July 2, 1991

Mr. David Lee Swindler
[redacted]

Dear Mr. Swindler:

Thank you for your letter of April 22, 1991, regarding the Federal Aviation Administration's (FAA) National Driver Register (NDR) Authorization Form that accompanies the FAA's application form for an airman medical certificate. I understand that despite the concerns raised in your letter, you have recently signed the authorization form under protest. Since your letter indicates that you may still have some unresolved questions about this matter, I would like first to explain the background of the NDR form, and then address the specific points you raised.

A proposed amendment to the Federal Aviation Regulations (FAR) (Title 14 of the Code of Federal Regulations) concerning FAA access to NDR information was published in a notice of proposed rulemaking (NPRM) in the Federal Register, 54 FR 21580, May 18, 1989. A copy of the NPRM is included as Enclosure 1.

The FAA explained in the NPRM what led it to seek access to NDR information. Under the heading, "Background," the FAA noted that in February of 1987 the Office of the Inspector General (OIG) for the U.S. Department of Transportation released the results of an audit of the FAA's airman medical certification program. The purposes of the OIG's audit were explained in the NPRM:

The OIG evaluated the procedures used by the FAA to ensure that an individual with a history of alcohol- or drug-related problems is not issued an airman certificate and the procedures used to determine if an individual reports this information to the FAA in an accurate and timely manner.

The results of the OIG audit are summarized in the NPRM. The audit showed that of the active pilots who held a driver's license issued by a state under study, and who had at least one driving-while-intoxicated (DWI) or driving-under-the-influence (DUI) conviction, 71% did not report this information to the FAA as required. The audit also showed that of the active pilots whose driver's licenses had been suspended or revoked for DWI or DUI within the past 7 years, 76% failed to report this information to the FAA. As a result of its audit, the OIG recommended that the FAA seek legislative changes to the NDR statute that would give the FAA access to NDR information. The National Transportation Safety Board and the General Accounting Office supported this recommendation.

Accordingly, in June of 1987, the Secretary of Transportation submitted a draft bill to Congress proposing amendments to the NDR Act to assist the FAA in identifying operators of aircraft who have motor vehicle driving problems by permitting access to the NDR. This was the basis for legislation enacted in December 1987 and codified at 23 U.S. Code section 401 note, which provides, in pertinent part:

Any individual who has applied for or received an airman's certificate may request the chief driver licensing official of a State to transmit information regarding the individual...to the Administrator of the Federal Aviation Administration. The Administrator of the Federal Aviation Administration may receive such information and shall make such information available to the individual for review and written comment. The Administrator shall not otherwise divulge or use such information, except to verify information required to be reported to the Administrator by an

airman applying for an airman medical certificate and to evaluate whether the airman meets the minimum standards as prescribed by the Administrator to be issued an airman medical certificate.

The regulations in the NPRM were designed to implement this legislation. The proposed amendment specifically covering access to the NDR is FAR section 67.3. The public was given 60 days in which to comment on the proposed regulations.

After the close of the comment period, the FAA reviewed the comments received and promulgated a final regulation, in FAR section 67.3, concerning access to the NDR. This final rule was published in the Federal Register (55 FR 31300, August 1, 1990) (copy enclosed as Enclosure 2) and had an effective date of November 29, 1990. This final rule provides:

At the time of application for a certificate issued under this part, each person who applies for a medical certificate shall execute an express consent form authorizing the Administrator to request the chief driver licensing official of any state designated by the Administrator to transmit information contained in the National Driver Register about the person to the Administrator. The Administrator shall make information received from the National Driver Register, if any, available on request to the person for review and written comment.

This rule is the basis for the request that you sign the NDR Authorization Form when you reported for a physical examination in March of this year.

When you took your physical examination in March 1991, the FAA was using an NDR Authorization Form which was to be given to the airman at the time of this examination. You said in your letter that you were asked to sign the NDR Authorization Form and refused to do so. A copy of the form is enclosed and marked Enclosure 3.

This authorization form states in the first paragraph that you, as an applicant for an FAA airman medical certificate, "hereby authorize the National Driver Register (NDR), through a designated State Department of Motor Vehicles, to furnish to the Federal Aviation Administration information pertaining to my driving record...." This paragraph further states, "Upon my request, the FAA shall make the information received from the NDR, if any, available for my review and written comment." The authority for this access to the NDR, as noted on the form, is 23 U.S. Code section 401 note.

The form includes a "Privacy Act Statement" which explains how the FAA will use the information received from the NDR:

The driving record information the FAA receives from the NDR will be matched with information you provide on the medical history part of the medical application, FAA Form 8500-8. Since the NDR identifies only probable matches, the FAA will verify the NDR information it receives with the State of record.

This Privacy Act Statement further states that your authorization for NDR access is mandatory, which is in order to enable the FAA to perform the matching described above. The second paragraph of this Statement includes detailed instructions on how you can obtain from the National Highway Traffic Safety Administration (NHTSA) "a copy of your NDR record to check its accuracy."

Turning now to the specific questions raised in your letter, you have objected that the FAA's request that you authorize access to your NDR driving record is an invasion of privacy.
On the medical application form there is a box (Item 21, box v) where you are to indicate by checking "yes" or "no" whether you have any "record of traffic convictions." The applicant is asked to provide further information below under the heading "Remarks."

You did not object at the time you filled out the application or in your letter to providing that information, which has been requested on the medical application form for years. Therefore, it would appear you do not disagree with the FAA that such information is relevant to assessing an applicant's fitness for a medical certificate.

Your privacy objection is focused not on providing a record of your traffic convictions, but on authorizing FAA access to NDR data for the purpose of verifying this information. We have explained above why it was necessary for the FAA to seek access to NDR information, based on the OIG report. Although we have no reason to question your personal veracity, the FAA had to institute the NDR search across-the-board for all pilots to try to identify pilots who might have a DWI/DUI conviction they were trying to conceal. This is the approach that was recommended by the OIG and other responsible federal agencies. As you can surely appreciate, the FAA has no other means readily available to identify these pilots.

If you are concerned about the privacy implications of the FAA's use of the NDR information, please be assured that our use is strictly limited as described above, in conformity with the legislation published at 23 U.S. Code section 401 note:

The Administrator shall not otherwise divulge or use such information, except to verify information required to be reported to the Administrator by an airman applying for an airman medical certificate and to evaluate whether the airman meets the minimum standards as prescribed by the Administrator to be issued an airman medical certificate.

You have also objected that the FAA has exceeded the bounds of the authority Congress delegated to it. Your question focuses on the use of "may" in the legislation.

Congress said in the 1987 amendment to the NDR legislation that anyone who has applied for an airman's certificate "may request the chief driver licensing official of a State to transmit information regarding the individual...to the Administrator of the FAA. The Administrator of the FAA may receive such information... (emphasis added)."

It is clear that Congress gave the FAA Administrator the authority to receive information about an individual's driving record as part of the medical application process. Congress used "may" precisely because it wanted the Administrator to decide whether to require this type of information. The FAA decided that it was appropriate to do so, for the reasons stated above, and thus promulgated the rule at FAR section 67.3. The FAA thereby exercised the authority delegated to it by Congress.

It is also true that you, as an applicant for an airman's medical certificate, may authorize FAA access to NDR information. You may, of course, also choose not to. However, (as the authorization form states) your failure to provide authorization will result in delay or denial of your application.

The FAA is statutorily responsible for determining the conditions and qualifications that must be satisfied to receive an airman medical certificate (49 U.S. Code App. sections 1421, 1422). One of those conditions is that you authorize access to your NDR record. If you refuse to provide such access, the FAA is free to deny your application.

The NDR legislation does not say that if you refuse to consent, the FAA must nevertheless issue your medical certificate. There is consent in the sense that the FAA cannot compel you to authorize NDR access. You are free either to consent, which permits the process of reviewing your application to go forward, or refuse to consent and thus bring this review to a halt.

You have questioned the FAA's advice in the authorization form that failure to provide authorization "will result in delay of further consideration or denial of your application for an airman medical certificate...." If an airman fails to provide authorization, consideration of his application will be delayed until we receive the authorization. Ultimately, if the airman continues to refuse to sign the NDR Authorization Form, the FAA would have to deny the application on the grounds that the airman failed to comply with an essential requirement for the airman medical certificate.

You have offered to provide the information on your driving record yourself, in lieu of direct FAA access to the NDR. While we appreciate your offer and again have no reason to doubt your personal veracity, this alternative would not be acceptable. The reason for the NDR check was to enable the FAA to verify pilots' self-reporting on the medical application. This goal would be defeated if we permitted pilots to supply their own driving records. Pilots with records of DWI/DUI convictions or license suspensions would have an incentive to tamper with or falsify their records to conceal these offenses. Therefore, the FAA determined that the most reliable and efficient way to obtain this information was directly from the NDR, with subsequent verification of the NDR information from the State of record.

You have expressed a concern about the accuracy of the information in the NDR. The FAA has no intention of denying a pilot's application for a medical certificate on the basis of inaccurate or incomplete information. That is why there are multiple opportunities for the pilot to check the information. As noted above in the discussion of the NDR Authorization Form, the FAA will make the information received from the NDR available to the pilot for review and written comment. (This is in accordance with the NDR legislation.) In addition, as noted under the Privacy Act Statement on the authorization form, you may obtain a copy of your NDR record from NHTSA if you submit a notarized request containing certain personal information to ensure correct identification.

Furthermore, the FAA will not take any action solely on the basis of the NDR information. The NDR is used as a "pointer" to the State of record that took action against the pilot's driver's license. Only after the FAA has verified the NDR information with the State of record will it consider taking any action. Therefore, since you have the opportunity to review your NDR record for accuracy, and because the NDR record itself will not be the basis for any action without verification from the State of record, you need not be concerned about FAA action based on possible mistakes in the NDR record itself.

We regret any inconvenience or misunderstanding that may have arisen in this matter, and hope we have cleared up the questions raised in your letter. We further hope that you will continue to cooperate with the FAA in its efforts to further aviation safety. The FAA consulted both the Experimental Aircraft Association and the Aircraft Owners and Pilots Association, among other interested groups, in connection with its recent revision of the medical application form. This revision, which includes an express consent signature block authorizing access to NDR information, is now scheduled to be implemented July 1, 1991.

If you have any further questions, please contact this office directly.

Sincerely,

Donald P. Byrne
Assistant Chief Counsel
Regulations and Enforcement Division