U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of the Chief Counsel

**800 Independence Ave., S.W.
Washington, D.C. 20591**

DEC 23 2013

Courtney B. Graham
Associate General Counsel
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Office of the General Counsel
National Aeronautics and Space Administration
300 E Street, SW
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Dear Ms. Graham:

This responds to your request for a legal interpretation dated July 3, 2013. NASA asks whether NASA astronauts, including civil servants and military members, who are U.S. Government employees must sign waivers of claims against the U.S. Government for personal injury, death, or property damage when participating in FAA licensed launches and reentries as otherwise required of space flight participants by 51 U.S.C. ch. 509 and its implementing regulations. NASA notes the potential for conflict between any such waiver and various federal employee compensation laws. On November 13, 2013, NASA supplemented its request by telephone to inquire whether section 50914 (b)(2) requires NASA astronauts as space flight participants to waive claims against the contractors and subcontractors of the U.S. Government.

NASA astronauts do not have to sign reciprocal waivers of claims as 51 U.S.C. §50914(b) requires of space flight participants generally. Section 50914(b) does not impair the rights of U.S. Government employees, including NASA astronauts, to seek compensation from the U.S. Government for injuries under the Federal Employees Compensation Act (FECA) or its military counterparts or compensation for damage to personal property under the Military Personnel and Civilian Employees Claims Act (MPCECA). Nor do NASA astronauts have to sign reciprocal waivers of claims against the U.S. Government's contractors and subcontractors under 51 U.S.C. §50914(b).

Background

NASA intends to fly U.S. government astronauts on spacecraft operated by commercial launch and reentry operators who are licensed by the FAA. At NASA, astronauts include civil servants and military members. The military members in the astronaut corps are detailed to NASA and retain all the rights, compensation, and benefits of other military members. NASA requests clarification about the FAA's statutes and regulations that may impact the rights and benefits that accrue to civil servant and military astronauts who may be injured or suffer other loss during an FAA licensed launch.

Relevant Statutes

51 U.S.C. §50914(b)

Relevant provisions of section 50914(b), enacted under the Commercial Space Launch Amendments Act of 2004 (CSLAA), require the Secretary of Transportation, and, by delegation, the FAA, to make a reciprocal waiver of claims with a space flight participant for FAA authorized launches or reentries involving the U.S. Government under which "each party to the waiver agrees to be responsible for property damage or loss it sustains, or for personal injury to, death of, or property damage or loss sustained by its own employees or by space flight participants, resulting from an activity carried out under the applicable license."[1]

To implement the statute, the FAA issued 14 C.F.R. §440.17 which states in pertinent part:

> For each licensed or permitted activity in which the U.S. Government, any of its agencies, or its contractors and subcontractors are involved, the Federal Aviation Administration of the Department of Transportation and each space flight participant shall enter into or have in place a reciprocal waiver of claims agreement in the form of the agreement in Appendix E of this part or that satisfies its requirements.[2]

The reciprocal waiver of claims of appendix E of part 440 requires a space flight participant to "waive[ ] and release[ ] claims it may have against the United States, and against its Contractors and Subcontractors, for Bodily Injury, including Death, or Property Damage sustained by the Space Flight Participant . . . regardless of fault,"[3] and "hold harmless and indemnify the United States. . . from and against liability . . . arising out of claims brought by anyone for Property Damage or Bodily Injury, including Death, sustained by Space Flight Participant."[4]

Federal Employees Compensation Act

FECA is the exclusive remedy against the U.S. Government for federal employees for claims relating to disability or death resulting from injury in the workplace, regardless of

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[1] 51 U.S.C. § 50914(b)(2).
[2] 14 C.F.R. § 440.17(e).
[3] 14 C.F.R. part 440, app. E – Agreement for Waiver of Claims and Assumption of Responsibility for a Space Flight Participant, ¶ (2)(a). The Appendix at 7(a) also includes the provision, "Nothing contained herein shall be construed as a waiver or release by the United States of any claim by an employee of the United States." The presence of this language highlights the conflict underlying any attempt to apply the requirement for a waiver to astronaut space flight participants who are employees of the United States.
[4] *Id.* at ¶ (5).

fault, and guarantees compensation, with few exceptions.[5] In return for this guarantee, federal employees are not entitled to seek tort remedies against the U.S. Government.[6]

Military Disability Benefits Programs

Active duty U.S. military personnel are entitled to disability severance pay when they have suffered an injury that renders them unfit to perform the duties of their office, grade, rank, or rating.[7] Military personnel and their dependents, including some former members of the armed services, are also entitled to medical and dental care under the Tricare Program.[8] Additionally, the U.S. Government, through the Department of Veterans Affairs, compensates military personnel who served on active duty and were "discharged or released under conditions other than dishonorable" for "disability resulting from personal injury suffered or disease contracted in [the] line of duty" during both peacetime and times of war.[9] Much like under FECA, military personnel who die or are injured "incident to service" are barred from recovery against the U.S. Government in tort under the *Feres* Doctrine.[10]

Military Personnel and Civilian Employees Claims Act of 1964

The MPCECA allows agency heads to compensate employees for claims against the U.S. Government for "damage to, or loss of, personal property incident to service."[11] The amount of compensation paid may be up to $40,000, or up to $100,000 in "extraordinary circumstances."[12]

Implied Repeal

A presumption against implied repeal of an earlier statute by one enacted later exists "unless the 'intention of the legislature to repeal [is] clear and manifest.'"[13] Put another way, repeal by implication will not be found "unless the later statute 'expressly contradict[s] the original act' or unless such a construction 'is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.'"[14] This presumption is stronger in the case

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[5] 5 U.S.C. § 8102(a).
[6] 5 U.S.C. § 8116(c).
[7] 10 U.S.C. ch. 61.
[8] 10 U.S.C. ch. 55.
[9] 38 U.S.C. §1110 and 1131.
[10] *Feres v. U.S.*, 340 U.S. 135, 146 (1950).
[11] 31 U.S.C. § 3721.
[12] 31 U.S.C. § 3721(b)(1).
[13] *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (holding that the Endangered Species Act did not repeal the Clean Water Act); *see also Dorsey v. United States*, 132 S. ct. 2321, 2340 (2012) ("The presumption against implied repeals requires us to give effect, if possible, to both [statutes]"); *Cook Cnty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 132 (2003) ("Working against the County's position, however is a different presumption, this one at full strength; the 'cardinal rule . . . that repeals by implication are not favored.' " (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936))).
[14] *Nat'l Ass'n of Home Builders,* 551 U.S. at 662 (2007) (quoting *Traynor v. Turnage*, 485 U.S. 535, 548 (1988)).

of longstanding statutory schemes.[15] Therefore, the presumption against implied repeal is not overcome unless (1) there is an irreconcilable conflict between the two statutory provisions in question, or (2) the later statute was meant to cover the whole subject of the earlier statute and "is clearly intended as a substitute."[16]

Section 50914(b) is a later act of Congress than FECA and its military counterparts, as well as the MPCECA. Congress did not expressly state that section 50914(b) is intended to repeal any of these earlier statutes. Looking to the legislative history of section 50914(b), Congress, in describing space flights participants and requiring them to waive claims against the U.S. Government, focused on space tourists without mentioning U.S. government astronauts.[17] In fact, the requirement for space flight participants to waive claims against the U.S. Government predates the retirement of the U.S. Space Shuttle and the subsequent development of NASA's Commercial Crew Program. Although a later statute may trump an earlier statute with which it conflicts, in the absence of Congress' clear intention to repeal, this applies only where two statutes conflict in a way that cannot be reconciled.[18]

Accordingly, the FAA may not presume that the reciprocal waiver requirement of section 50914(b) repeals NASA astronauts' rights to compensation under FECA and its military counterparts or the MPCECA, unless (1) there is an irreconcilable difference between the relevant provisions, or (2) it is clear that the later provision was intended to cover the entire subject of the earlier statutes as a substitute.[19]

No Irreconcilable Conflict

There is not an irreconcilable conflict between section 50914(b) and the MPCECA or FECA and its military counterparts. The FAA may give effect to section 50914(b) by only requiring space flight participants who are not federal civil servants or military members to waive potential claims against the U.S. Government. This more limited approach satisfies the goal of section 50914(b) to protect the U.S. Government from liability for the majority of potential claims from space flight participants, whom Congress envisioned as space tourists, as well as Congress' earlier aim of compensation to U.S. Government employees for property damage and injuries in their line of work through the MPCECA, and FECA and its military counterparts.[20] The federal personnel compensation laws already prohibit claims against the U.S. Government in tort.

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[15] *Andrus v. Glover Const. Co.*, 446 U.S. 608, 618 (1980) ("[R]epeals by implication of longstanding statutory provisions are not favored . . . .").

[16] *Branch v. Smith*, 538 U.S. 254, 273, 285 n.1 (2003)

[17] H.R. Rep. No. 108-429 (2004) (discussing the CSLAA as addressing issues of space tourism and even stating the Committee's belief "that space flight participants can purchase their own insurance" which government personnel would not have to do).

[18] *Morton v. Mancari*, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.")

[19] *Branch*, 538 U.S. at 273, 285 n.1.

[20] Past FAA statements, that pre-date the 2004 CSLAA requirement that space flight participants sign a waiver, are consistent with this interpretation. In the context of determining what the statute meant by requiring employers to "be responsible for" the personal injury to, death of, or property damage or loss sustained by its own employees resulting from a licensed activity, the FAA ruled out an interpretation that Congress was

No Clear Intent of Statutory Applicability

As the Supreme Court has noted, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."[21] The FAA may find that Congress did not intend section 50914(b) to cover the entirety, or even a portion, of the MPCECA's authority or that of FECA and its military counterparts.

FECA and its military counterparts, as well as the MPCECA, cover "a narrow, precise, specific subject" in comparison to the "more generalized spectrum" covered by the section 50914(b). FECA and its military counterparts cover the specific subject of compensation to federal employees (either civilian or military) for disability or death resulting from an injury in the course of their work. The MPCECA covers the narrow subject of claims by military and civilian government personnel for damage to personal property during the course of work. In contrast, section 50914(b) covers the broader, general subject of the rights of compensation and indemnity for space flight participants, who, the record shows, Congress envisioned as private persons, not employees of the U.S. Government.[22]

Thus, section 50914(b) does not substitute for the MPCECA and FECA or its military counterparts, particularly because those statutes contain longstanding schemes for which the presumption against implied repeal is stronger.[23] The CSLAA, throughout its legislative history, focuses on space flight participants as tourists without mentioning government astronauts. The FAA will not ignore government astronauts' right to recovery from the U.S. Government, under FECA or its military counterparts, or to recovery for damages to personal property under the MPCECA, from the U.S. Government without specific instruction from Congress, particularly because section 50914(b) applies to a much broader population than these statutes.

Contractors & Subcontractors

Under 50914(b)(2), the U.S. Government also makes a reciprocal waiver of claims agreement with space flight participants "for... [its] contractors and subcontractors involved in launch services or reentry services... ." This admittedly ambiguous provision raises the question of whether Chapter 509 requires separate reciprocal waivers of claims between NASA astronauts and the government's contractors and subcontractors. It does not.

Section 50914(b)(2) creates an obligation between the U.S. Government and a space flight participant to enter into an agreement. It does not establish such a relationship between the

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merely referring to FECA or other federal and state workers compensation schemes. *Financial Responsibility Requirements for Licensed Launch Activities, Final Rule*, 63 Fed. Reg. 45592, 45602-03 (Aug. 26, 1998) ("Financial Responsibility Rule").

[21] *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (finding that very specific venue provisions of the National Bank Act were not trumped by more general venue provisions in the Securities Exchange act enacted 70 years later because the later statute was much more general and there was no clear and manifest intent of repeal by the legislature).

[22] *See*, H.R. Rep. No. 108-429 (2004).

[23] *Andrus*, 446 U.S. at 618.

space flight participant and the government's contractors and subcontractors because it does not require a space flight participant to enter into a reciprocal waiver of claims with the contractors and subcontractors. A government contractor's rights hinge[24] on the U.S. Government entering into a reciprocal waiver of claims with a space flight participant. When the space flight participant is a NASA astronaut, the U.S. Government, as the astronaut's employer, may not enter into such a waiver. Accordingly, the FAA will not construe its statute to extinguish a NASA astronaut's ability to pursue a claim against the U.S. Government's contractors or subcontractors.[25]

Conclusion

NASA astronauts, both civil servants and military members, do not have to sign reciprocal waivers of claims against the U.S. Government and its contractors and subcontractors as 51 U.S.C. §50914(b) requires of space flight participants generally. Section 50914(b) does not change NASA astronauts' rights to seek compensation for injury, death, or personal property damage under the Federal Employees Compensation Act or its military counterparts or compensation for damage to personal property under the Military Personnel and Civilian Employees Claims Act.

This interpretation has been coordinated with the Associate Administrator for Commercial Space Transportation. Please feel free to contact Laura Montgomery, Manager of the Space Law Branch, at (202) 267-3150, or me with any questions or concerns.

Sincerely,

Mark W. Bury
Assistant Chief Counsel for International Law,
Legislation and Regulations Division, AGC-200

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[24] Although it may be possible to obtain a benefit for someone who is not party to an agreement, generally, one may not obligate someone without his consent. Because agreeing "for" someone else has different implications, depending on the context, the FAA has had to implement the provision at issue by requiring signed reciprocal waivers of claims. The provision may only be implemented through these waiver agreements, which means the statute confers no benefits or obligations without them.

[25] To provide additional context, this interpretation is consistent with Congressional intent. When Congress considers and rejects a statutory change, its decision may be informative. Here, Congress considered and rejected requiring space flight participants generally to waive claims against an operator, and, in this context, some of NASA's contractors are also launch and reentry operators. *Compare* H.R. 3752, 108th Cong., 2d Sess., § 3 (proposing to amend 49 U.S.C. § 70112(b)(1), now 51 U.S.C. § 50914(b)(1)) *with* P.L. 108-492 (Dec. 23, 2004), H.R. 5382, 108th Cong., 2d Sess., (with no amendments to 49 U.S.C. § 70112(b)(1), now 51 U.S.C. § 50914(b)(1)). Accordingly, it seems highly unlikely that if Congress meant to leave intact a space flight participant's rights to bring claims, that Congress meant to impair those same rights for NASA astronauts. Additionally, as discussed earlier, Congress enacted the 2004 CSLAA to address the development of space tourism. In 2004, NASA had not yet retired its U.S. Space Shuttle or begun its commercial crew initiatives, and the Congressional record does not show that Congress meant the 2004 amendments to apply to NASA astronauts.