

FAA ENFORCEMENT ACTION

Understand the process and know how to respond

STORY BY LINDSEY MCFARREN

Federal Aviation Administration enforcement actions have decreased substantially since the implementation of the compliance philosophy. In fact, according to a recent industry presentation by Ali Bahrami, FAA associate administrator for aviation safety, enforcement actions have decreased 70 percent. However, that doesn't mean certificated entities – individual airmen or mechanics, repair stations, air carriers or others – are now immune from traditional FAA enforcement action, which can range from civil penalties to suspension or revocation of the airman, mechanic, air carrier, repair station or other certificate.

“Enforcement numbers are drastically lower in the past couple of years,” said Paul Lange of the Law Offices of Paul A. Lange, a law firm specializing in regulatory matters and litigation, among other aviation matters. “The FAA’s overall goal is compliance, but that doesn’t mean they don’t still take formal enforcement action when they believe it necessary.”



Some FAA departments, including the Office of Hazardous Materials Safety and the Drug Abatement Division, still produce a disproportionate number of enforcement actions.

How does the FAA’s enforcement process work?
What are your rights as a certificated entity?
How should you respond to notification of an investigation of you or your organization?

THE ENFORCEMENT PROCESS

Inspection and notification

Typically, an FAA investigation begins with an inspection such as a ramp or base inspection. Some investigations are triggered by a specific incident such as a runway overrun. Companies should be notified of the investigation through a letter of investigation or notice of investigation.

“You have the right to know if you or your organization is being investigated, but it’s common for what appears to be a simple inspection to turn into a

formal investigation,” said Kent Jackson, founder of Jetlaw, an aviation law firm specializing in regulatory compliance and other matters and author of the *Federal Aviation Regulations Explained* series. “Don’t assume any correspondence with or visit from the FAA is informal or casual.”

The Pilots Bill of Rights made clear the FAA’s mandate to advise an entity if it is under investigation. However, it’s possible for FAA inspectors to be gathering information far in advance of officially beginning an investigation. You should contact your legal counsel as soon as you are aware or suspect you are under investigation.

Establish a few company policies in advance of any possible FAA investigation. First, require all visitors to sign in with name and title. If a team of inspectors arrive for a friendly visit or disclosed investigative purposes, you know exactly who participated. The names, titles and even home office of the FAA representatives can give you an idea of the scope and criticality of an investigation. Second, require a member of your management team be present any time the FAA arrives to review records or conduct a full inspection. If inspectors arrive unannounced, be sure the management team is notified immediately, but as Lange advised, “Be polite and as cooperative as you reasonably can within your level of authority.”

Document the records reviewed by the inspectors. If the inspectors ask for copies, make two copies – one for the inspector and one for your organization. If the inspector takes digital photos of records, make notes of what records were photographed. Ideally, take your own photos.

“Sometimes an inspector says they want to review records alone,” Lange said. “The certificate holder has an obligation under the regulations to maintain the integrity of the documents. Insist that a representative from your organization stay with the records.”

Don’t try to hide documents or play other games with records.

“Give the FAA any records they want, with the exception of records clearly out of their scope,” Jackson said. “The FAA will just subpoena anything you don’t voluntarily provide, and the agency has never lost a subpoena battle.”

Continued on following page

WHEN IS OMISSION ACTUALLY FALSIFICATION?

The NTSB recently reinstated the FAA’s emergency order of revocation of a Part 145 repair station for violations related to maintenance records, among other alleged violations. In *Daniel K. Elwell, Acting Administrator, Federal Aviation Administration v. Kornitsky Group, LLC, d/b/a AeroBearings, LLC*, an ALJ disagreed with the FAA’s findings related to falsification of records, reversing the emergency order of revocation, but upheld other findings and instead ordered a suspension of AeroBearings’ repair station certificate.

The FAA exercised its right to appeal to the NTSB, which reversed the ALJ’s decision, finding in favor of the FAA and reinstating the emergency order of revocation.

While this case – admittedly overly simplified in its description here – provides a recent example of the enforcement process described in this article, it also tells a cautionary tale of changing perspectives within the NTSB and broadens accepted standards for proving falsification.

Previously, for the FAA to prove falsification, the agency had to meet certain standards for intentional falsification. An omission in a maintenance record could be considered falsification but only if the mechanic had intent to falsify the record. Omissions immaterial to future work on the aircraft and left out of the record for simplicity or time’s sake were not considered falsification.

In May, the NTSB determined the motive for omitting facts from a maintenance record is irrelevant – the act of omission in and of itself may be considered falsification.

Robert Sumwalt, chairman of the NTSB, wrote a dissenting opinion in which he strongly disagreed with the majority of the Board’s decision that failure to be “scrupulously accurate” in maintenance records constitutes intentional falsification. His criticism continued, adding, “I do not share the majority’s enthusiasm for such expansion of jurisprudence.”

The case could be appealed to the Federal District Court and beyond, so there’s no telling if the Board’s decision will remain the law of the land. For now, though, this decision sets precedent for future falsification allegations.

“The lesson for mechanics is clear – be thorough and accurate in all maintenance log entries,” Jackson said. “Don’t take shortcuts in documentation, regardless of your motivation for doing so. When it comes to falsification, it is not just your certificate and livelihood that are on the line. You could face criminal charges, as well.” □

FAA ENFORCEMENT ACTION

Continued from page 35

Exercising appeal rights

You are under no obligation to reply to a letter of investigation or notice of investigation, but you must respond if you plan to exercise your appeal rights. If you do plan to appeal the FAA's findings, you must respond to the letter of investigation or notice of investigation and request an informal conference.

You have 10 days to respond to the letter of investigation or notice of investigation. In almost all cases, it is wise to respond in writing within that time frame. Not doing so allows the FAA's findings to remain uncontested before going to FAA counsel and subjects you to the enforcement action the FAA deems appropriate.

Notice of proposed certificate action or notice of proposed civil penalty

If the FAA decides to pursue the matter, the next step is for an FAA attorney to prepare and serve either a notice of proposed certificate action or notice of proposed civil penalty. These read like a complaint in litigation, which is essentially what they are. They lay out the facts and allegations of wrongdoing that the FAA believes justify the action or damages sought.

Informal conference

The NOPCA and NOPCP provide options for a response. The most commonly chosen response is an informal conference – essentially a settlement conference. Prior to the informal conference, you will have an opportunity to see the evidence gathered against you by the FAA, but only if you request it. That evidence is contained in what the FAA calls its Enforcement Investigative Report. The EIR contains all critical details of the investigation and will help you prepare for the informal conference. Most FAA enforcement action is resolved at the informal conference level.

Administrative law judge hearing

A hearing with an administrative law judge is the next step in the process if a settlement is not reached at the informal conference. An ALJ travels to your city to hear the evidence. Rules of evidence apply to the ALJ hearing. In the past, the ALJ was bound by FAA legal interpretations, but now the ALJ can interpret the law without necessarily following FAA interpretations.

If the ALJ upholds the FAA's findings, you might choose to proceed to the next step: an appeal to the full National Transportation Safety Board in the case of certificate action, or to the FAA decision-maker in the case of a civil penalty. If the ALJ finds in favor of you or your organization, the FAA might appeal.

Appeal to the full National Transportation Safety Board or to the FAA decision-maker

An appeal to the full NTSB is not an evidentiary hearing – the Board reviews all elements of the case and makes a decision without additional evidence. It is typically decided without oral argument. In the case of civil penalty actions, the FAA decision-maker fills the same appellate role as the full NTSB. The decisions at this level are important, as they set precedent for future decisions at each level of the process.

Additional appeals

While certain circumstances allow an opportunity to appeal to a U.S. District Court, most cases are still adjudicated through the administrative process outlined above.

If you can articulate that the full NTSB or FAA decision-maker committed errors of law, you may appeal to an appropriate U.S. Court of Appeals. The standard of review is extremely high, and a certain level of deference to the agency is part of that standard. That is why very few cases are overturned on appeal, with a smaller subset finding in favor of the certificate holder. While an appeal to the U.S. Supreme Court is theoretically possible, it would be an extremely rare case to make it that high and to be accepted by that Court for review.

The enforcement process, whether the case is appealed all the way to the U.S. Court of Appeals or is resolved in a preceding step, can be lengthy. With certain exceptions, the FAA has six months to notify a certificate holder (i.e., a pilot, mechanic or air carrier) of proposed certificate action. The FAA has two years to notify a person or entity of proposed civil penalties. The process following notification can take months or years to resolve.

Although many instances of alleged noncompliance are now dealt with through the FAA's Compliance Philosophy, it's important to understand how formal enforcement actions progress and how best to respond to FAA allegations. Remain courteous and professional but vigilant, whether working with the FAA through the compliance philosophy or reacting to the formal notification of investigation. □