RESPONDING TO FAA ENFORCEMENT INVESTIGATIONS AND PROCEEDINGS – Has the Paradigm Really Shifted?

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Federal Aviation Regulations ("FAR’s")
(14 C.F.R. Parts 1-198). In particular:

• Parts 1, 43, 45, 47, 49, 61, 67, 91, 121, 125, 135 and 141
• Stealth FAR’s

Policies
Interpretations
Internal Orders
Handbooks
Notices
Ops Specs/Operating

Limitations
Other Guidance (AC’s, AD’s,
SB’s, etc.)
Case Precedent
Variations between Regions
and Districts
In addition to FAR’s:

Other pertinent laws/regulations:

- Alcohol/Drug Testing Requirements
  - 49 C.F.R. Part 40
  - 14 C.F.R. Part 120
- HazMat Regulations
  - 49 C.F.R. Parts 105-107
- DOT Regulations
  - 14 C.F.R. Parts 200-399

- NTSB Regulations
  - 49 C.F.R Parts 800-845
  - TSA Regulations
    - 49 C.F.R. Parts 1500-1562
  - OSHA
    - Whistleblower Protection
      - 49 USC 42121a
      - 29 C.F.R. Sec. 1979.104
HOW THE FAA LEARNS OF POTENTIAL VIOLATION:

--Witnessing first hand
--ATC
--Third Party Complaint
--Report to FAA by other governmental or law enforcement agencies
--FAA review of records of other agencies
--Records/reports required to be maintained under applicable laws or regulations
FAA ENFORCEMENT PROCEEDINGS:

The Old Way:

- **Administrative Actions**
  - FAA Flight Standards Office (FSDO). Does not involve FAA Legal and includes letters of correction, warnings and reprimands. Does not result in finding of violation.

- **Legal Enforcement Actions**
  - Starts at FSDO and ends with FAA legal (Office of Chief Counsel) initiating enforcement action.
    - Civil Penalty
    - Certificate Action: Suspension / Revocation / Emergency Actions
    - Right to informal conference
    - Appeals to NTSB, DOT, US Courts, depending upon type of action and amount of penalty.
    - Cease and Desist Orders

- **Referral to Department of Justice**
Appeals of FAA Actions

Venue depends on the action taken

- Certificate Actions—NTSB (Reg. 821); ALJ; 5 Member Board
- Civil Penalties against pilots and mechanics—NTSB (Reg. 821); ALJ; 5 Member Board
- Civil Penalties—(FAA Rules of Practice, FAR Part 13); DOT ALJ; FAA Administrator
- US District Court (civil penalties if over $50K for individual or small business; if over $400K for all others)
Seeds of Change – Evolution from punitive system to the “New Compliance Philosophy”

• Voluntary Disclosure Programs—ASRS, ASAP, VDRP
• Data Sharing—FOQA
• Safety Management Systems (SMS)
• Pilot’s Bill of Rights (Public Law 112-53)
What did the Pilot Bill of Rights do?

- Disclosure of Enforcement Investigative Report and better access to ATC Data;
- NTSB application of Federal Rules of Civil Procedure;
- Options of Appeal of FAA/NTSB Orders to U.S. District Court or U.S. Court of Appeals
- NOTAMS improvement plan
- Revision of medical certification process
- Clarified the NTSB’s “statutory deference” afforded to the FAA
“New Compliance Philosophy”

The Compliance Philosophy represents a focus on using non-enforcement methods, or “Compliance Action” for correcting unintentional deviations or noncompliance that arises from facts such as flawed systems and procedures, simple mistakes, lack of understanding, or diminished skills. Examples include: on-the-spot corrections, counseling, and additional training (including remedial training).

“Generally, if you are qualified and both willing and able to cooperate, the FAA will resolve the issue with compliance tools, techniques, concepts, and programs.”

See FAA Order 8000.373, 6/26/15; Order 2150.3B, Chg 9, 9/23/15; Order 8900.1, Chg 422, 6/22/16; Notices N8900.343, 2/2/16 and N8900.352, 3/9/16
“Willing and Able”

• **“Willing”** may be demonstrated where:
  – Person acknowledges responsibility for the event;
  – Person openly shares information with the FAA to determine the root cause of the event; and
  – Person promptly implements corrective action.

• **“Able”** may be demonstrated where:
  – Person has resources sufficient to implement the necessary corrective action(s);
  – Person has, or has the ability to develop through corrective action, the knowledge and technical competence required of the certificate they hold; and
  – Person has access to data, equipment, facilities, etc., necessary to comply with regulatory requirements and appropriately manage risk.

SOURCE: Order 2150.3B, Chg 9(3)(a)
FAA’s Stated Goal:

…”use the most effective means to return an individual or entity that holds an FAA certificate, approval, authorization, permit or license to full compliance and to prevent recurrence….

Order 8000.373, Par. 4.d.
QUESTION: Does New Compliance Philosophy Apply to All Certificate Holders And Operators?

**YES, at least in theory:** Individual certificate holders (i.e., pilots, flight engineers, mechanics and repairmen) as well as air carriers, corporate operators, repair stations and other air agencies and those holding not only certificates but authorizations and permits.

**In practice:** Absent a carrier’s or air agency’s use of VDRP or participation in ASAP, the FAA is not as magnanimous! FAA response may also vary depending upon whether corrective action has been taken.
THE NEED TO BE PROACTIVE!
LEARNING OF POTENTIAL VIOLATIONS

Problem: Not All Violations Are Readily Apparent

– Employees (management, non-management, union, non-union) should be encouraged to report safety concerns.

– Data sharing, Input and Feedback

– Report safety concerns free of retaliation
CORPORATE CULTURE—CREATING A “SAFE” ENVIRONMENT

• Employees will only report if they know:
  – There will be no arbitrary reprisals
  – Senior management will constructively act on the information
  – Senior management will back up the employees in the event the FAA initiates an action against them (both individually and against the company)
  – Fair discipline with mitigation

Management must create a company culture of open and effective internal communication
UPON LEARNING OF A VIOLATION:

- Comprehensive investigation
- Timely and responsive corrective action
- Undertake mitigation measures
- If you have not already done so, now’s the time to speak with legal counsel
TRADITIONAL IN-HOUSE INVESTIGATION:

- What happened?
- How did it happen?
- Is there a history of it happening previously?
- Who was responsible?
- Were employees appropriately trained?
- Were employees following all prescribed instructions, procedures and manuals?
- Were these instructions, procedures and manuals adequate?
- Were independent contractors responsible?
- Were the contractors in compliance with the terms and conditions of their contracts?
- Were contractors provided sufficient guidance and training?
- Were quality control procedures adequate?
- Do any remedial or other corrective actions need to be taken to avoid recurrence?
While traditional in-house investigations are retrospective, an IN-HOUSE INVESTIGATION UTILIZING SMS CONCEPTS AND METHODOLOGY IS PROSPECTIVE:

1. What’s going to cause our next mishap?
2. How do we know?
3. What are we doing to prevent it?
4. Is what we’re doing working?
QUESTION: WHEN TO BEGIN SELF INVESTIGATION?

What triggers a duty to investigate, mitigate, alleviate, and report? Investigation must be timely!

- After FAA issues a Letter of Investigation (LOI)? TOO LATE!
- After FAA initiates a proposed enforcement action? TOO LATE!
- After FAA sets an informal conference date? TOO LATE!
- During pendency and conduct of the hearing? After Appeal? TOO LATE!
- Immediately upon learning of the violation? YES, BUT UNDER SMS PRINCIPLES, THIS MAY EVEN BE TOO LATE!
SELF REPORTING AND SNAAP

- Aviation Safety Action Program (ASAP)
- Voluntary Disclosure Reporting Program (VDRP)
- The New Compliance Philosophy and Safety Management Systems
  - See Streamlined No Action and Administrative Action Process (SNAAP)

Sources: FAA Orders 8000.373, 8900.1; National Policy N8900.352 (effective date March 9, 2016); Order 2150.3B; Notice 8900.343
Cancelled: Notice 8900.331
SELF DISCLOSURE

• FAA Voluntary Disclosure Reporting Program

1. Disclosure before FAA learns of inadvertent violation; CAVEAT: Disclosure during investigation or when FAA inspection is pending
2. Meaningful investigation
3. Violation does not indicate a lack, or reasonable question, of qualification of certificate holder
4. Appropriate/immediate *corrective action to prevent recurrence*—investigation alone will not suffice without corrective action being taken.

→ Possible mitigation or closing of matter

Sources: (Advisory Circular (“AC”) 00-58, *Voluntary Disclosure Reporting Program*)
NASA AVIATION SAFETY REPORTING PROGRAM ("ASRP")

To qualify:

- The occurrence doesn’t result in an “accident”
  - As defined in NTSB Reg. Part 830 as “Serious Injury” or “Substantial Damage”
- No criminal offense
- Inadvertent and not deliberate
- Report within 10 days of occurrence

Precludes imposition of suspension or civil penalty but violation will be made matter of public record!
LETTER OF INVESTIGATION

• DO YOU RESPOND?

– The investigation is already underway
– Failure to respond is evidence poor “attitude”
– Credibility with local FAA is important (and it is common courtesy)
– First chance to attack inaccuracies/explain/advise of corrective actions or mitigation measures
– Opportunity to stop an enforcement action in its tracks
– May determine whether or not, and what type of, enforcement action will be taken and how severe it may be
– Mitigation is more effective earlier than later
– Convincing the FAA inspector that no violation occurred, or that appropriate corrective action has been taken to preclude recurrence may keep file from going to legal.

ALWAYS SPEAK WITH COUNSEL BEFORE RESPONDING!
Caveat: CRIMINAL PROCEEDINGS

- NASA Reporting
- ASRP
- FAA Investigations
- 18 U.S.C. Section 1001
PUBLIC DISCLOSURES

• Federal Aviation Reauthorization Act of 1996 –
  – FAA isn’t supposed to disclose voluntarily-provided information… **BUT**, FAA can disclose if for safety concerns

WHEN YOU DISCLOSE TO THE FAA, ANTICIPATE THAT WHATEVER YOU SAY, AND WHATEVER YOU SUBMIT WILL EVENTUALLY BE RELEASABLE AND MADE AVAILABLE TO THE PUBLIC
Even with New Compliance Philosophy, FAA must take legal action when:

a) Intentional or Reckless Conduct
b) Failure to Complete Corrective action
c) Conduct Creating or Threatening to Create an Unacceptable Risk to Safety (CAVEAT: Catch all?)
d) Required by law (not defined)

SOURCE: Order 2150.3B, Chg 9(5)(a)-(f)
EMERGENCY ACTION

- The following allegations will likely result in an emergency action against your certificate(s):
  - Falsification of Records;
  - Drug Convictions and Undisclosed Motor Vehicle Actions;
  - Refusal to Submit to DOT-Mandated Drug/Alcohol Test; or
  - Lack of Qualifications to Hold Certificate.

The FAA does not need to give notice of emergency certificate actions
UAS / DRONES

- Basic Law Enforcement Response
- FAA Drone Incident Reporting
- FAR Part 107
- New Compliance Philosophy N/A
- Licensed Pilots at Particular Risk
“The role of aviation counsel is not only to defend the enforcement action after it has been initiated, but to better understand the client’s day to day concerns and provide the necessary advice and assistance to mitigate its effects and prevent recurrence of the violation”
NBAA BACE

BUSINESS AVIATION CONVENTION & EXHIBITION

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