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Regulatory  
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## **THE DO'S AND DONT'S IN RESPONDING TO FAA INVESTIGATIONS AND ENFORCEMENT ACTIONS**

### **Overview**

Today's impressive aviation safety record did not happen overnight or by itself. As history reflects, we have learned from 100+ years of mistakes and failures. Aviation is safe because those in it strive to make it safe as a matter of professional responsibility, dedication and pride, and not because the FAA suspends certificates or imposes civil penalties<sup>1</sup>.

While the industry is safe, it is not perfect. Neither the aircraft nor the equipment are fail-safe. Likewise, there is the human element. People are not perfect--they make mistakes; they make errors in judgment; and sometimes they simply have "a bad day".

Notwithstanding almost three decades of "deregulation", there is probably no industry or activity that is as highly regulated. While many regulations appear to be specific and clear, many others are not and can impose strict liability—i.e. imposition of liability even if one did not intend to cause a violation.

There are also ambiguities, and even apparent conflicts between FAR provisions. There are also the "Stealth FAR's"--the FAA's

policies, interpretations, internal orders, handbooks, notices and guidelines, as well as case precedents, which are not so easily found or widely known, all of which can change from time to time without notice. To add to the confusion, the FAA's interpretation of the FAR's can vary, not only from Region to Region, and from district office to district office, but from inspector to inspector.



# Investigation:

## Okay, so there has been a mishap, now what?

The importance of a thorough and complete in-house investigation cannot be understated. Questions that must be answered every time you become aware of a possible violation:

- 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 contractors responsible?
- Were contractors given adequate guidance and training?
- Were the contractors in compliance with the terms and conditions of their contracts?
- Were quality control procedures adequate?
- Do any remedial or other corrective actions need to be taken to avoid recurrence?

but from inspector to inspector.

While professional responsibility, dedication and pride may keep your aviation activities safe, the majority of enforcement actions arise not from deliberate acts but rather from inadvertence or simple mistake. A violation is a violation and if an FAA inspector comes across evidence of a violation he or she has no alternative but to write it up.

### Types of Enforcement Actions

Enforcement actions can be administrative, such as a letter of reprimand or warning, or legal-- the suspension or revocation of any certificate or rating, or the imposition of monetary civil penalties.

Administrative actions are taken through the FAA Flight Standard District Office (FSDO) and do not involve the FAA legal department. These include letters of correction, warnings and reprimands. Legal enforcement actions first start at the FSDO, go through the Regional Flight Standards Division and are then forwarded to the FAA's legal department (Office of the Chief



Counsel or the appropriate Regional Counsel) which decides whether to initiate action and, if so, what type.

### Before the Enforcement Action Begins

In the majority of general aviation operations cases, an enforcement investigation is precipitated by third party complaints. In conducting its investigation, the FAA must literally start from scratch. For example, in a airspace incursion incident, the FAA must determine the identity of the aircraft, the operator and crewmember, and specifically what, if anything, happened.

In general aviation maintenance, air carrier and repair station cases, required compliance records can realistically hand the FAA its case on a silver platter. It is difficult, if not impossible, to convince the FAA that required records mean something other than what they appear to say. FAA inspectors can show up at

any 'reasonable' time and ask for all required compliance information retained by a certificate holder.

While ATC deviations, in-flight airworthiness and/or maintenance discrepancies and hazardous materials infractions may readily come to a certificate holder's attention, not all potential violations are readily apparent. Corporate aircraft operators and air carriers need to ensure that lines of internal communication are open so they will learn of the irregularity or potential violation before the FAA does. No one should adopt a wait-and-see approach—something akin to sticking one's head in the sand.

### Learning of the Potential Violation

Investigation is the most crucial phase of the enforcement process because

you may have the opportunity to stop an enforcement action in its tracks. How an operator responds to a mishap or potential violation is critical—it may very well be determinative not only as to whether or not, and what type of, enforcement action will be taken and how severe it may be, but the continued viability of that operation

Comprehensive investigation by the operator, accomplishment of timely and responsive corrective action and undertaking other mitigation measures are far more effective if taken earlier, rather than later. Likewise, convincing the FAA inspector at the onset that no violation has occurred, or that appropriate corrective action has been taken to preclude possible recurrence, may prevent the matter from going further.

For corporate operations and air carriers, periodic internal



air carriers, periodic internal risk assessments and operation and maintenance audits are vital. Management must create a culture that ensures that lines of internal communication are and remain open, effectively leading to a mishap-free environment. Employees (management and non-management, union and non-union, alike) should be encouraged to report safety concerns, irregularities and potential violations to appropriate levels of senior management.

The only way this can be accomplished is if senior management proactively seeks out, and encourages those within the organization to report potential safety violations, provides an environment that is conducive to data sharing and manifests an attitude throughout the organization encouraging input and feedback. Employees must feel as though they can trust senior management to be responsive to reported safety concerns, free of retaliation.

This corporate culture may occasionally create a conflict akin to walking a tight rope. Employers must retain the right to discipline those employees who may have deviated from company policies and procedures. applicable



and procedures, applicable instructions or FAR's, while at the same time, employers must understand that employees will only report critical information if they know that there will be no arbitrary reprisals, that senior management will constructively act on the information and that senior management will back up the employees in the event the FAA initiates action against them.

### **Self-Disclosure: To be completed simultaneously with your internal investigation**

There are numerous Voluntary Disclosure Programs (VDP's) under which prompt and voluntary disclosure of apparent noncompliance may result in the FAA's administratively closing the matter without taking legal enforcement action, or in the event the FAA initiates legal enforcement action, will result in the mitigation of any sanction or penalty. The most prominent VDP is the FAA-NASA Aviation Safety Reporting Program (ASRP), an industry wide program for reporting any irregularity or occurrence provided it did not result in an accident (as defined in NTSB Regulation 830), did not involve a criminal offense or lack of qualification and was due to inadvertence. The ASRP Report will not prevent the FAA from instituting enforcement action, but will preclude it from suspending certificates or imposing civil penalties, provided it is filed within 10 days of the occurrence. See FAA Advisory Circular 00-46D. (Other major VDPs include the Aviation Safety Action Program and Voluntary Disclosure Reporting Program. However, these are more

Program. However, these are more industry specific. See FAA Advisory Circulars 120-66B and 00-58B, respectively). For the purpose of encouraging voluntary submission of safety and security information, the FAA has been directed<sup>1</sup> not to disclose voluntarily-provided information...(but here's the catch) if the FAA determines that doing so would inhibit further disclosure or interfere with security concerns. How the FAA will make this determination, or what guidelines it will use, are anyone's guess. Needless to say, 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!



### **Letter of Investigation: Have You Called Your Attorney Yet?**

An investigation leading to an enforcement action can be conducted without any requirement that the FAA notify the person or entity that it is investigating. However, if a LOI is issued, it is probably too late for the certificate holder and its employees to avail themselves of the voluntary disclosure programs. However, do not assume that because the FAA has not issued an LOI, you are in the clear. The time to start investigation and taking the appropriate protective measures is upon the occurrence of the incident (or, for company managers, the time that you first learn of the incident). Do you respond to the LOI? There is a split in the legal community on this one. However, my recommendation is a resounding "YES", for several reasons:

1. By the time the FAA has issued the LOI and the time for response has run, the FAA's investigation is not only already underway, but has probably been substantially completed;
2. Failure to respond to the LOI has traditionally been regarded by the FAA as indicative of poor "attitude" and compliance disposition and possibly be deemed as an admission of culpability;
3. Organizational certificate holders have to work with the FAA on a daily basis. Failure to respond will eventually work to one's detriment in future dealings with the investigating Inspector and District Office. A certificate holder's perceived credibility and ability to communicate are oftentimes regarded by the FAA as its "stock in trade"; and
4. Common courtesy. Nobody likes to be ignored.

**Notice of Proposed Action: Definitely Time to Call the Attorneys (If You Haven't Done So Already)**

With the exception of emergency certificate actions, the FAA must give notice of its proposed action--either in the form of a Notice of Proposed Civil Penalty, a Civil Penalty Letter or a Notice of Proposed Certificate Action. These notices advise of the action that the FAA intends to take, recite the operative facts upon which the FAA has based the action and list the FAR's that have been allegedly violated.

If the violation includes falsification of records or entails some act that suggests the violator lacks sufficient qualifications to hold their certificate, then rest assured that FAA legal will initiate not only a certificate action, but an emergency action. Certificate actions can include suspensions or revocations and either one can be done on an emergency basis if the FAA feels it is important enough.

Again, the investigation process is extremely important because by the time the file has gotten to legal, the matter has left the district office and has gone through several levels of administrative review. In other words, it's now out of the inspector's hands.

Issuance of the Notice requires a

resolution of the matter. The importance of the informal conference cannot be understated.

Generally, it is an off the record meeting conducted for the purpose of discussing, settling or otherwise resolving the case. Because FAA legal counsel will conduct and preside at the conference, I recommend that you also have legal counsel present who is well-versed in FAA enforcement matters. In many instances, representatives from FAA's technical offices will also attend. Depending on the technical nature of the violation, you may need your own expert who understands the underlying facts and issues involved. These cases frequently settle at the informal conference, or shortly thereafter. However, for those that don't, the FAA will take its final action for which there are appeal procedures.



**Civil Penalties**

FAA civil penalties are appealable to a Department of Transportation Administrative Law Judge. If either party feels the results are not satisfactory, they may appeal to the FAA Administrator. If the appeal is denied or unfavorable, a petition for review of the Administrator's decision can be filed with the United States Court of Appeals.

## Certificate actions

The FAA's Orders of Suspension or Revocation are appealable to the NTSB and unless the FAA has initiated an emergency action, the filing of an appeal stays the effectiveness of the FAA's action. At the conclusion of the hearing, the Administrative Law Judge (ALJ) will issue an initial decision and order either affirming, reversing or modifying the FAA's Order. While there are multiple avenues for further appeal and review, including review by the full board and then the United States Appellate Court, the FAA has the upper hand, so again, the preliminary investigation and initial actions of the certificate holder are the most



Aircraft operators, specifically corporate operators and air carriers, have many goals--many of which may conflict. The integrity and survival of the aviation industry require that safety come first--ahead of profitability, market share, growth and other noble corporate objectives. It is imperative that operators establish and communicate this basic safety policy and ensure that all employees understand it and recognize their responsibilities thereunder--not only with respect to their own efforts, but also as to what goes on around them. If there are problems, they should immediately be brought to the attention of management so that the causes can be investigated and appropriate corrective actions can be taken. Developing, implementing and maintaining a corporate culture of safety awareness, communication and trust is perhaps the best defense of all. The FAA's enforcement/investigative process is far from perfect -- at times, it can be draconian and

heavy-handed. It is also a reality with which we must deal. 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 prevent the occurrence of the violation or at least mitigate its effects.

For more information please visit

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or contact us at (415) 421-2500.

\* This article applies to civil actions only and not to criminal actions resulting from intentional and/or negligent acts. This article is for informative purposes only and should not be construed as legal advice.

