NTSB and Accident Investigations
On a weekly basis, if not daily, we learn from news and social media about a transportation accident with tragic loss of life or significant injuries often followed by a tag line that “the NTSB is investigating.” While we may be aware that the NTSB’s investigation will determine the cause or probable cause of the event, how the agency conducts its investigations and carries out its activities is not always well-understood. This guide describes the key aspects of an NTSB accident investigation and outlines what companies involved in an NTSB accident investigation should expect. We also provide at the end a quick reference checklist for the entire NTSB process.

What we can do for you
LeClairRyan attorneys have decades of experience in guiding companies through NTSB investigations. Whether your business is in the aviation, rail, pipeline, surface transportation, or maritime sectors, we can help you. Included on our team of experienced NTSB practitioners is a former NTSB General Counsel.

While movies like Flight and Sully remind the public that the NTSB investigates aviation accidents, the NTSB also has jurisdiction over accidents in the rail, pipeline, surface transportation (such as commercial motor vehicle and intercity motorcoach operations), commercial space launch, and maritime sectors. When warranted, the NTSB will also investigate non-transportation companies, such as manufacturers, airports, and emergency responders.

If you are involved as a party in an NTSB investigation, we can assist you throughout every stage of the process, including evidence-gathering and analysis phases, a possible public hearing, the NTSB’s preparation of its accident report with its investigative findings, probable cause determination, and safety recommendations, and, where warranted, seeking reconsideration or modification of the accident report. We also can represent you in any civil or criminal proceedings that may follow in the wake of an accident, as well as handle any resulting regulatory compliance actions.

What is the role of the NTSB?
Created more than 50 years ago, the NTSB is an independent Federal agency with five Board Members appointed for five-year terms by the President and subject to confirmation by the U.S. Senate. One board member is separately appointed by the President to serve as chairman for a two-year term, subject to U.S. Senate confirmation, and a second board member is appointed by the President as vice chairman for a two-year term. During its existence, the agency has investigated thousands of aviation, highway, rail, pipeline, and marine accidents and issued more than 14,500 recommendations to federal, state, and local agencies, private companies, and other transportation stakeholders to improve transportation safety. More than 80 percent of these safety recommendations are acted upon favorably. The NTSB has a staff of approximately 420 employees located in its Washington, D.C. headquarters and aviation safety regional offices in Anchorage, AK, Denver, CO, Ashburn, VA, and Federal Way, WA.

What should I do in the event of an accident?
The NTSB is responsible for investigating all civil aviation accidents in the United States; international aviation accidents outside the United States or its territories involving U.S.-manufactured, operated, or registered aircraft; and major accidents in the other modes of transportation.

NTSB regulations require operators to notify the NTSB immediately of aviation accidents and certain incidents. A report should be made by calling the 24/7 NTSB Response Operations Center at 844-373-9922. You also will be required to complete a Pilot/Operator Aircraft Accident/Incident Report Form (NTSB Form 6120.1, available at https://www.ntsb.gov/Documents/6120_1web.pdf) within 10 days after the accident/incident. Although there are no requirements to report major non-aviation accidents/incidents to the NTSB, you can notify the agency of an accident by calling the telephone number provided above.

What happens after I report an accident?
The NTSB Investigative Process

After a major accident in any transportation mode, the NTSB, based on available information, will quickly determine whether to launch a “Go Team” to the accident site to begin the investigation. In determining to launch to the accident site, the agency will designate a senior investigator as the Investigator-in-Charge (IIC) to organize, conduct, and manage the field phase of the NTSB accident investigation. Other Go Team participants will include agency employees with the technical expertise needed for the investigation and may include staff from media relations, government relations, and family assistance offices. In addition, an NTSB board member may accompany the Go Team and, as the official agency spokesperson, is responsible for conducting media briefings on the factual information obtained by the investigators while on scene.

Also, no later than a day or two after a major accident, the NTSB chairman will arrange to speak with the chief executive officer (CEO) of the transportation provider involved in the accident to explain the NTSB investigation process and the agency’s expectations for the provider’s cooperation and assistance in the process. This conversation is also an excellent opportunity for the CEO and his or her senior executives to ask questions about any aspect of the NTSB investigation.
The Party System

A fundamental component of the NTSB investigation is the party system. The IIC designates federal, state, or local government agencies, as well as organizations whose employees, functions, activities, or products were involved in the accident and that can provide suitable qualified technical personnel, to actively assist in the investigation. The role of a party member is to provide technical advice and assistance to the NTSB in the fact gathering phase of the investigation. NTSB regulations prohibit attorneys or individuals who represent claimants or insurers from serving as a party member. All party representatives, other than representatives of other federal agencies, must sign an NTSB party agreement that spells out their roles and responsibilities in support of the investigation. A party coordinator serves as the main spokesperson/representative for a party.

Party members must follow all NTSB directions and instructions, may not withhold information pertinent to the investigation, cannot disclose accident-related information to the public without the prior approval of the IIC, and agree that their participation is not for the purpose of preparing for litigation. While on-scene, the IIC is authorized to issue subpoenas for the production of records or to compel a witness to participate in an interview.

Note: Whenever a party submits documents and information to the NTSB during any phase of the NTSB process, up to and including the Board’s issuance of the final accident report, it should keep a copy of each document provided to the NTSB and maintain a list of every document or physical item provided. Also, it is not necessary to provide the NTSB with original documentation; copies are acceptable. In the event that the party provides to the NTSB confidential commercial or trade secret information, it should mark the documents accordingly and ensure the NTSB withholds this information from public disclosure in its accident docket.

Although in rare instances agencies, companies, or other organizations decline to participate in an investigation as a party member for various reasons, in our view, there are overriding advantages to participating directly in the investigation and having access to all information shared among the parties.

Working Groups

While on scene, the NTSB establishes smaller working groups led by agency investigators with expertise in various technical areas. For example, in the event of a major aviation accident, the NTSB will establish working groups in such areas as aircraft operations, airframe structures, powerplants (engines), air traffic control, cockpit voice recorders and flight data recorders, weather, human performance, and survival factors. Party coordinators have the opportunity to propose personnel from their organization for assignment to one or more working groups but the final decision regarding the assignment of specialists is made by the IIC in coordination with the respective group chairman.

Witness Interviews

Witness interviews are an important aspect of an NTSB investigation. The interviews are conducted under oath and NTSB regulations permit the witness to be accompanied by a representative during the interview. The representative can be an attorney but cannot supplement the witness’s testimony. The interviews are transcribed or summarized and placed in the public NTSB accident docket. Party participants in the investigation may be present during interviews and can ask questions of the witness.

Field Notes

Each group chairman is required to compile field notes documenting the on-site activities of their group. Field notes represent the summation of factual material gathered and information obtained by each investigative group participating in the investigation.

At the end of the on-scene investigation, every member of the working group signs the group’s field notes. These signatures indicate that each member of the group has read all of the group field notes and either agrees with the information included in the notes or has indicated, in writing, specific areas of disagreement and the reasons for that disagreement. If group members do not attach written statements of disagreement to the field notes, the NTSB will assume that they agree with the content and completeness of the information contained in the field notes.

Investigative Hearing

The Board may hold an investigative hearing as part of a major transportation accident investigation. The purpose of the hearing is two-fold: first, to gather sworn testimony from subpoenaed witnesses on issues identified by the Board during the course of the investigation and, second, to allow the public to observe the progress of the investigation. Hearings are usually held within six months of an accident, but may be delayed for complex investigations. The hearings are open to the public and also available via webcast and a transcript is prepared and placed in the public accident docket.

Public hearings allow the Safety Board to gather more facts about an accident and to put on record a substantial amount of information about circumstances relating to the accident. Hearings also allow the public to learn more about the Board’s investigation of an accident for which there is substantial interest. The IIC prepares a memorandum
to the Board recommending whether or not to convene a public hearing and indicates the views of each party to the investigation on whether it wants a public hearing. The Board will order a hearing if it determines that a hearing is in the public interest.

Usually a week or so before the hearing, the NTSB conducts a prehearing conference during which the parties are advised of the witnesses the NTSB will call at the hearing, the topics about which they will be examined, and the exhibits that will be offered in evidence. Also, at the prehearing conference, parties to the investigative hearing must submit copies of any additional documentary exhibits they desire to offer for admission at the hearing.

Group Chairmen’s Factual Reports

Upon completion of a group’s factual documentation, the group chairman will prepare a factual report based on the field notes and subsequent investigation activities. The group chairman makes available a draft version of the report to the group members for comments that can be incorporated into the group chairman’s factual report. If a group member is dissatisfied that their comments were not included in the factual report, the party should contact the group chairman’s supervisor to discuss the issue. If the party remains concerned, they may write a letter to the IIC detailing their position. This letter will be entered into the public docket for the accident.

It is important to note that NTSB factual reports are admissible as evidence in any subsequent civil litigation resulting from the accident. For this reason, it is critical that a company’s group members review the draft reports carefully, raise any concerns with the group chairman, and document any issues that are not resolved to the party’s satisfaction.

Technical Review

The Technical Review is normally the final step in the factual phase of the investigation and provides the parties with the opportunity to perform a final review of all factual material obtained during the investigation. It allows the parties to raise any investigation problem areas so the issues can be resolved or at least addressed in the preparation of the final accident report. In addition, the Technical Review provides an
opportunity for a formal review of the accuracy of information contained in the group chairmen’s factual reports.

The Technical Review is typically held as soon as possible after completion of the public hearing, if one is held, or fact-gathering process. The Technical Review will be held after group chairmen have completed their investigative activities, written their factual reports, and collected the documents that will complete the public docket of the Board’s investigation. The IIC will notify the parties of the date, time, and location of the Technical Review in writing. The review focuses on fact-finding only; analysis will not be discussed.

What happens after the NTSB completes its investigation?
Once the group chairmen factual reports are complete and relevant documents and witness statements are assembled, NTSB begins the analysis phase of the investigation. This phase is conducted entirely by the NTSB and parties to the investigation are precluded from participating in this process. Also at this time, staff will commence drafting the final accident report. This process can take several months.

Party Submissions
Although the Technical Review provides parties with the opportunity to offer comments on the factual material, we strongly encourage parties to submit to the NTSB their proposed findings to be drawn from the evidence produced during the course of the investigation, a proposed statement of probable cause, and/or proposed safety recommendation(s) designed to prevent future accidents. We strongly urge parties to prepare thoughtful, complete, and persuasive party submissions. The party submission is a valuable part of a board member’s information gathering process and the NTSB will place each submission in the public docket.

The IIC will advise each party coordinator of the opportunity to present the party submission and the date the submission is due. If the Board has voted to hold a public meeting at which it will consider the draft final accident report, the due date for the submission will be set prior to the date the Sunshine Act notice announcing the Board meeting is published in the Federal Register. (The NTSB’s Sunshine Act regulations require the agency to publicly announce the time, location, and subject matter of the meeting at least one week in advance of the meeting.) Submissions should be sent to the IIC.

Meeting with Individual Board Members Prior to the Board Meeting
We also strongly advise clients to meet with individual Board members one or two weeks prior to the Board Sunshine Act meeting to consider NTSB staff’s draft final accident report. (Meeting with Board members separately, or no more than two Board members at the same time, will ensure compliance with the Sunshine Act, which precludes a quorum of Board members (three or more) from jointly conducting official agency business.) NTSB modal safety office staff, an agency attorney, and the Board member’s special assistant typically attend these meetings. By a week or two before the Board meeting, each Board member will have reviewed the draft report and examined information included in the accident docket. These meetings provide an excellent opportunity to raise key issues directly with each Board member as well as discuss matters raised in your party submission.
The Public Board Meeting

The Board meeting to consider the draft accident report is held in the NTSB Boardroom in Washington, D.C. and, with very rare exception, is open to the public. The meeting is also webcast and the webcast remains available for viewing on the NTSB website for three months after the meeting. At the meeting, staff makes presentations concerning the accident and the investigation. Copies of the NTSB Chairman’s opening and closing statements, presentations by agency staff at the meeting, any videos shown during the meeting, and meeting summaries remain available on the NTSB website for several years.

During the meeting, Board members pose questions for staff response and deliberate and vote on the proposed findings of fact, probable cause statement, safety recommendations, and the overall report itself. Board members also reserve the right to file concurring and/or dissenting statements to be included in the final report. Shortly after the conclusion of the Board meeting, the NTSB issues an abstract summarizing the meeting results. The complete final Board Accident Report is made available several weeks after the Board meeting.

By statute, and unlike the group chairmen’s factual reports, the Board Accident Report is not admissible in civil litigation resulting from the accident.

What Does My Organization Need to Do if It Receives a Safety Recommendation from the NTSB?

The NTSB issues its safety recommendations to various recipients. These frequently include the U.S. Department of Transportation or one of its operating administrations (i.e., the Federal Aviation Administration, Federal Railroad Administration, Federal Motor Carrier Safety Administration, Federal Transit Administration, National Highway Traffic Safety Administration, and the Pipeline and Hazardous Materials Safety Administration); the U.S. Coast Guard, transportation operators and their professional associations, labor organizations, manufacturers, and state and local organizations. It is important to note, however, that the NTSB does not have any regulatory or enforcement authority to compel compliance with its recommendations.

If the NTSB believes that a safety risk needs urgent attention while its accident investigation is underway, it can issue an urgent recommendation seeking expedited action. The recipient of the recommendation has 30 days to respond to the NTSB. For non-urgent safety recommendations, the recipient needs to respond within 90 days. After receiving and evaluating the response to a recommendation, the NTSB will consider the matter open until sufficient action has been achieved to mark it closed. The NTSB can also delineate a response as “Closed-Unacceptable Action” if the response expresses disagreement with the need outlined in the recommendation and the NTSB concludes that further correspondence on, or discussion of, the matter would not change the recipient’s position.

What If I Disagree with the Board Accident Report?

By NTSB regulation, a party or “other person having a direct interest in an investigation” can submit to the NTSB a petition for reconsideration or modification of the NTSB’s findings and determination of probable cause. A petition must be based on the discovery of new evidence or on a showing that the Board’s findings are erroneous. A petition based on the discovery of new factual matters must identify the new matter; include affidavits of prospective witnesses, authenticated documents,
or both, or an explanation of why such substantiation is unavailable; and state why the new matter was not available prior to Board’s adoption of its findings. A petition based on a claim of erroneous findings must set forth in detail the grounds upon which the claim is based.

There is no time limit or statute of limitations on when a petition for reconsideration or modification can be filed. Under the Board’s internal procedures for considering petitions, staff who were not involved in the underlying accident investigation will be assigned to review and analyze the petition and prepare a decision for Board Members’ consideration. Recent case law, however, has made clear that the NTSB’s decision to reject a petition is not subject to judicial review.

Litigation Following an Accident Subject to an NTSB Investigation

It is reasonable to expect that civil or criminal litigation, as well as administrative enforcement action(s), may result from a transportation accident. As mentioned above, LeClairRyan can represent you in any civil or criminal proceedings that may follow in the wake of an accident, as well as handle any resulting regulatory compliance actions.

If a party to litigation or administrative enforcement action is seeking access to NTSB documents or wants an NTSB investigator to testify, the party must comply with the NTSB’s so-called Touhy regulations. Touhy regulations are regulations many federal agencies have in place that specify internal agency procedures for how and when a person requesting federal documents or witnesses can obtain them.

Touhy regulations most frequently arise in civil litigation where the United States is not a party. The NTSB’s Touhy regulations specify that its employees may only testify as to the firsthand factual information they obtained during the course of an investigation that is not reasonably available elsewhere, such as NTSB factual accident reports. They are precluded from testifying regarding matters beyond the scope of their investigation or giving any expert or opinion testimony. In addition, NTSB employees may be made available only for depositions or written interrogatories; they are not permitted to appear and testify in civil court proceedings.

All requests for written material from the NTSB must be submitted to the agency’s General Counsel. With the exception of published NTSB reports, materials available in a public accident docket, or databases available on the NTSB website, an NTSB employee or former NTSB employee may not provide any material to a private litigant, court, or other authority without the approval of the agency General Counsel. In addition, any subpoena issued to the NTSB for any of this material must be withdrawn before the NTSB will release the material.
All requests for written material from the NTSB must be submitted to the agency’s General Counsel. With the exception of published NTSB reports, materials available in a public accident docket, or databases available on the NTSB website, an NTSB employee or former NTSB employee may not provide any material to a private litigant, court, or other authority without the approval of the agency General Counsel. In addition, any subpoena issued to the NTSB for any of this material must be withdrawn before the NTSB will release the material.

A major transportation accident occurs. Did you:

- Immediately notify the NTSB at 844-373-9922? (If it’s an aviation accident, did you complete a Pilot/Operator Aircraft Accident/Incident Report Form (NTSB Form 6120.1) within 10 days of the accident?)
- Notify outside counsel and your insurer, and take steps to preserve all physical evidence and documentation?
- Ensure that the CEO speaks with the NTSB Chairman about the NTSB’s investigation and the NTSB’s expectation for your company’s participation in the investigation?
- Select the appropriate team members to appear on-scene with the NTSB, select a highly qualified employee to serve as the NTSB party coordinator, and designate appropriate employees with technical expertise to serve as party representatives?
- Ensure that every party member follows all NTSB directions and instructions, including not withholding information pertinent to the investigation and that your company or organization does not disclose accident-related information to the public without the prior approval of the IIC?
- Ensure that a log is kept of all documents and physical evidence made available to the NTSB and that copies of all submitted documents are retained?
- Identify any proprietary or trade secret information made available to the NTSB and ensure it is withheld from public disclosure?
- Ensure party members participate fully in group chairman meetings, including participating in witness interviews, reviewing closely all field notes and draft factual reports, and raising any concerns to the group chairman or the IIC?
- Ensure that any company witness is fully prepared for and has representation at the NTSB interview?
- Fully prepare for an investigative hearing if the NTSB Board decides to hold one?
- Fully participate in the NTSB Technical Review?
- Provide a party submission in advance of the public Board Accident Meeting and include proposed findings of fact, a probable cause statement, and proposed safety recommendations?
- Meet with individual Board members shortly in advance of the Board Accident Meeting?
- Ensure the return of available physical evidence once it is no longer needed by the NTSB?
- Attend the Sunshine Act Board Accident Meeting or view the webcast?
- Review the complete accident docket and the final Board Accident Report to determine whether a petition for reconsideration should be filed?
<table>
<thead>
<tr>
<th>Contacts</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Mark Dombroff</td>
<td>Diane Westwood Wilson</td>
<td>Thomas Almy</td>
</tr>
<tr>
<td>Member</td>
<td>Member</td>
<td>Partner</td>
</tr>
<tr>
<td>703.248.7002</td>
<td>212.430.8049</td>
<td>703.647.5907</td>
</tr>
<tr>
<td><a href="mailto:mark.dombroff@leclairryan.com">mark.dombroff@leclairryan.com</a></td>
<td><a href="mailto:diane.wilson@leclairryan.com">diane.wilson@leclairryan.com</a></td>
<td><a href="mailto:thomas.alm@gmail.com">thomas.alm@gmail.com</a></td>
</tr>
<tr>
<td>Alex Braunstein</td>
<td>Morgan Campbell</td>
<td>Chris Dalton</td>
</tr>
<tr>
<td>Associate</td>
<td>Partner</td>
<td>Associate</td>
</tr>
<tr>
<td>561.229.1223</td>
<td>703.248.7003</td>
<td>916.246.1157</td>
</tr>
<tr>
<td><a href="mailto:alex.braunstein@leclairryan.com">alex.braunstein@leclairryan.com</a></td>
<td><a href="mailto:morgan.campbell@leclairryan.com">morgan.campbell@leclairryan.com</a></td>
<td><a href="mailto:chris.dalton@leclairryan.com">chris.dalton@leclairryan.com</a></td>
</tr>
<tr>
<td>James Eastwood</td>
<td>Christa Hinckley</td>
<td>Allan Horowitz</td>
</tr>
<tr>
<td>Partner</td>
<td>Partner</td>
<td>Partner</td>
</tr>
<tr>
<td>703.248.7006</td>
<td>713.752.8324</td>
<td>703.248.7008</td>
</tr>
<tr>
<td><a href="mailto:james.eastwood@leclairryan.com">james.eastwood@leclairryan.com</a></td>
<td><a href="mailto:christa.hinckley@leclairryan.com">christa.hinckley@leclairryan.com</a></td>
<td><a href="mailto:allan.horowitz@leclairryan.com">allan.horowitz@leclairryan.com</a></td>
</tr>
<tr>
<td>William Janicki</td>
<td>Cecilia Littleton</td>
<td>James Mackler</td>
</tr>
<tr>
<td>Member</td>
<td>Counsel</td>
<td>Partner</td>
</tr>
<tr>
<td>916.246.1149</td>
<td>703.647.5922</td>
<td>615.669.5102</td>
</tr>
<tr>
<td><a href="mailto:william.janicki@leclairryan.com">william.janicki@leclairryan.com</a></td>
<td><a href="mailto:cecilia.littleton@leclairryan.com">cecilia.littleton@leclairryan.com</a></td>
<td><a href="mailto:james.mackler@leclairryan.com">james.mackler@leclairryan.com</a></td>
</tr>
<tr>
<td>Mark McKinnon</td>
<td>Darcy Osta</td>
<td>Erin Rivera</td>
</tr>
<tr>
<td>Partner</td>
<td>Partner</td>
<td>Associate</td>
</tr>
<tr>
<td>703.248.7005</td>
<td>703.647.5930</td>
<td>703.248.7007</td>
</tr>
<tr>
<td><a href="mailto:mark.mckinnon@leclairryan.com">mark.mckinnon@leclairryan.com</a></td>
<td><a href="mailto:darcy.osta@leclairryan.com">darcy.osta@leclairryan.com</a></td>
<td><a href="mailto:erin.rivera@leclairryan.com">erin.rivera@leclairryan.com</a></td>
</tr>
<tr>
<td>Rebecca Tingey</td>
<td>David Tochen</td>
<td>Mark Whitson</td>
</tr>
<tr>
<td>Partner</td>
<td>Counsel</td>
<td>Partner</td>
</tr>
<tr>
<td>212.634.5043</td>
<td>202.659.6704</td>
<td>321.432.4353</td>
</tr>
<tr>
<td><a href="mailto:rebecca.tingey@leclairryan.com">rebecca.tingey@leclairryan.com</a></td>
<td><a href="mailto:david.tochen@leclairryan.com">david.tochen@leclairryan.com</a></td>
<td><a href="mailto:mark.whitson@leclairryan.com">mark.whitson@leclairryan.com</a></td>
</tr>
</tbody>
</table>

© 2018 LeClairRyan PLLC. All rights reserved. Attorney Advertising materials. These materials have been prepared by LeClairRyan for informational purposes only and are not legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. Readers should not act upon this information without seeking professional counsel in the reader’s home jurisdiction.