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Focusing on ADHD: A Second Look at the FAA's Ban on ADHD Medication in the Cockpit

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**FOCUSING ON ADHD: A SECOND LOOK AT THE FAA’S
BAN ON ADHD MEDICATION IN THE COCKPIT**

Baine Sellers*

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I. INTRODUCTION

HEAD IN THE CLOUDS, lost in a daydream. Most airline passengers want their pilots' attention on critical data such as airspeed and altitude during final approach. But inattention is a common culprit in airline crashes.¹ Because of this fact, it would make sense that the Federal Aviation Administration (FAA) would want to do everything possible to help pilots maintain attention; instead, it has implemented policies that have the opposite effect. Pilots with attention-deficit hyperactivity disorder (ADHD) are threatened with the possibility of losing their certification if they disclose their condition. And if these pilots take medication to treat their ADHD, they are almost guaranteed to face the same result—especially because required drug testing will likely uncover their use of the medication. This system creates a dangerous incentive for pilots with ADHD to hide their condition and to continue flying without taking medication to treat the condition.

ADHD is a neurological disorder “associated with severe inattention, hyperactivity and impulsivity that interfere with an individual’s ability to function in school, at work or in social settings.”² People with ADHD tend to be forgetful, make careless mistakes, and have difficulty focusing.³ However, certain amphetamine-based medications, such as Adderall, have proven to be effective at treating the symptoms of ADHD.⁴

Unfortunately for people suffering from this condition, ADHD and its treating medications are usually disqualifying conditions for a medical certificate—an FAA certification of

¹ See Paul Payne, *Study: Gender Differences in Plane Crashes*, ABC NEWS (May 19, 2001), <http://abcnews.go.com/US/story?id=93264&page=1>.

² JANE TRAN TESORO & COLL. OF PSYCHIATRIC & NEUROLOGICAL PHARMACISTS, NAT’L ALLIANCE ON MENTAL ILLNESS, ADDERALL (AMPHETAMINE) 2 (2007), *available at* <http://www.namihelps.org/assets/PDFs/fact-sheets/Medications/Adderall.pdf>.

³ See *id.* ADHD is divided into three categories: predominantly inattentive type (characterized by a lack of ability to sustain attention), predominantly hyperactive-impulsive type (characterized by an inability to sit still), and combined type (characterized by a combination of the symptoms of the previous two categories). Brian Krans, *Difference Between ADD and ADHD*, HEALTHLINE (June 29, 2010), <http://www.healthline.com/health/add-adhd-attention-deficit-difference-between-add-adhd>. Predominantly inattentive type ADHD was previously known as “attention deficit disorder,” or “ADD,” and is still sometimes referred to as such. See *id.*

⁴ Tangu Sichilima & Michael J. Rieder, *Adderall and Cardiovascular Risk: A Therapeutic Dilemma*, PAEDIATRICS & CHILD HEALTH 193 (Mar. 2009), *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690554/>.

physical fitness required for nearly all pilots⁵—which discourages pilots from being honest about an ADHD diagnosis and receiving treatment. Understandably, the FAA does not want distracted pilots behind the stick, drifting off into daydreams while holding the lives of passengers in their hands. But surely a pilot who has his symptoms under control through the use of medication will be allowed to fly, right? Wrong. The FAA has an almost complete ban on amphetamines, including drugs that have proven successful in treating ADHD.⁶ While the agency has begun to shift its ideology in recognition of the possible safety improvements by encouraging the treatment of other mental conditions through medication,⁷ it remains wary of the idea of allowing the use of ADHD medications.⁸

Part II of this comment explores the background and the history concerning the web of Federal Drug Administration (FDA) regulations that are of concern to pilots with ADHD, including regulations governing the process of obtaining an FAA airman medical certificate; the process of “self-grounding” and “self-certification” through which pilots are expected to determine whether they are fit to fly on a day-to-day basis; and drug testing of certain classes of pilots. Part II also discusses the historical use of amphetamines in military aviation.

Part III discusses the current state of the regulations in this area first by looking closely at a decision by the FAA and National Transportation Safety Board (NTSB) in denying the medical certificate of a pilot who was taking Adderall, a common amphetamine-based ADHD medication, to treat his ADHD symptoms.⁹ Part III then looks at recent changes in the FAA’s policy regarding antidepressants—another type of psychotropic drug used to treat mental disorders.

Finally, Part IV critically examines some of the arguments against the use of amphetamines in aviation. Part IV then describes some of the negative consequences that may arise from the current policy, including the creation of an incentive for pi-

⁵ See 14 C.F.R. §§ 67.107, 67.113, 67.207, 67.213, 67.307, 67.313 (2013); Tyghe L. Nielsen (*Nielsen II*), N.T.S.B. Order No. SM-4801, 2008 WL 1913977, at *1 (Apr. 16, 2008).

⁶ See Pilot Med. Solutions, Inc., *FAA Accepted Medications*, LEFT SEAT, <http://www.leftseat.com/medcat1.htm> (last updated Dec. 12, 2012).

⁷ Shirley S. Wang & Melanie Trotman, *Depressed Pilots Can Fly on Medication, FAA Decides*, WALL ST. J., Apr. 3, 2010, <http://online.wsj.com/article/SB10001424052702304871704575159740692643072.html>.

⁸ See Pilot Med. Solutions, Inc., *supra* note 6.

⁹ *Nielsen II*, 2008 WL 1913977, at *1.

lots to leave their ADHD untreated, and possible third-party liability in the event of an accident involving a pilot with undisclosed ADHD. This Part concludes by recommending a new FAA policy on ADHD medication similar to the current FAA policy on antidepressants.

II. BACKGROUND AND FAA REGULATION OF AMPHETAMINE MEDICATIONS IN AVIATION

The FAA has decided that stimulant ADHD medications are unsafe for use by airmen.¹⁰ In fact, the FAA expects pilots taking such medication or diagnosed with ADHD between medical certification examinations to ground themselves voluntarily.¹¹ Moreover, while the FAA normally trusts pilots to disclose medical conditions and medications they are taking,¹² commercial and air transport pilots are drug tested for amphetamines, thus practically assuring that they will not take these ADHD medications.¹³

This is not to say that the use of amphetamine-based medications is unheard of in aviation; in fact, many may be surprised to learn that these medications have been used in military aviation for decades.¹⁴

A. FAA MEDICAL CERTIFICATION PROCESS

Congress passed the Federal Aviation Act of 1958 (the Act) to promote aviation and maintain aviation safety standards.¹⁵ Recodified in Title 49 of the U.S. Code, the Act empowers the FAA to require that a pilot receive a medical certificate from a designated Aviation Medical Examiner (Examiner) prior to obtaining any pilot certificate other than a sport pilot certificate.¹⁶

¹⁰ See *id.*

¹¹ See 14 C.F.R. § 61.53(a) (2013); Ian Blair Fries, *Medications and Flying*, FLIGHT TRAINING (Apr. 2007), http://flighttraining.aopa.org/magazine/2007/Apr./200704_Features_Medications_and_flying.html.

¹² J. Mac McClellan, *The FAA's Health Guarantee*, LEFT SEAT (Jan. 13, 2011), <http://macsblog.com/2011/01/the-faa's-health-guarantee-2/>.

¹³ See discussion *infra* Part II.C; see also 14 C.F.R. § 120.1.

¹⁴ U.S. DEP'T OF NAVY, MANUAL NAVMED P-6410, PERFORMANCE MAINTENANCE DURING CONTINUOUS FLIGHT OPERATIONS: A GUIDE FOR FLIGHT SURGEONS 8 (Jan. 1, 2000), available at <http://www.med.navy.mil/directives/Pub/6410.pdf>.

¹⁵ Aircraft Owners & Pilots Ass'n, *Pilot's Guide to Medical Certification*, FLIGHT TRAINING, <http://flighttraining.aopa.org/students/presolo/special/medical.html> (last visited Jan. 2, 2013).

¹⁶ FAA, GUIDE FOR AVIATION MEDICAL EXAMINERS 6, 16–17, available at http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/

Although the FAA has not established a formal list of approved or restricted medications, many medications and their underlying conditions may be disqualifying through catch-all provisions in Part 67 of the Federal Aviation Regulations (FARs).¹⁷ These provisions disqualify a pilot if he is taking a medication or has a mental condition that the Federal Air Surgeon finds, “based on the case history and appropriate, qualified medical judgment relating to the [mental condition or medication] involved,” either makes the pilot incapable of performing his duties safely or may reasonably be expected to prevent the pilot from performing those duties.¹⁸ Under these regulations, the Examiner considers two components of the examination process in deciding whether to issue a certificate: (1) a physical examination similar to a standard, annual physical examination at a doctor’s office; and (2) health history information provided by the pilot on his medical application form (Form 8500-8).¹⁹

While ADHD is not one of the fifteen listed disqualifying mental conditions,²⁰ the Examiner is required to defer a pilot’s application to the FAA to make a final decision if the pilot discloses that he has ADHD.²¹ Due to the bureaucratic nature of the pilot certification process, a pilot whose application is deferred may not receive an initial response from the FAA for months.²²

Furthermore, the FAA typically prohibits the use of any medications that act on the central nervous system.²³ Therefore, the agency normally does not allow the use of medication for

guide/media/guide.pdf (last updated Jan. 3, 2013); *see also* 49 U.S.C. §§ 40113(a), 44701–44703, 44709 (2006) (current certification provisions). A valid U.S. driver’s license may take the place of a medical certificate for a pilot to obtain a sport pilot certificate. FAA, STUDENT PILOT CERTIFICATE PROCEDURES AND SPORT PILOT ENDORSEMENTS 1, *available at* http://www.faa.gov/licenses_certificates/airmen_certification/sport_pilot/media/student_pilot%20guidance.pdf (last updated Mar. 12, 2010).

¹⁷ *See* 14 C.F.R. §§ 67.107, 67.207, 67.307 (general mental disqualification); *id.* §§ 67.113, 67.213, 67.313 (general medication disqualification); Pilot Med. Solutions, Inc., *supra* note 6.

¹⁸ 14 C.F.R. § 67.213; *see also id.* §§ 67.107, 67.113, 67.207, 67.307, 67.313.

¹⁹ *Exam Techniques and Criteria for Qualification*, FAA, http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/app_process/exam_tech/ (last updated May 25, 2012); Gary Crump, *Exam Prep*, AOPA MED. SENSE (May 18, 2011, 7:46 PM), <http://blog.aopa.org/medsense/?cat=8>.

²⁰ 14 C.F.R. §§ 67.107, 67.207, 67.307.

²¹ FAA, GUIDE FOR AVIATION MEDICAL EXAMINERS, *supra* note 16, at 126, 133.

²² Aircraft Owners & Pilots Ass’n, *supra* note 15.

²³ *Id.*

ADHD²⁴ and will almost always deny the application of a pilot who has admitted to taking such a medication.²⁵

Pilots who disclose the disorder must cease using any ADHD medications and, after at least ninety days off the medication, undergo a neuropsychological evaluation to ensure that they do not display ADHD symptoms before the FAA will grant a medical certificate.²⁶ This testing is typically expensive, and the pilot must foot the bill.²⁷ Furthermore, these “special issuance authorizations” have a time limitation—often twelve months—and the FAA may withdraw the special issuance any time it “sees evidence of an ‘adverse’ change in the condition.”²⁸ The time limitation is “determined by the type of medical condition and the perceived risk of incapacitation that could result from the condition.”²⁹ At the end of this period, the pilot may be required to undergo further time-consuming and costly testing to renew his certificate.³⁰ Even after jumping through these hoops, “[a]dditional limitations may be placed on the operational privileges of the certificate, such as limiting a 2nd class medical holder to carrying passengers for hire only when part of a qualified two-pilot crew.”³¹

In other words, a pilot who exhibits ADHD symptoms serious enough to require medication—or at least an honest one who chooses to report the condition to an Examiner—might just have to kiss his license goodbye.

B. “SELF-CERTIFICATION” AND “SELF-GROUNDING”

Once the FAA issues a medical certificate, a pilot generally must ground himself if any disqualifying medical issues arise.³² FAR 61.53 prohibits a medically certified pilot from acting “as pilot in command, or in any other capacity as a required pilot flight crewmember,” when the pilot “[k]nows or has reason to

²⁴ See Tyghe L. Nielsen (*Nielsen II*), N.T.S.B. Order No. SM-4801, 2008 WL 1913977, at *1 (Apr. 16, 2008).

²⁵ Pilot Med. Solutions, Inc., *supra* note 6. Pilots using Ritalin have been granted exceptions (with restrictions) in very rare circumstances. *Id.*

²⁶ *Medication Class—Attention Deficit Disorder Medications*, AVIATION MED. ADVISORY SERV., <http://aviationmedicine.com/medications/index.cfm?fuseaction=medicationDetail&medicationID=15> (last visited Jan. 20, 2013).

²⁷ Aircraft Owners & Pilots Ass’n, *supra* note 15.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Fries, *supra* note 11.

know of [a] medical condition that would make [him] unable to meet the requirements for [a] medical certificate.”³³ Similarly, a pilot with only a sport pilot certificate obtained with a U.S. driver’s license must ground himself if he knows or should know of a medical condition that would make him “unable to operate the aircraft in a safe manner.”³⁴ Furthermore, FAR restrictions on all classes state that pilots may not act as crewmembers of civil aircraft “[w]hile using any drug that affects the person’s faculties in any way contrary to safety.”³⁵

This creates a system in which each pilot is certified periodically by the Examiner and FAA but is expected to “self-certify” every other day during the life of his medical certificate.³⁶ Because this system essentially uses the same guidelines that the Examiner and FAA use to determine whether to issue a medical certificate in the first place, the first step is to determine whether a medical condition would be cause for disqualification for a medical certificate.³⁷ Therefore, a pilot would likely be required to ground himself if, between medical certifications, he was diagnosed with ADHD.³⁸ The second step is to determine whether any medications used to treat the condition would be disqualifying; thus, a pilot would certainly need to ground himself if he began taking any amphetamines used to treat ADHD.³⁹

C. FAA DRUG TESTING⁴⁰

Although federal law requires pilots seeking medical certification to disclose the use of any medications—whether prescription or non-prescription⁴¹—the FAA medical examination does not include a drug test.⁴² However, this does not necessarily mean that any less-than-scrupulous pilots who are taking a medication but fail to disclose this fact or ground themselves will get away with it. The FAA generally requires that commercial and

³³ 14 C.F.R. § 61.53(a) (2013).

³⁴ *Id.* § 61.53(b)–(c).

³⁵ *Id.* § 91.17(a) (3).

³⁶ McClellan, *supra* note 12.

³⁷ *See* Fries, *supra* note 11.

³⁸ *See id.*; discussion *supra* Part II.A.

³⁹ *See* Fries, *supra* note 11.

⁴⁰ Note that this Part is not meant to provide an exhaustive analysis of FAA drug testing policies, but rather is a brief overview of issues in FAA drug testing relating to ADHD medications.

⁴¹ *See* FAA, GUIDE FOR AVIATION MEDICAL EXAMINERS, *supra* note 16, at 32.

⁴² Pilot Med. Solutions, Inc., *supra* note 6.

air transport pilots be drug tested by their employers.⁴³ These pilots and other airline industry employees who perform “safety-sensitive function[s]” are tested for five substances, including amphetamines, and thus will likely be exposed if taking many of the medications commonly used to treat ADHD.⁴⁴ There are six types of drug testing that employers are required to perform on pilots: pre-employment drug testing; random, annual drug testing of at least half of all safety-sensitive employees; post-accident drug testing; drug testing based on reasonable cause; drug testing of employees returning to duty after refusing a previous drug test; and follow-up drug testing of employees who have returned to duty after refusing or failing a previous drug test.⁴⁵

The ramifications for a pilot found to be using amphetamine-based ADHD medications could be enormous. An employee who engages “in prohibited drug use during the performance of a safety-sensitive function” or who has two verified positive results on drug tests is permanently disqualified from performing that safety-sensitive function.⁴⁶ Many employers will even terminate employment after the employee’s first failed drug test.⁴⁷ At the very least, the first failed drug test will probably lead to a temporary suspension of a pilot’s ability to fly commercially.⁴⁸

Refusal to take a drug test may result in similar sanctions, including (1) denial of an application for any certificate, rating, or authorization issued by the FAA under Part 61 for a period of up to one year after the refusal; and (2) suspension or revocation of any certificate, rating, or authorization issued under Part 61.⁴⁹ Furthermore, even though pilots certified as sport, recreational, or private pilots normally are not subject to drug tests, they

⁴³ 14 C.F.R. § 120.1 (2013) (“This part applies to the following persons: (a) All air carriers and operators certificated under part 119 of this chapter authorized to conduct operations under part 121 or part 135 of this chapter, all air traffic control facilities not operated by the FAA or by or under contract to the U.S. military; and all operators as defined in 14 CFR 91.147.”).

⁴⁴ *Id.* § 120.107. Safety-sensitive functions include the following: flight crew member duties, flight attendant duties, flight instruction duties, aircraft dispatcher duties, aircraft maintenance and preventative maintenance duties, ground security coordinator duties, aviation screening duties, and air traffic control duties. *Id.* § 120.105.

⁴⁵ *Id.* § 120.109.

⁴⁶ *Id.* § 120.111.

⁴⁷ ABX AIR, INC., ANTI-DRUG AND ALCOHOL MISUSE PREVENTION POLICY AND PROGRAMS 11 (Dec. 15, 2011), available at <http://www.myabx.com/new/download/ABX-drug-and-alcohol-handbook-2011-12-15.pdf>.

⁴⁸ See 14 C.F.R. § 120.113(d).

⁴⁹ See *id.* § 120.11.

would be required to take drug tests if, for example, they applied for a job maintaining commercial aircraft.⁵⁰ If a sport, recreational, or private pilot refused to take such a drug test, that pilot would be subject to the same sanctions as a commercial pilot, resulting in denial of future certificates or the revocation or suspension of any current ones.⁵¹ This system of drug testing and sanctions would certainly make many pilots think twice before taking an ADHD medication.

D. USE OF “GO-PILLS” IN MILITARY AVIATION

While amphetamine use has always been frowned upon in civil aviation, it may surprise many that amphetamine use has long been a common, sanctioned practice in military aviation and in the rest of the military.⁵² The practice dates back to World War II, during which both British and German pilots used amphetamines to prevent fatigue and maintain pilot performance.⁵³ The U.S. Navy and Air Force adopted this practice and began making amphetamines available to aviators during the Vietnam War.⁵⁴

Fatigue is a real, documented danger in the cockpit. Military pilots may be expected to fly missions stretching thousands of miles,⁵⁵ often at night. This subjects pilots to high levels of fatigue and can often create disastrous results: “The Air Force alone has recorded nearly 100 fatal crashes due to pilot fatigue, one reason the surgeons general of the various branches of the armed forces have been open to new ways to keep flight crews well rested and alert.”⁵⁶

To this date, the U.S. military still issues amphetamines such as dextro-amphetamine (Dexedrine)—often referred to as “go-pills”⁵⁷—to reduce fatigue and maintain performance during extended and continuous flight operations.⁵⁸ Branches of the military issue pilots a small dose of Dexedrine—generally 5 mil-

⁵⁰ See *id.* § 120.105.

⁵¹ *Id.* § 120.11.

⁵² See U.S. DEP’T OF NAVY, *supra* note 14, at 8.

⁵³ See *id.* at 1, 8.

⁵⁴ *Id.* at 8.

⁵⁵ Jon Bonné, “Go Pills”: A War on Drugs?, MSNBC.COM (Jan. 9, 2003), http://www.msnbc.msn.com/id/3071789/ns/us_news-only_on_msnbc_com/t/go-pills-war-drugs/.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ U.S. DEP’T OF NAVY, *supra* note 14, at 8.

ligrams.⁵⁹ Using amphetamines to counteract fatigue in the cockpit has proven effective.⁶⁰ Amphetamines' "impact on neurotransmitters increases consciousness and can help stabilize sleep patterns."⁶¹ Studies and reports from Air Force pilots have shown that these small doses increase cognitive performance and maintain alertness, all while avoiding most of the side effects related to using amphetamines.⁶²

The military relies on a policy of self-regulation amongst its pilots.⁶³ While the medication is issued to the aviators before flights, responsibility for the use of Dexedrine is delegated to the pilots themselves.⁶⁴ The decision of when to take the pills, or whether to take them at all, is left to the pilots, who then have close follow-ups with the flight surgeon after missions.⁶⁵ As the Navy has explained, "If the operational tempo is intense enough to generate significant fatigue, then an overly restrictive medication protocol will probably lose its utility due to lack of flexibility. Aviators, by their nature, are efficient at using tools given to them to achieve specific goals. Anti-fatigue medications are no exception."⁶⁶ Because issuance of large amounts of amphetamines at one time could create a potential for overuse and abuse of the medication, the flight surgeon limits the amount of Dexedrine issued to what is required for one or two missions.⁶⁷

The military's use of these "go-pills" came under attack after a friendly fire incident in 2002 in which two Air Force fighter pilots killed four Canadian soldiers in a mistaken bombing in Afghanistan.⁶⁸ The pilots mistook weapons flashes from a group of Canadians conducting nighttime live-fire exercises for hostile fire.⁶⁹ The fighter pilots failed to wait for clearance to fire and

⁵⁹ See *id.*

⁶⁰ See Bonné, *supra* note 55.

⁶¹ *Id.*

⁶² U.S. DEP'T OF NAVY, *supra* note 14, at 8-9.

⁶³ *Id.* at 9.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Lianne Hart, *Air Force Rushes to Defend Amphetamine Use*, L.A. TIMES, Jan. 18, 2003, <http://www.theage.com.au/articles/2003/01/17/1042520778665.html>.

⁶⁹ David M. Halbfinger, *Charges Are Dropped in Bombing of Allies*, N.Y. TIMES, June 20, 2003, <http://www.nytimes.com/2003/06/20/us/charges-are-dropped-in-bombing-of-allies.html?ref=williamumbach>.

dropped their bombs.⁷⁰ Seconds afterward, the pilots were denied clearance to fire.⁷¹

What sparked the debate over the use of amphetamines was a claim by the pilots' lawyers that the pilots' judgment was impaired by the Dexedrine they were taking.⁷² The Air Force disputed these claims, asserting that the use of Dexedrine by pilots is safe and that it "'has never been associated with a proven adverse outcome in a military operation.'"⁷³ The Air Force ultimately dropped the charges against the two pilots,⁷⁴ so whether the stimulants actually did impair the pilots' judgment was never settled.

III. RECENT DEVELOPMENTS RELATING TO THE FAA'S REGULATION OF MEDICATIONS

In 2008, the NTSB upheld the denial of an airman medical certificate in a case that illustrates the FAA's and NTSB's hard-line approach to stimulant ADHD medications.⁷⁵ Two years later, however, the FAA announced its new policy on antidepressants in a move that may provide hope for pilots with ADHD that the FAA is beginning to head in a new direction when it comes to the treatment of mental conditions.⁷⁶

A. NTSB SUPPORTS FAA'S HARD-LINE APPROACH TO ADDERALL IN THE CASE OF TYGHE L. NIELSEN

The NTSB's decisions in the *Nielsen* cases perfectly illustrate how the FAA's regulation of ADHD and its treating medications works to prevent aviators from flying with ADHD—even when their symptoms are treatable—and demonstrate the government's black-and-white attitude on the subject of ADHD medication in the cockpit.⁷⁷

Tyghe Nielsen was a physician in the second year of his residency in family medicine at the time of his first hearing with the

⁷⁰ Hart, *supra* note 68.

⁷¹ *Id.*

⁷² *See id.*

⁷³ *Id.*

⁷⁴ Halbfinger, *supra* note 69.

⁷⁵ Tyghe L. Nielsen (*Nielsen II*), N.T.S.B. Order No. SM-4801, 2008 WL 1913977, at *1 (Apr. 16, 2008).

⁷⁶ Wang & Trotman, *supra* note 7.

⁷⁷ *Nielsen II*, 2008 WL 1913977, at *1.

NTSB.⁷⁸ Nielsen received his pilot's license from the FAA in November 2004.⁷⁹ But the FAA suspended his medical certificate and refused to issue him a new third-class medical certificate upon learning that he had begun taking Adderall to treat ADHD.⁸⁰

At the end of his second year of medical school, Nielsen failed the first round of his medical board exams.⁸¹ After struggling with every round of tests and performing poorly despite his high level of intelligence, Nielsen tried one of his brother's Adderall tablets and found that it improved his comprehension and ability to recall things he had read.⁸² In 2004, sometime after receiving his medical certificate, Nielsen was diagnosed with ADHD.⁸³ Nielsen's physician prescribed him 20 milligrams of Adderall XR, and Nielsen subsequently passed the test with much higher scores than before.⁸⁴

At the time of the first hearing, Nielsen had been on a dose of 20 milligrams of Adderall, twice daily, for two years.⁸⁵ There were some weekends during which he had not taken his medication and experienced the same ADHD symptoms that he had prior to treatment, including irritability and difficulty with reading comprehension.⁸⁶ While on the medication, however, these symptoms were alleviated.⁸⁷ The Adderall gave him "a sense of quieting and allow[ed] him to focus on whatever he need[ed] to do."⁸⁸ The medication improved his ability to focus and to retain information without having to re-read material that he had just read.⁸⁹ Furthermore, Nielsen experienced no side effects from the medication except for occasional trouble falling asleep.⁹⁰ Nielsen did not want to test the severity of his ADHD by abstaining from taking his medication because he thought it might affect his decision making with his patients.⁹¹

⁷⁸ Tyghe L. Nielsen (*Nielsen I*), N.T.S.B. Order No. SM-4801, 2007 WL 4116180, at *1 (Oct. 18, 2007), *aff'd*, 2008 WL 1913977 (Apr. 16, 2008).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at *1, *4.

⁸⁴ *Id.* at *1-2.

⁸⁵ *Id.* at *2.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

When Nielsen applied to renew his third-class medical certificate, he disclosed his use of Adderall on his application.⁹² Upon request by the FAA, Nielsen underwent a psychological evaluation.⁹³ The neuropsychologist found that, when not using his medication, “Nielsen performed at or above average on most tasks administered to him across all neurocognitive domains assessed.”⁹⁴ Nielsen “demonstrated intact intellectual abilities, processing speed, language function, executive functioning and fine motor skills” but struggled with fluctuations in his ability to concentrate.⁹⁵ The neuropsychologist concluded that, despite Nielsen’s inability to concentrate, his neurocognitive abilities were “at least at a level sufficient to allow him to pilot safely and operate an aircraft.”⁹⁶

The FAA also required Nielsen to undergo a psychiatric evaluation.⁹⁷ The psychiatrist diagnosed Nielsen with ADHD and “recommended that [Nielsen] continue taking Adderall indefinitely,” but “saw no reason why [Nielsen] should be denied a pilot’s license.”⁹⁸ The psychiatrist stated that Nielsen had never been treated for a seizure or mental disorder, nor had he ever had an incidental seizure or lost consciousness.⁹⁹

Despite the recommendations of these two physicians, the Federal Air Surgeon (Air Surgeon) denied Nielsen’s application, stating that Nielsen was ineligible “because of a history of Attention Deficit Disorder requiring a disqualifying medication, Adderall, for control.”¹⁰⁰ The Air Surgeon also considered granting a special issuance medical certificate but determined that Nielsen’s ADHD would prevent Nielsen from performing his duties as an airman “‘under any condition that could reasonably be prescribed.’”¹⁰¹ Nielsen petitioned the FAA Administrator for review of the Air Surgeon’s ruling, but the Administrator responded that Nielsen’s medical records supported the Air Surgeon’s finding, which disqualified Nielsen under the FAR’s gen-

⁹² Tyghe L. Nielsen (*Nielsen II*), N.T.S.B. Order No. SM-4801, 2008 WL 1913977, at *1 (Apr. 16, 2008).

⁹³ *Id.*

⁹⁴ *Nielsen I*, 2007 WL 4116180, at *4.

⁹⁵ *Id.* at *2, *4.

⁹⁶ *Id.* at *4.

⁹⁷ *Id.* at *2.

⁹⁸ *Id.* at *4.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at *1.

¹⁰¹ Tyghe L. Nielsen (*Nielsen II*), N.T.S.B. Order No. SM-4801, 2008 WL 1913977, at *1 (Apr. 16, 2008).

eral mental and medication disqualification provisions.¹⁰² Similarly, the FAA denied Nielsen's Request for Reconsideration because he was still taking "a currently unacceptable medication, Adderall."¹⁰³

Still determined, Nielsen appealed the FAA's decision to the NTSB's Office of Administrative Law Judges.¹⁰⁴ In a hearing before the administrative law judge, both Nielsen and the Administrator presented evidence and witnesses concerning Nielsen's ability to fly an aircraft safely.¹⁰⁵ In addition to Nielsen's own testimony, Nielsen's supervisor in his residency program was accepted as an expert in family medicine and affirmed Nielsen's capability to function efficiently and effectively as a physician while taking Adderall.¹⁰⁶ The supervisor testified that Nielsen was "an excellent physician" who exhibited no symptoms of ADHD while on his medication and was "able to multitask and make[] decisions regarding multiple patients."¹⁰⁷ The supervisor further stated that Nielsen's current dosage of 40 milligrams per day was not excessive.¹⁰⁸ He acknowledged that Adderall is an amphetamine that is useful in treating ADHD but compared ADHD to blood pressure: "once stabilized the patient is monitored, but further problems are not expected."¹⁰⁹ Additionally, the opinions from the neuropsychologist's and psychiatrist's reports that Nielsen was safe to fly bolstered Nielsen's position.¹¹⁰

The Administrator countered by arguing that either ADHD or the use of Adderall alone would be disqualifying and that the combination of the two consequently would be disqualifying as well.¹¹¹ To support this argument, the Administrator first called a psychiatrist, Dr. Elin Berg, as an expert witness.¹¹² The main thrust of Berg's argument was that ADHD would prohibit a pilot

¹⁰² *Nielsen I*, 2007 WL 4116180, at *1 (listing the following FAR provisions: 67.107(c), 67.207(c), 67.307(c), 67.113(c), 67.213(c), and 67.313(c)); see also *supra* Part II.A (discussing FAA medical regulations and disqualification).

¹⁰³ *Nielsen I*, 2007 WL 4116180, at *1.

¹⁰⁴ *Id.* See generally *Description of the Airman Appeals Process*, NTSB, http://www.nts.gov/legal/airman_appeals.html (last visited Jan. 8, 2013) (providing an overview of the process for appealing the denial of FAA certificates to the NTSB).

¹⁰⁵ See *Nielsen I*, 2007 WL 4116180, at *1-8.

¹⁰⁶ *Id.* at *3.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at *2-4.

¹¹¹ *Id.* at *9.

¹¹² *Id.* at *5.

from operating an aircraft safely.¹¹³ She testified that ADHD and the symptoms Nielsen displayed would be “of concern in a pilot where you have to make quick decisions and pay attention to a lot of incoming data” and disagreed with the earlier psychiatric and neuropsychological opinions that Nielsen could fly safely.¹¹⁴ Specifically, she opined that Nielsen’s problems with inattention and his struggles with the memory portions of his neuropsychological evaluation would prevent him from being a safe pilot because a pilot needs to have a “working memory of all relevant factors,” without which a pilot would not “have the correct basis for what [he] decide[s] to do.”¹¹⁵ Additionally, she was concerned that Nielsen’s “problem with multitasking” would prevent him from “being a safe aviator, especially if conditions were less than ideal,” because—according to Berg—being an aviator requires performing tasks involving “divided attention.”¹¹⁶ She stated that Adderall does not improve multitasking “very efficiently.”¹¹⁷ Berg also pointed out that ADHD can lead to impulsive decision making.¹¹⁸ Furthermore, an FAA medical officer added that people diagnosed with ADHD have a higher rate of car accidents and that flying is a more complicated undertaking with many distractions.¹¹⁹

Berg further asserted that Nielsen could not operate a plane safely when taking Adderall.¹²⁰ In support, the Administrator submitted as exhibits the warnings for potential side effects of Adderall, including a “black box warning” that Adderall may contribute to “serious cardiovascular events, adverse psychiatric events, including emergence of new psychotic or manic symptoms, and visual disturbances,” along with adverse events including “weakness, headache, agitation, anxiety, dizziness and insomnia” reported by 5% of adults taking Adderall XR.¹²¹ The FAA medical officer also felt that Adderall was unsafe for use by pilots, claiming that feelings of well-being associated with increasing levels of amphetamines and the contrasting decreases in mood sometimes connected to amphetamine withdrawal

¹¹³ See *id.* at *5–7.

¹¹⁴ *Id.* at *6.

¹¹⁵ *Id.* at *5.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at *6.

¹¹⁸ *Id.* at *5.

¹¹⁹ *Id.* at *7.

¹²⁰ *Id.*

¹²¹ *Id.* at *6.

could affect a pilot's judgment.¹²² However, Dr. Berg admitted that there was no indication that Nielsen suffered from any of Adderall's possible side effects, other than occasional trouble falling asleep.¹²³

Ultimately, the administrative law judge sided with the Administrator, finding that Nielsen failed to meet his burden to demonstrate by a preponderance of the evidence that the Air Surgeon "was not reasonable in concluding[,] based on the case history [and] qualified medical judgment related to the condition involved[,] that sections 67.307(c) and 67.313(c) prevented issuing an unrestricted medical certificate" to Nielsen.¹²⁴ The judge found that Nielsen's ADHD was a disqualifying mental condition under FAR 67.307 because of the condition's symptoms, but he also found that Adderall was a disqualifying medication under FAR 67.313 because of the possible side effects testified to by the Administrator's witnesses.¹²⁵ While the judge recognized that Nielsen was perfectly able to perform his duties as an airman while taking Adderall, he stated that potentially severe, life-threatening side effects could arise in the future without warning.¹²⁶ Additionally, the judge chided Nielsen for not taking his medication on occasional weekends and stated that the FAA cannot monitor airmen to ensure that they are taking their medications, that their medications continue to be effective, and that the airmen do not develop any adverse side effects.¹²⁷ Subsequently, the full Board of the NTSB agreed and affirmed the administrative law judge's decision on appeal.¹²⁸

B. FAA CHANGES POLICY TO ALLOW THE USE OF ANTIDEPRESSANTS

In 2010, the FAA decided to change its long-standing ban on all psychiatric medications by allowing the use of four antidepressants popular among pilots: Prozac, Zoloft, Celexa, and Lexapro.¹²⁹ These medications—known as selective serotonin

¹²² *Id.* at *7.

¹²³ *Id.*

¹²⁴ *Id.* at *12.

¹²⁵ *Id.* at *9.

¹²⁶ *Id.* at *11–12.

¹²⁷ *Id.* at *11 ("[H]e is a physician himself and presumably should know better.").

¹²⁸ Tyghe L. Nielsen (*Nielsen II*), N.T.S.B. Order No. SM-4801, 2008 WL 1913977, at *1 (Apr. 16, 2008).

¹²⁹ Wang & Trotman, *supra* note 7.

reuptake inhibitors (SSRIs)¹³⁰—work by preventing the reabsorption of serotonin in the brain, which improves the ability of brain cells to send and receive messages and, in turn, helps fight depression.¹³¹ Antidepressants are one of the highest selling types of medications in the United States, with nearly \$10 billion in sales in the year before the new policy went into effect.¹³² Doctors issued nearly seventy-five million prescriptions for the four allowed SSRIs that same year.¹³³

An airman who is taking an antidepressant must meet four requirements and undergo additional scrutiny to acquire and maintain a medical certificate.¹³⁴ First, a pilot may be considered for a special issuance medical certificate if he is diagnosed with one of three depressive disorders or with any other condition for which the SSRI is prescribed.¹³⁵ Second, the pilot must be clinically stable and on a stable dosage of medication for at least twelve continuous months prior to the examination without any “aeromedically significant side effects.”¹³⁶ Third, the pilot must be taking one of the four previously mentioned SSRIs or its generic equivalent; the use of any other SSRI is disqualifying, even if it is in the same family of SSRIs as one of these medications.¹³⁷ Fourth, the pilot must not have symptoms or a history of psychosis, suicidal ideation, electro-convulsive therapy, or treatment with multiple SSRIs concurrently.¹³⁸ If a pilot meets these four conditions, he must be evaluated by a Human Intervention Motivation Study Aviation Medical Examiner (Intervention Examiner).¹³⁹ The Intervention Examiner will review all of the pilot’s medical material and conduct a detailed evaluation of the pilot.¹⁴⁰ Finally, the Intervention Examiner will make a recommendation on whether the special issuance should be granted

¹³⁰ FAA, GUIDE FOR AVIATION MEDICAL EXAMINERS, *supra* note 16, at 127.

¹³¹ *Selective Serotonin Reuptake Inhibitors (SSRIs)*, MAYO CLINIC (Dec. 9, 2010), <http://www.mayoclinic.com/health/ssris/MH00066>.

¹³² Wang & Trotman, *supra* note 7.

¹³³ *Id.*

¹³⁴ FAA, GUIDE FOR AVIATION MEDICAL EXAMINERS, *supra* note 16, at 127.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 128.

¹⁴⁰ *SSRI Decision Path – II (HIMS AME)*, FAA, http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/media/SSRI%20Decision%20Path%20-%20II.pdf (last visited Jan. 9, 2013).

and will defer the application and send the package to the FAA to make a final decision on a case-by-case basis.¹⁴¹

If the FAA grants the special issuance, the pilot must undergo follow-up evaluations with the Intervention Examiner; the pilot must send the Intervention Examiner both a current status report from his treating physician and a psychiatric consultation status report every six months, as well as undergo a cognitive screening every two years if the pilot is not flying commercially.¹⁴² Pilots flying under Part 121 or 135 (commercial and air transport pilots) must send a letter from airline management every three months and undergo annual cognitive screening.¹⁴³

Along with pressure from pilots' organizations, part of the incentive for this change in policy was the fact that newer psychiatric medications have fewer side effects than their predecessors, thus easing the FAA's concerns regarding side effects, such as sedation.¹⁴⁴ Furthermore, "FAA Administrator Randy Babbitt said some pilots with depression likely weren't being treated or were doing so in secret out of fear of losing their jobs."¹⁴⁵ At the time of the change in policy, the FAA was unsure how many pilots fell into this category but believed that the depression rate among pilots did not differ much from that of the general public—about 10%.¹⁴⁶ Babbitt told the press in a 2010 statement that the FAA needed "to change the culture and remove the stigma associated with depression," and that "[p]ilots should be able to get the medical treatment they need so they can safely perform their duties."¹⁴⁷ Notably, the FAA added that "it would consider allowing other psychiatric medicines in the future."¹⁴⁸

The FAA offered a six-month grace period during which any pilots who had been taking antidepressants could come forward and not be punished.¹⁴⁹ However, any pilots who had recently changed medications or dosages, or who wanted to begin taking

¹⁴¹ *Id.*

¹⁴² *SSRI Follow Up Path*, FAA, http://www.faa.gov/about/office_org/headquarters_offices/avs/offices/aam/ame/guide/media/SSRI%20Follow%20Up%20Path.pdf (last visited Jan. 9, 2013).

¹⁴³ *Id.*

¹⁴⁴ Wang & Trotman, *supra* note 7.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Rebecca Ruiz, *Airline Crew Member Mental Health in Spotlight After Captain's Breakdown*, NBC News (Mar. 28, 2012), <http://www.nbcnews.com/travel/airline-crew-member-mental-health-spotlight-after-captains-breakdown-583646>.

¹⁴⁸ Wang & Trotman, *supra* note 7.

¹⁴⁹ *Id.*

a new medication, were subject to the normal twelve-month waiting period before becoming eligible for special issuance.¹⁵⁰ The FAA's main focus with this regulation was to ensure that applicants were stable, as it takes time to determine how an individual will respond to a certain SSRI.¹⁵¹ In most cases, it takes three to six weeks for an SSRI to begin taking effect, and a doctor can generally determine how an individual is responding after about three months.¹⁵² More importantly, "[i]t takes an additional six months or so to get a sense of whether the depression will recur while on the medication."¹⁵³

Many psychiatrists and pilots' organizations backed the new policy.¹⁵⁴ Psychiatrists proclaimed that it is "far better to encourage pilots to get help than allow them to fly with untreated mental illness."¹⁵⁵ According to one psychiatrist who commented on the subject, "Untreated depression affects cognition probably more than any possible detrimental effect of any of these antidepressants."¹⁵⁶ The FAA also asserted that the new policy was "consistent with recommendations from several industry groups, including the Aerospace Medical Association, Aircraft Owners and Pilots Association, and the Air Line Pilots Association"—the world's largest pilot union.¹⁵⁷

As with most changes in policy, however, this one also had its detractors.¹⁵⁸ Critics' main battle cry was that pilots taking these drugs would pose a danger because of the alleged link between antidepressants and worsening mood, behavioral problems, and suicide.¹⁵⁹ These critics implied that SSRIs would cause pilots to become aggressive and suicidal, with an aim to take down entire loads of passengers with them.¹⁶⁰ Journalist Evelyn Pringle noted that warning labels on SSRIs warn of possible side effects, in-

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *See id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (quoting P. Murali Doraiswamy, a professor of biological psychiatry at Duke University Medical Center).

¹⁵⁷ *Id.*

¹⁵⁸ *See, e.g.,* Evelyn Pringle, *SSRIs Render Unfriendly Skies*, SCOOP INDEP. NEWS (July 14, 2010), <http://www.scoop.co.nz/stories/HL1007/S00116.htm>; Peter Breggin, *Pilots Taking Antidepressants? The FAA Is Risking Our Lives*, HUFFINGTON POST (Apr. 19, 2010), http://www.huffingtonpost.com/dr-peter-breggin/antidepressants-pilots-ta_b_542240.html.

¹⁵⁹ *See* Pringle, *supra* note 158.

¹⁶⁰ *See id.*

cluding “‘anxiety, agitation, panic attacks, insomnia, irritability, hostility, aggressiveness, [and] impulsivity.’”¹⁶¹ Dr. Peter Breggin claimed that even when these side effects are not severe, they may still “‘impair judgment and increase the likelihood of accidents and violence.’”¹⁶² These critics pointed to the number of pilots involved in crashes who were found to have SSRIs in their systems.¹⁶³ Of the 4,143 pilots involved in fatal accidents between January 1, 1993, and December 31, 2003, 100 pilots had SSRIs in their systems.¹⁶⁴ A 2010 report indicated “that in a review of 127 accidents in the NTSB database [that had occurred] since 1991[and] contain[ed] the word ‘antidepressant,’ only three were nonfatal.”¹⁶⁵ The final argument that these critics presented against the new policy was the claim that SSRIs are largely ineffective and “‘work no better than placebo.’”¹⁶⁶

IV. ANALYSIS

A. A CRITICAL LOOK AT THE SAFETY ARGUMENTS AGAINST ADDERALL USE BY AIRMEN IN *NIELSEN*

Some of the arguments posed by the FAA and NTSB against the use of stimulant ADHD medications in *Nielsen I*¹⁶⁷ and *II*¹⁶⁸ are questionable at best. The NTSB ultimately came to the correct conclusion that the FAA’s decision in denying Nielsen’s medical certificate should be affirmed.¹⁶⁹ However, this was a function of the FAA’s current policy on ADHD and stimulant medication and the strict standard of review, rather than the soundness of the NTSB’s reasoning as to whether it would be safe to grant Nielsen a medical certificate.¹⁷⁰ While many of the FAA’s and NTSB’s concerns regarding pilots flying with untreated ADHD certainly may be justified, their arguments in this

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Tyghe L. Nielsen (*Nielsen I*), N.T.S.B. Order No. SM-4801, 2007 WL 4116180, at *1 (Oct. 18, 2007), *aff’d*, 2008 WL 1913977 (Apr. 16, 2008).

¹⁶⁸ Tyghe L. Nielsen (*Nielsen II*), N.T.S.B. Order No. SM-4801, 2008 WL 1913977, at *1 (Apr. 16, 2008).

¹⁶⁹ *See id.* at *4.

¹⁷⁰ *See Nielsen I*, 2007 WL 4116180, at *12 (requiring that the petitioner demonstrate “by a preponderance of the evidence that the Federal Air Surgeon was not reasonable in [his] conclu[sion]”).

case regarding the use of stimulant medication are more suspect.¹⁷¹

What seems to be the most common argument against the use of Adderall by airmen has stemmed from the FDA's requirement of a "black box" warning advising that using Adderall could cause heart attacks and sudden death.¹⁷² In *Nielsen I*, the administrative law judge was quite concerned that even though Nielsen experienced no side effects from taking Adderall besides occasional sleeplessness, side effects could arise unexpectedly in the future, and that "the potential adverse reactions from this drug are severe, perhaps life threatening, and are inconsistent with safe operation of an aircraft."¹⁷³

This image of Adderall as a life-threatening drug came about in 2005 when the Canadian government temporarily banned Adderall XR following the deaths of twelve children who were taking the medication.¹⁷⁴ After examining these cases, however, the FDA declined to take similar action.¹⁷⁵ Of the twelve cases, five were children who had underlying structural heart defects, which increase the risk of sudden death.¹⁷⁶ Several of the other cases also had factors that could have led to or at least contributed to the deaths, "including a family history of ventricular tachycardia, association of death with heat exhaustion, dehydration and near-drowning, very rigorous exercise, fatty liver, heart attack, and type 1 diabetes mellitus."¹⁷⁷ One of the other patients appeared to have overdosed.¹⁷⁸ Most importantly, the FDA found that in considering the nearly thirty million Adderall prescriptions that had been written for children, the rate of sudden death was no higher than would be expected in the same population without treatment.¹⁷⁹ The FDA, therefore, added the black box warning not because of an increased risk of sudden death amongst the general population, but as a precaution "because it appeared that patients *with underlying heart defects* might

¹⁷¹ See *id.* at *8–12.

¹⁷² See *id.* at *10.

¹⁷³ *Id.* at *12.

¹⁷⁴ See U.S. FOOD & DRUG ADMIN., PUBLIC HEALTH ADVISORY FOR ADDERALL AND ADDERALL XR (2005), available at <http://www.fda.gov/Drugs/DrugSafety/PublicHealthAdvisories/ucm051672.htm>.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

be at increased risk for sudden death.”¹⁸⁰ More recently, the FDA conducted a large-scale study on children and young adults and confirmed that while patients should be screened for preexisting cardiac problems, there was otherwise no “association between use of certain ADHD medications and adverse cardiovascular events.”¹⁸¹

The judge in *Nielsen I* also chastised Nielsen for failing to take his Adderall occasionally on weekends, claiming that Nielsen was “a physician himself and presumably should know better.”¹⁸² The judge readily noted that the evidence suggested that Nielsen was fully capable of concentrating and performing other critical duties as a pilot when taking Adderall.¹⁸³ But the judge stated that Nielsen’s actions showed that he could not “be trusted to faithfully take the dose of Adderall prescribed for him daily,” and that the FAA could not be expected to monitor him to ensure that he did continue to take his medication.¹⁸⁴

This argument fails for two reasons. First, the FAA already trusts pilots who are on certain medications—used to treat otherwise disqualifying underlying conditions—to take those medications as prescribed, and the FAA does so without any type of system ensuring that they do, in fact, take their medication every day.¹⁸⁵ It is difficult to understand why allowing the use of Adderall would require the FAA to develop some kind of oversight program to ensure that pilots take their Adderall as prescribed when it does not have one for pilots taking antidepressants, which are used to treat another otherwise potentially disqualifying condition.¹⁸⁶ Second, it is a common practice for physicians to recommend that a patient *not* take ADHD medications every day.¹⁸⁷ While newer research generally supports taking Adderall every day, physicians may sometimes determine that a patient will benefit from such “drug holidays,” as they are known, and

¹⁸⁰ *Id.* (emphasis added).

¹⁸¹ U.S. FOOD & DRUG ADMIN., FDA DRUG SAFETY COMMUNICATION: SAFETY REVIEW UPDATE OF MEDICATIONS USED TO TREAT ATTENTION-DEFICIT/HYPERACTIVITY DISORDER (ADHD) IN CHILDREN AND YOUNG ADULTS (Nov. 1, 2011), available at <http://www.fda.gov/Drugs/DrugSafety/ucm277770.htm>.

¹⁸² Tyghe L. Nielsen (*Nielsen I*), N.T.S.B. Order No. SM-4801, 2007 WL 4116180, at *11 (Oct. 18, 2007), *aff’d*, 2008 WL 1913977 (Apr. 16, 2008).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See, e.g., *supra* Part III.B (discussing FAA policy on SSRIs).

¹⁸⁶ See *id.*

¹⁸⁷ See Michael J. Manos, *Opinions on Drug Holidays in Pediatric ADHD*, MEDSCAPE, <http://www.medscape.org/viewarticle/519331> (last visited Jan. 17, 2013).

recommend that the patient not take the medication when he does not need to concentrate on important things (on the weekends, for example).¹⁸⁸ Drug holidays may sometimes be useful to maintain sensitivity to the medication and “to reduce the likelihood of side-effects.”¹⁸⁹

Furthermore, the FAA’s argument that Nielsen’s difficulty with multitasking would make him unfit to fly is quite misleading. Many studies have shown that very few people actually can multitask—only about 2%.¹⁹⁰ For the other 98%, trying to focus on multiple tasks at once results in significantly worse performance on each of those tasks.¹⁹¹ As one researcher said, “It turns out multitaskers are terrible at every aspect of multitasking. They’re terrible at ignoring irrelevant information; they’re terrible at keeping information in their head nicely and neatly organized; and they’re terrible at switching from one task to another.”¹⁹² Therefore, it should have come as no surprise that Nielsen was bad at multitasking—and perhaps this is a good thing because the best way for most people to complete an activity is to focus on one task at a time.¹⁹³

Finally, one of the FAA’s expert witnesses testified that Adderall has “a high potential for abuse and may lead to drug dependence.”¹⁹⁴ To reduce the risks of abuse and addiction, the government strictly regulates Adderall, and physicians closely monitor patients, write prescriptions on tamper-proof prescription pads in some states, and avoid prescribing the medication to patients who show signs of drug abuse.¹⁹⁵ Furthermore, studies have shown that “effective ADHD treatment with stimulants may *prevent* an individual with ADHD from developing a substance abuse disorder due to ‘self-medicating’ with alcohol, ma-

¹⁸⁸ *Id.*

¹⁸⁹ *Drug Holiday*, WEBMD, <http://dictionary.webmd.com/terms/drug-holiday> (last visited Jan. 17, 2013).

¹⁹⁰ Garth Sundem, *This Is Your Brain on Multitasking*, PSYCHOLOGY TODAY (Feb. 24, 2012), <http://www.psychologytoday.com/blog/brain-trust/201202/is-your-brain-multitasking>.

¹⁹¹ *Id.*

¹⁹² Interview by PBS Frontline with Clifford Nass, CEO, Commc’n Between Humans & Interactive Media Lab (Dec. 1, 2009), *available at* <http://www.pbs.org/wgbh/pages/frontline/digitalnation/interviews/nass.html>.

¹⁹³ *See id.*

¹⁹⁴ Tyghe L. Nielsen (*Nielsen I*), N.T.S.B. Order No. SM-4801, 2007 WL 4116180, at *6 (Oct. 18, 2007), *aff’d*, 2008 WL 1913977 (Apr. 16, 2008).

¹⁹⁵ TESORO & COLL. OF PSYCHIATRIC & NEUROLOGICAL PHARMACISTS, *supra* note 2, at 3.

rijuana or other illicit drugs. The risk comes from *not* treating ADHD.”¹⁹⁶

While taking Adderall can make many pilots with ADHD better able to fly, there are some categories of people that should be screened out. For example, the “adverse psychiatric events” that the FAA cited as possible side effects¹⁹⁷ are usually associated with people who have preexisting “psychotic symptoms caused by schizophrenia, schizoaffective disorder, bipolar disorder or any other brain disorder associated with psychotic symptoms because [amphetamines] are likely to worsen psychotic illness.”¹⁹⁸ Therefore, these side effects could be avoided by screening for preexisting psychotic symptoms.¹⁹⁹ Furthermore, the risk of sudden-death problems can be avoided largely by screening out pilots with heart problems or certain other medical conditions.²⁰⁰ It is worth noting that many of these people who would be at risk for complications with Adderall would generally not be prescribed Adderall in the first place, and would often be medically disqualified by those independent medical or psychiatric conditions alone.²⁰¹ For those remaining pilots who have no disqualifying conditions independent of their ADHD, the risks of serious side effects from Adderall would be lower.²⁰²

B. NEGATIVE CONSEQUENCES OF THE FAA’S CURRENT POLICY

The FAA’s current ban on the use of any ADHD medications can have many severe, unintended consequences, ranging from the foreseeable impacts on the pilots themselves to potential liability placed on others because of the pilots’ actions. First, the complete ban on amphetamines and the disqualification of pilots with ADHD likely has a chilling effect on the disclosure of ADHD, similar to the effect that the previous ban on antidepressants had on the disclosure of the use of those medications.²⁰³

¹⁹⁶ *Id.*

¹⁹⁷ *Nielsen I*, 2007 WL 4116180, at *6.

¹⁹⁸ TESORO & COLL. OF PSYCHIATRIC & NEUROLOGICAL PHARMACISTS, *supra* note 2, at 2.

¹⁹⁹ *See id.*

²⁰⁰ *See id.*

²⁰¹ *See, e.g.*, 14 C.F.R. §§ 67.107–113 (2013) (mental, neurologic, cardiovascular, and general medical standards for first-class medical certificate).

²⁰² *See* U.S. FOOD & DRUG ADMIN., FAA DRUG SAFETY COMMUNICATION, *supra* note 181; TESORO & COLL. OF PSYCHIATRIC & NEUROLOGICAL PHARMACISTS, *supra* note 2, at 6.

²⁰³ *See* Robert B. Schultz, *If You Have Attention Deficit Hyperactive Disorder, the FAA Says You Can’t Fly*, AIRPORT JOURNALS (July 2008), <http://www.airportjournals>

The ban puts pilots diagnosed with ADHD between a rock and a hard place, as they will be disqualified if they disclose their condition, but will also be disqualified if they take medication to treat the condition and make them safe to fly.²⁰⁴ Pilots are further discouraged from disclosing ADHD because of the possibility of losing their livelihood.²⁰⁵ Finally, when pilots do keep this information to themselves, their employers may be held liable in lawsuits for damages resulting from the pilots' negligence.²⁰⁶

1. *The Current Policy Discourages Pilots from Disclosing ADHD*

As exemplified by the NTSB's decisions in the case of Tyghe Nielsen, the current FAA regulations create a classic catch-22 for pilots who require a medical certificate but are diagnosed with ADHD.²⁰⁷ Pilots diagnosed with ADHD are required—under penalty of federal law—to disclose their condition.²⁰⁸ However, because ADHD is generally considered a disqualifying condition, disclosure will most likely result in the denial of a pilot's medical certificate.²⁰⁹ Moreover, the FAA's ban on all amphetamines prevents a pilot from taking medication to treat ADHD.²¹⁰ Taken together, these policies create an incentive for pilots with ADHD to hide their condition and to continue flying without medication, thus potentially putting the lives of passengers in the hands of airmen who might not be able to concentrate on the tasks required to safely fly a plane.

Although it is impossible to put a number on how many pilots are currently flying in spite of a diagnosis with ADHD, it is likely that the FAA's current policy has an effect on disclosure that is similar to that of the previous ban on antidepressants.²¹¹ Unlike the policy on antidepressants, however, commercial and air

.com/display.cfm/Florida/0807005; see also discussion *supra* Part III.B (discussing how the FAA's change in policy on SSRIs was intended, in part, to encourage pilots to disclose depression and antidepressant medications).

²⁰⁴ Schultz, *supra* note 203.

²⁰⁵ See generally *Owens v. Lumber Prods.*, 409 F. App'x 103, 105 (9th Cir. 2011).

²⁰⁶ See Katie Eder, *Attorneys: Pilots Who Hide Medical Conditions Can Create Liability for Airlines*, NJBIZ (Apr. 10, 2012, 12:26 PM), http://www.njbiz.com/article/20120410/NJBIZ01/120419985/-1/enews_dailyT2.

²⁰⁷ Schultz, *supra* note 203; see Tyghe L. Nielsen (*Nielsen II*), N.T.S.B. Order No. SM-4801, 2008 WL 1913977, at *1 (Apr. 16, 2008); Tyghe L. Nielsen (*Nielsen I*), N.T.S.B. Order No. SM-4801, 2007 WL 4116180, at *1 (Oct. 18, 2007), *aff'd*, 2008 WL 1913977 (Apr. 16, 2008).

²⁰⁸ See Eder, *supra* note 206.

²⁰⁹ See discussion *supra* Part II.A; *Nielsen II*, 2008 WL 1913977, at *1.

²¹⁰ See discussion *supra* Part II.B; *Nielsen II*, 2008 WL 1913977, at *1.

²¹¹ See Schultz, *supra* note 203; Eder, *supra* note 206.

transport pilots cannot get away with taking the medication secretly, as these pilots (and other pilots, on occasion) are subject to drug testing.²¹² Therefore, a commercial pilot diagnosed with ADHD faces a tough decision: disclose the condition and probably lose his livelihood or his love of flying, or choose not to disclose and simply continue to fly with untreated ADHD. It is certain that at least some such pilots have chosen the latter option. An article on the subject, for example, quoted a pilot with ADHD describing the thrilling feeling of having so many different things to focus on while flying with the condition.²¹³

The FAA has done its best to discourage pilots from covering up their medical conditions by imposing harsh penalties—including criminal penalties—on pilots who lie on their medical certificate applications.²¹⁴ Pilots found to have made fraudulent or intentionally false statements on an application for a medical certificate may face suspension or revocation of “all airman, ground instructor, and medical certificates and ratings held by that person.”²¹⁵ Other penalties may include “fines up to \$250,000, [and] up to five years imprisonment.”²¹⁶ Some pilots may even go beyond lying and choose to fly without obtaining a medical certificate at all.²¹⁷ The consequences for this may be even more severe, as insurance may not cover any resulting accidents.²¹⁸

Accident statistics would seem to indicate that this system is working, as medical factors have played a role in only 0.5% of all aviation accidents.²¹⁹ However, despite the enormous consequences of being caught in a lie, it is evident that the system can be bypassed and that pilots do just that on a regular basis.²²⁰ While it may be impossible to determine how many pilots are currently flying with undisclosed ADHD, a look at a recent FAA

²¹² See discussion *supra* Part II.C.

²¹³ Schultz, *supra* note 203.

²¹⁴ See Brent Blue, *Telling the Truth on Your Medical: What You Need to Know*, PLANE & PILOT MAG. (Oct. 1, 2008), <http://www.planeandpilotmag.com/proficiency/pilot-skills/telling-the-truth-on-your-medical.html>.

²¹⁵ 14 C.F.R. § 67.403 (2013).

²¹⁶ Blue, *supra* note 214; see 18 U.S.C. §§ 1001, 3571 (2006).

²¹⁷ Blue, *supra* note 214.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ See Press Release, LeClairRyan, Pilots Having Issues in the Cockpit Is a Growing Concern, Says Veteran Aviation Attorney (Apr. 9, 2012), *available at* <http://www.leclairryan.com/news/xprNewsDetail.aspx?xpST=NewsDetail&news=788>.

study is revealing as to how common it is for pilots to hide medical conditions.²²¹ A report released by the FAA revealed that hundreds of fatal accidents involved pilots who had failed to disclose potentially disqualifying medical conditions.²²² In an examination of toxicology tests, FAA researchers found that nearly 10% of all pilots involved in fatal accidents during a ten-year period had undisclosed, serious medical conditions.²²³ The Department of Transportation conducted a separate investigation and found that of a sample of 40,000 pilots, 3,200 failed to disclose medical conditions for which they were receiving disability benefits from the Social Security Administration.²²⁴ By extrapolating the FAA's data to all pilots holding a medical certification, it has been estimated that the total number of certified pilots who have lied about medical conditions on their applications could approach 64,000.²²⁵

There is no reason to think that this practice is not just as prevalent among pilots who have ADHD because, in spite of the potentially enormous consequences, the risk of being caught is slim to none if a pilot chooses to hide the condition and leave it untreated. Undisclosed psychological problems are practically impossible to uncover because of the absence of any standardized psychological testing or evaluations to obtain a standard medical certificate.²²⁶ Furthermore, of the pilots who are caught lying, the federal government only prosecutes a small portion due to resource limitations.²²⁷ Therefore, this small risk is probably outweighed in many circumstances by the likely consequences of disclosing ADHD—for commercial pilots, loss of medical certification and employment.

So, if the harsh penalties for lying are not preventing pilots from flying with potentially disqualifying medical conditions, then why is the rate of accidents in which medical factors were an issue so low? A possible explanation is that a pilot and his personal physician simply are good judges of whether that pilot is safe to fly, just as every pilot makes a daily decision about

²²¹ *See id.*

²²² *Id.*

²²³ MAJORITY STAFF OF H. COMM. ON TRANSP. & INFRASTRUCTURE, 110TH CONG., REP. ON FAA OVERSIGHT OF FALSIFICATIONS ON AIRMAN MEDICAL CERTIFICATE APPLICATIONS 2 (Comm. Print 2007).

²²⁴ *Id.*

²²⁵ *Id.* at 9.

²²⁶ Eder, *supra* note 206.

²²⁷ MAJORITY STAFF OF H. COMM. ON TRANSP. & INFRASTRUCTURE, 110TH CONG., *supra* note 223, at 6.

whether to “self-certify” and fly.²²⁸ This is supported by the fact that there has never been a sport pilot accident related to a medical deficiency, despite the lack of a requirement for a medical certificate or drug testing.²²⁹

Regardless of exactly how many pilots have hidden their ADHD during the medical certification process, there can be little doubt that it does happen. Some of the more conservative estimates have concluded that about 4% of the adult U.S. population has ADHD.²³⁰ Therefore, if the assumption that the FAA used when estimating depression among pilots applies to ADHD in the same way—that the incidence among pilots is roughly the same as the incidence among the general population²³¹—it is possible that a large number of pilots suffer from ADHD.²³² Because of drug testing and the fact that the consequences of disclosing ADHD may often outweigh the risks of being caught and prosecuted, this policy creates an incentive for pilots to hide their conditions and to continue flying without seeking treatment.²³³

2. Potential Consequences for Third Parties

Not only could a pilot’s decision to hide his ADHD diagnosis and continue flying put passengers in harm’s way, it could also have serious consequences for third parties. Douglas Amster, an attorney who specializes in aviation tort defense, has warned that a pilot’s omissions or misrepresentations on his medical certificate application could create liability for a commercial pilot’s employer or its insurer in the event of an accident involving the pilot.²³⁴ Even if a claim against an insurer for losses resulting from the accident is barred by the pilot’s actions in covering up

²²⁸ See Gary Crump, *Medical Self Certification 2.0*, AOPA MED. SENSE (Nov. 2, 2011, 2:28 PM), <http://blog.aopa.org/medsense/?p=101>.

²²⁹ *Frequently Asked Questions—EAA/AOPA Medical Exemption Request*, EXPERIMENTAL AIRCRAFT ASS’N, http://www.eaa.org/govt/FAQ_medical_exemption.pdf (last visited Jan. 14, 2003).

²³⁰ See, e.g., *Adult ADHD (Attention Deficit/Hyperactive Disorder)*, ANXIETY & DEPRESSION ASS’N OF AM., <http://www.adaa.org/understanding-anxiety/related-illnesses/other-related-conditions/adult-adhd> (last visited Jan. 14, 2013).

²³¹ Wang & Trotman, *supra* note 7.

²³² See *Adult ADHD (Attention Deficit/Hyperactive Disorder)*, *supra* note 230.

²³³ See Schultz, *supra* note 203.

²³⁴ Press Release, LeClairRyan, *supra* note 220.

his condition, the insurer may still face a costly, protracted battle in court.²³⁵

Airlines attempt to “close the loopholes” of voluntary medical reporting and avoid liability for damages caused by a pilot who fails to disclose a medical condition by requiring pilots to complete rigorous training programs and by maintaining oversight of the pilots’ medical conditions.²³⁶ Nevertheless, as Amster explained of such incidents that do occur, “No matter what, if something happens, [the airline is] going to get sued.”²³⁷

A violation of a statute or regulation is evidence of negligence in some states (New Jersey, for example).²³⁸ In other states, a pilot’s violation of the FARs may even constitute negligence per se.²³⁹ Because of the doctrine of respondeat superior, it is not difficult to imagine a scenario in which an airline is held to be vicariously liable for damages resulting from an accident when the pilot’s failure to disclose his ADHD creates a presumption of negligence or is considered negligence per se. Furthermore, it is also possible that an owner of the aircraft who leases or rents it to the pilot could face similar vicarious liability.²⁴⁰

A pilot’s failure to disclose his condition could have a similar financial impact on insurers.²⁴¹ As a condition of coverage, aviation insurance policies generally require pilots to be “properly certificated.”²⁴² Historically, however, this has raised questions of policy interpretation, including questions of exactly what constitutes a “properly certificated” pilot and whether these terms encompass medical certification or situations where a pilot has been medically certified but has a disqualifying condition at the time of the accident.²⁴³ This has created problems for insurers because common rules of interpretation construe the policies

²³⁵ Douglas H. Amster, *The Legal Consequences of Undisclosed Medical Conditions on Aircraft Operator Liability*, 77 J. AIR L. & COM. 221, 228 (2012).

²³⁶ Eder, *supra* note 206.

²³⁷ *Id.*

²³⁸ Amster, *supra* note 235, at 233.

²³⁹ *Id.* at 238 (citing *Associated Aviation Underwriters v. United States*, 462 F. Supp. 674, 680 (N.D. Tex. 1978)). Some of these jurisdictions provide an exemption to the rule “where the violation is related to licensing as opposed to safety.” *Id.* (citing *Duty v. E. Coast Tender Serv., Inc.*, 660 F.2d 933, 947–49 & n.1–2 (4th Cir. 1981) (en banc) (Hall, J., dissenting)).

²⁴⁰ See *Estate of Dean v. Air Exec, Inc.*, 534 N.W.2d 103, 103 (Iowa 1995) (discussing vicarious liability of aircraft lessor).

²⁴¹ Amster, *supra* note 235, at 227.

²⁴² *Id.* at 229.

²⁴³ *Id.* at 229–30.

strictly against the insurers, and some policies contain different language or completely lack any such language.²⁴⁴

Even if it is determined that a specific policy requires the pilot to have been in compliance with the medical FARs at the time of the crash for losses to be covered by the policy, some states will additionally require the insurer to show a causal connection between the pilot's regulatory violation and the accident prior to declining coverage.²⁴⁵ Disputes over undisclosed medical conditions in these states will require a costly and lengthy "fact-intensive investigation . . . as to the precise nature of the medical condition, whether it was material to the issuance of the policy, and whether it was a factor in the loss," entailing extensive motion practice and the testimony of many opposing medical and technical experts.²⁴⁶ Proving a causal connection would likely be next to impossible in the case of a pilot's failure to disclose ADHD; imagine the difficulty of proving—without a surviving witness who was in the cockpit—whether the pilot's inattention, as opposed to simple pilot error, caused the accident, and in turn whether the pilot's ADHD caused that failure to pay attention.²⁴⁷

C. SSRI REGULATIONS CAN SERVE AS A MODEL FOR A NEW POLICY ON ADHD MEDICATIONS

Because of the possible consequences of the current FAA ban on stimulant ADHD medications, the FAA should consider revising its policy to allow the use of these medications in certain, restricted circumstances. The FAA should look to the newer policy on antidepressants as a guide for shaping new medication regulations.²⁴⁸ Through careful scrutiny, the FAA could limit any risks associated with the medications while encouraging pilots who would otherwise have an incentive to hide their conditions to come forward.²⁴⁹ This would improve safety, as whatever risks may be associated with stimulant medications—after

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 230 (citing *U.S. Specialty Ins. Co. v. Skymaster of Va., Inc.*, 123 F. Supp. 2d 995, 1002–03 (E.D. Va. 2000), *aff'd on other grounds*, 26 F. App'x 154 (4th Cir. 2001)).

²⁴⁶ *Id.* at 231 (citing *S.C. Ins. Co. v. Collins*, 237 S.E.2d 358, 359–62 (S.C. 1977)).

²⁴⁷ *See id.*

²⁴⁸ *See generally* Wang & Trotman, *supra* note 7 (discussing the FAA's change in policy to allow the use of certain SSRIs).

²⁴⁹ *See supra* Part IV.B.1 (discussing how current FAA policy creates an incentive for pilots with ADHD to continue operating with the condition untreated).

screening out pilots with other conditions that would subject them to increased side effects—would be small compared to the risk of pilots flying with untreated ADHD.²⁵⁰

The FAA should establish a program with oversight similar to the program currently used for pilots flying while taking SSRIs. First, the FAA should determine what dosages for specific ADHD medications are acceptable for use in the cockpit. Certification for pilots taking these medications should be restricted to those pilots who have been taking a constant dosage for a certain period of time—a year, for example—and whose treating physicians certify that the pilot has responded positively to treatment, has reported no significant side effects, and has shown no signs of substance abuse. As with the certification process for SSRIs, pilots with a history of other mental illnesses that could be exacerbated by amphetamines should not be certified. Furthermore, pilots with a history of other physical conditions that could increase risk when taking amphetamines—such as heart conditions that can increase the risk of sudden death when taking Adderall—should be screened out.

After conducting an initial evaluation, the Examiner should defer the pilot's application to the Intervention Examiner, who should then conduct further mental evaluation and send the pilot's file and a denial or grant recommendation to the FAA for a final determination on a case-by-case basis. If the FAA grants the certificate, the pilot should undergo follow-up testing on a timeline similar to that used for SSRIs to ensure that the condition is still under control and that no significant side effects have arisen. The FAA could also require periodic letters from commercial pilots' physicians certifying that the treatment is still effective for those pilots.

The FAA should additionally allow an amnesty period for pilots who have been flying with undisclosed ADHD to come forward without risk of punishment. After this grace period, any pilots who test positive for amphetamines but have not disclosed the use of ADHD medication would be subject to scrutiny. This combination of allowing pilots to come forward and use ADHD medications after undergoing additional examinations and con-

²⁵⁰ See Tyghe L. Nielsen (*Nielsen I*), N.T.S.B. Order No. SM-4801, 2007 WL 4116180, at *1, *7 (Oct. 18, 2007), *aff'd*, 2008 WL 1913977 (Apr. 16, 2008) (testimony stating that people with untreated ADHD are involved in more car accidents than general population and that flying is a more complicated task than driving); *supra* Part IV.A (examining risks of amphetamine-based medications, especially within populations with certain independent conditions).

tinuing to enforce the existing ban on amphetamines for all other pilots would give most pilots with ADHD an incentive to disclose their condition and undergo treatment.

Some may argue that the FAA should not take these steps because there is not much data to determine what impact they would have.²⁵¹ But “[t]here is rarely, if ever, any data to support something that’s never been done before.”²⁵² The FAA took similar measures in allowing both SSRIs and insulin—both of which have many side effects similar to ADHD medications—with little data on the use of those medications in aviation.²⁵³ The FAA has monitored the data from pilots using those drugs, and in contradiction to the grim predictions by some,²⁵⁴ medical incapacitation remains extremely rare.²⁵⁵ If pilots are allowed to use medication to treat their ADHD, medical incapacitation among these pilots will likely remain low because of the FAA’s medical standards and “‘because diligent pilots ground themselves if they feel that they cannot safely act as pilot in command.’”²⁵⁶ Furthermore, the FAA can look to the military for data on amphetamines in aviation. While the dosage of Dexedrine used by military pilots typically is low,²⁵⁷ it is telling that amphetamine use “‘has never been associated with a proven adverse outcome in a military operation.’”²⁵⁸ It is important to note that the allegation that Dexedrine played a role in the 2002 friendly fire incident was made by the pilots’ defense attorneys in an attempt to relieve the pilots of blame,²⁵⁹ and no evidence to support this argument ever came to light because the military dropped the charges.²⁶⁰ The medical data that is available suggests that it would be safer to allow pilots to take ADHD medication than for those pilots to fly with the condition untreated. As was said about the FAA’s new policy on SSRIs, it is “far better to en-

²⁵¹ See Crump, *supra* note 228.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ See Pringle, *supra* note 158.

²⁵⁵ *Regulatory Brief: Pilot Medical Applications Center of Congressional Investigation, AIRCRAFT OWNERS & PILOTS ASS’N*, <http://www.aopa.org/whatsnew/regulatory/operation-safe-pilot.html> (last updated Aug. 16, 2007).

²⁵⁶ See *id.*

²⁵⁷ U.S. DEP’T OF NAVY, *supra* note 14, at 8.

²⁵⁸ Hart, *supra* note 68.

²⁵⁹ *Id.*

²⁶⁰ See Halbfinger, *supra* note 69.

courage pilots to get help than allow them to fly with untreated mental illness.”²⁶¹

V. CONCLUSION

As progress is made in understanding and treating mental disorders, the FAA needs to keep up by developing policies that encourage pilots to seek the treatment they need to be safe in performing their duties as airmen. The FAA recognized this in developing its new policy for SSRIs in 2010 but has failed to take the same steps for pilots taking ADHD medications. The FAA should reverse the incentive to hide ADHD diagnoses by creating a new policy for ADHD medication modeled after its policy for SSRIs. This change would encourage pilots with ADHD to disclose their conditions and receive the treatment they need while limiting the risks associated with these medications. Ultimately, this policy change should improve safety, as a pilot will be safer if he is taking medication to treat his ADHD than if he continues to fly without seeking treatment.

²⁶¹ Wang & Trottman, *supra* note 7.



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