefined in the model law. It is important to note that there are and will be sources of safety information beyond operators and their agents. For instance, manufacturers will implement similar reporting programs in the near future for design and manufacturing activities. Indeed, such reporting has already been made mandatory for European-based manufacturers. Safety information generated by other sources and other programs with similar objectives requires equal protection.

### **3. Definition of the Entities Covered by the Model Law**

The RASG-PA should also clarify whether the model law restricts disclosure only by regulatory bodies (the “aeronautical authority” in the language of the model law) or by anyone with access to safety information. The current draft of the model law is inconsistent on this point. For example, Article 7 appears to apply to disclosures only by a regulatory body while Article 10 arguably prevents disclosure by any entity. This distinction is important. If the restrictions apply only to the regulatory body, then the confidentiality provisions could be evaded simply by directing subpoenas or other judicial demands for information to the entity that first reported the information or to other entities that received the information.

We support restrictions on disclosure by any entity, whether a regulator, an individual or organization reporting the safety information, or any third party who gains access to the information. The goal is to encourage open reporting of safety information. That goal is frustrated by inappropriate disclosure whether the disclosure is by regulators, operators, or others.

### **4. Exceptions Allowing Disclosure of Safety Information**

The fourth basic issue to be addressed is the exceptions to be placed on the principle of confidentiality. In other words, when should safety information be disclosed?

#### **a. Principles of Confidentiality and Protection of Safety Information**

We are concerned that the basic principles of the draft model law appear inconsistent with fundamental ICAO principles as found in Resolution A 36-9 and Appendix E of Annex 13. “It is not the purpose of protecting safety information to interfere with the proper administration of justice.” Annex 13, Appendix E, ¶ 2.2. “National laws and regulations protecting safety information should ensure that a balance is struck between the need for the protection of safety



information in order to improve aviation safety, and the need for the proper administration of justice.” *Id.* ¶ 2.3. ICAO contemplates the use of safety information in a variety of proceedings, provided that suitable safeguards are employed. *Id.* ¶ 3.5.

We recommend that the model law clearly state that it is intended to protect against the inappropriate use of safety information. As defined in Appendix E of Annex 13, inappropriate use is:

the use of safety information for purposes different from the purposes for which it was collected, namely, the use of the information for disciplinary, civil, administrative and criminal proceedings against operational personnel, and/or disclosure of the information to the public.

*Id.* ¶ 1.5.b. We recommend importing this definition into the model law.

Notably, ICAO defines inappropriate use only in the context of proceedings against “operational personnel,” or where safety information is publicly disclosed. *Id.* ¶ 1.5.b. ICAO’s guidance aims to prevent use of safety information against individuals, not against organizations. Also, ICAO guidance allows use of safety information in civil proceedings. *Id.* ¶ 3.5. Yet, the comparable language in the prefatory materials to the model law, § 4.20, does not include civil litigation in its list, and § 5.9 seems to indicate that safety information should not be used in any legal proceeding. Nothing in Appendix E to Annex 13 counsels against the use of safety information in, for instance, civil litigation allocating responsibility for an accident between an operator and a manufacturer provided that the safety information is shielded from public disclosure. We recommend that the model law track Annex 13’s provisions.

#### **b. Exceptions Justifying Disclosure of Safety Information**

ICAO currently allows disclosure under limited exceptions. ICAO permits disclosure where:

an appropriate authority considers that circumstances reasonably indicate that the occurrence may have been caused by conduct with intent to cause damage, or conduct with knowledge that damage would probably result, equivalent to reckless conduct, gross negligence or willful misconduct.

*Id.* ¶ 4.b.; *see also id.* ¶ 4.a. We support disclosure in these rare circumstances.

ICAO also allows disclosure of safety information where an appropriate authority determines that the release of the information is necessary for the proper administration of justice and that the need for release of the specific safety information at issue outweighs the broader need for confidentiality of safety information. *Id.* ¶ 4.c.

We also support disclosure in these instances, so long as appropriate procedures are in place to ensure review by judicial authorities and to prevent public disclosure. Relevant safety information should be available to courts and parties in civil litigation arising from an accident in limited circumstances and under controlled conditions protecting the information from public disclosure.

The model law's exceptions allowing disclosure of safety information do not track ICAO guidance. Importantly, there is no general exception in the model law allowing disclosure where the release of information is necessary for the proper administration of justice and the need for information outweighs the interest in confidentiality. We recommend including such an exception.

Moreover, the model law's exceptions are inconsistently applied. Beginning with Articles 7 and 10, it is unclear from the language of the model law whether these are three independent conditions (disclosure if a *or* b *or* c) or three dependent conditions (disclosure if a *and* b *and* c). Assuming that they are independent conditions, these articles appear to allow disclosure of information for use in any criminal proceeding, even for simple negligence, but do not allow disclosure in connection with any civil proceeding, even in cases involving willful misconduct.

The specific language of the exceptions also raises questions as to their interpretation. The first exceptions in these two articles are almost identical. Yet Article 7 refers to information that "might be necessary" for a criminal investigation while Article 10 refers to information that "could be needed." Assuming this is not a translation issue, the purpose and meaning of this difference are unclear. As to the second exceptions in these two articles, the language is difficult to understand. What is the distinction between "information" and "facts"? And, does this mean that "facts" contained in SMS reports can always be disclosed, regardless of the situation? Finally, these articles seem to allow the use of safety information in administrative proceedings relating to the cancellation, suspension, or rejection of licenses or certificates, but not other regulatory enforcement actions. The reason for this distinction is unclear.

Turning to Article 18, voluntarily reported information is treated differently than other types of safety information. For instance, the exception for criminal proceedings is removed and disclosure is now allowed in any instance of willful misconduct or simple negligence. The purpose of the different language is unclear. As a matter of public policy, voluntary reporting of safety information should be encouraged and protected. We recommend that voluntarily reported information be given equal protection, if not superior protection, to other forms of safety information.

Also, in Article 18, the issue of disclosure to Annex 13 investigations is broached for the first time. Assuming that this exception intends to allow accident investigators access to voluntarily reported information, why are accident investigators given access to only this information, but not to other types of safety information? We believe accident investigators should have access to all safety information relevant to determination of the probable causes of an accident.

We recommend that the exceptions in the model law allowing disclosure of safety information should more closely track the exceptions identified by ICAO in Appendix E to Annex 13. Specifically, we support prohibiting the use of safety information against individuals who report the information, subject to the ICAO exceptions. Otherwise, we recommend that (1) accident investigators be allowed access to all relevant safety information, (2) parties to civil litigation arising from accidents be given access to the same information made available to the official accident investigators, and (3) parties to civil litigation be allowed access to other safety information, subject to judicial safeguards, where the release of information is necessary for the proper administration of justice and where the need for disclosure outweighs the interest in

confidentiality. Other approaches could lead to incorrect probable cause determinations and unfair judicial allocations of fault for accidents. This could reduce aviation safety and interfere with the proper administration of justice.

As a final note, we recommend that the prefatory materials include an admonition to the member states that the model law's provisions should be thoughtfully adapted to that state's laws. For instance, the term "gross negligence" has different meanings and consequences in different states. We will be happy to provide examples of this issue when we meet to discuss the model law. But the key point is that the exceptions allowing disclosure should be tailored appropriately to each state's legal system.

## **5. Comments on Specific Model Law Provisions**

In addition to the four fundamental issues discussed above, we are also concerned about several specific provisions of the draft model law. We focus for now on a few examples.

As one example, the scope of Article 21 is unclear. The language appears to imply that reporting individuals are prohibited from testifying regarding an incident that they report, even if the incident is discovered independently of the safety information. If this is the intended effect, it is unclear why this evidentiary bar furthers the broader goals of aviation safety and the proper administration of justice.

As another example, it is unclear whether Articles 13 through 15 allow the model law's provisions to be replaced by contractual agreements negotiated between regulators and operators, at least with respect to data captured by flight data recorders. We do not understand why allowing operators (or other entities) to negotiate different rules for the disclosure of FDR data is desirable.

A separate issue with respect to Articles 13 through 15 is whether these provisions supplant the rules for accident flight data recordings under Annex 13. As described above, we support the current Annex 13 processes and would not advocate replacing those rules with the model law's provisions. We also would not want these provisions to be interpreted in such a way as to bar an operator who has entered into this type of agreement from disclosing FDR data to the relevant airframe or component part manufacturer.

As a final example, the wording in Article 11 is vague, as it does not clarify whether the "action" or "procedure" therein is limited to disciplinary or regulatory enforcement hearings, or whether it includes all forms of civil and criminal proceedings.

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Again, Boeing and Airbus thank you for the opportunity to provide comments to the model law. We look forward to discussing these issues with the RASG-PA legal team.