



# FAA Investigations

## What Every Lawyer Wants You To Know *Before* You Need to Know It

*Presented by*

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# What We'll Cover Today

- The FAA investigative process, the FAA's methods and understanding the consequences, and the steps of a legal enforcement action
- FAA's Current Compliance and Enforcement Philosophy – Kinder and gentler but the Hammer can still come down
- NTSB Accident Investigations – Report or not report, and the role of the investigators (NTSB vs FAA vs local police)
- Awareness of the many lurking legal issues – it's important to be informed, and ready if it happens to you
- Time for questions

# FAA Investigations

- FAA has authority to adopt minimum safe standards (i.e., regulations) that we are then expected to meet
- FAA has an interest, as do we, to assure compliance with the FAA's regulations
- FAA can learn of a possible violation in various ways:
  - A complaint from the public, generally through the Administrator's Hotline or direct call to the tower or the FSDO
  - Visual observation by a controller or an FAA inspector
  - Routine inspection activity
  - Accident or incident
  - Ramp check
  - Self reports
- FAA Inspector will investigate: collect statements, conduct interviews, make a record of calls and visits, request and obtain copies of logbooks, records, and other information AND send a letter of investigation to the airman

# Pilot's Bill of Rights Notification

- Requires timely written notification of investigation – *any* investigation, including possible FAR violation & medical application
- Usually seen in LOI but can be provided to you in person or by email, sometimes with a Compliance Philosophy Brochure
- PBOR Notice must contain WARNINGS, to include that:
  - Response to LOI not required
  - No adverse inference for failing to respond
  - Response may be used in evidence against pilot
  - FAA's investigative file ("EIR") will be made available to pilot
  - Right to air traffic data, including from Government Contractors (but pilot must assure preservation)

# The Ramp Check & The LOI

- Ramp Check
  - FAA's routine surveillance tool, but also a form of investigation
  - Ask for inspector's credentials
  - Be courteous, present certificates and aircraft documents (not surrender)
  - No legal requirement to respond to any questions
  - Not required to allow access to your aircraft, or anyone else's aircraft
  - Air agencies may have to allow access to facilities
- Letter of Investigation (LOI)
  - No legal requirement to respond – strategy to doing so
  - Contains certain now-required Pilot's Bill of Rights notifications by the FAA – fair notice that you're a target and fair access to air traffic data
  - Requirement to make certificates and logbooks available to FAA, if requested in the letter - FAR 61.51, 91.203, 91.417
  - Required report to FAA in "emergency" and "ATC priority, if requested" - FAR 91.3, 91.123
- Same advice applies to individuals and certificate holding companies

# Request for Re-examination

- “709 check” = request for re-exam
- Letter comes from an FAA inspector
  - Request must be reasonable
  - Re-exam must be limited to reason for request
- Failure or refusal to be reexamined leads to emergency order of suspension until a successful reexam is accomplished
- Successful re-exam usually ends the matter, but technically no “double jeopardy” to protect against FAA accusation of a FAR violation
- Airman should arrange to get training in areas to be re-examined; have it logged and signed off

# FAA's Compliance Program - overview

- Announced by FAA in June 2016 to make system safer without being counterproductive – Just Culture
  - In essence, an extension of the voluntary reporting programs and data sharing
  - Intended to apply to all FAA programs
- Adds a new *informal* tool for FAA Inspectors to use to resolve apparent violations
- Seeks to correct unintentional deviations or noncompliance arising from simple mistakes, lack of proficiency, flawed procedures, misunderstandings, diminished skills
- Does not apply when behavior is intentional, reckless, repeated, criminal, or demonstrates a lack of qualification, or where law requires enforcement

# FAA's More Productive Resolutions

- Airman or Agency must be “willing and able” to comply with the regulations and safe operating practices
  - FAA will need to be able to verify facts and assess that airman is proactive, cooperative, and capable of participating in appropriate remediation
  - Refusal to speak with FAA, or obtaining legal counsel, does not automatically disqualify the use of this tool
- Typical Forms of Compliance Action: Counseling, correction (on-the-spot or after-the-fact), informal training, remedial training program, improvement to procedure, modified practice – a “fix” addressing the underlying safety concern
- Action is documented but not made a part of airman's record – no violation history
- Why legal advice may help the objectives of safety to be achieved

# What Are We Seeing

- Compliance Actions being used for altitude and airspace busts, logbook discrepancies, missed proficiency, missed maintenance, minor incidents, oversights in preflight, airworthiness, certificates not accessible
- Compliance Actions being used in company records discrepancies and unintentional operational or maintenance oversights
- Compliance Actions not appropriate for intentional falsification of medical applications, logbooks, or company records, use of unapproved medications or development of disqualifying medical condition, unapproved parts, CRM disruption, refusals to submit to proper drug or alcohol testing requests, exceeding certificate authority

# Results of FAA Scrutiny

- Investigation Outcomes: No Action, Request for Reexamination, Compliance Action, Administrative Action, Legal Enforcement Action – suspension, revocation, civil penalty, Criminal Sanctions – rare
  - Potential Impact: mark on airman record (Future Enforcement, Insurance, Ratings, Aviation Career (PRIA, PRD, and Argus/Wyvern ratings), No NASA Waiver), lost time, costs, sometimes starting over
- Enforcement Action structure: event, FAA gathers information, letter of investigation, response, notice of proposed certificate action, informal conference to attempt settlement, order, appeal, hearing before an NTSB administrative law judge, appeal to the full NTSB Board, further appeal to the U.S. Courts of Appeals

# Voluntary Reporting

- Many data sharing safety programs:
  - For individuals: ASRP (“NASA Report”); ASAP; ATSAP
  - For companies and some protection for individuals: VDRP
  - For certificated companies: SMS, FOQA
  - Not the FAA Hotline
- Well-established good advice to file a voluntary safety report under ASRP, ASAP, VDRP, and other programs as soon as something comes to your attention (at the time, or later is now ok)
  - As always, be cautious and be informed about making such filings, but rarely a reason not to file (except accident, crime, or intentional misbehavior, and when report may become available to others)
- *Good reasons* for making those reports
  - Helps the system
  - Helps you

# NTSB Accident Investigations

- NTSB definition of accident, 49 CFR 830.2
  - Aircraft accident means an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage. For purposes of this part, the definition of “aircraft accident” includes “unmanned aircraft accident,” defined as maximum gross takeoff weight of 300 pounds & up.
- Notification and written report, NTSB Accident Report Form 6120.1, *required* by the pilot/operator
  - TO NTSB, **NOT FAA**
- For certain accidents, the NTSB will delegate some of the investigative tasks to the FAA (and FAA will always be party to an NTSB aircraft accident investigation)
  - Presents a potential conflict for the FAA representative involved
  - FAA cannot act as both FAA and NTSB – make sure you know their role before continuing communications – your legal responsibilities in responding differ
  - NTSB is in charge of the investigation – provide information directly to NTSB

# Additional Topics, generally

- Basic Med
  - Valid U.S. Driver's License & Compliant with conditions/restrictions
  - Valid Medical Certificate as of July 15, 2006 (expired ok, not denied, revoked or withdrawn); no medical certificate denied, revoked, or withdrawn in the meantime
  - Bi-Annual Education (free/online) – 24 Months (grants FAA access to National Drivers Registry)
  - Four years between physicals – 48 Months
- DUI/DWI Reporting
  - Two potential reporting responsibilities: FAR §61.15 and Item 18v on Medical Application
  - Can you continue to fly?

# Additional Topics, generally

- Pilot Records Improvement Act/Pilot Records Database
  - Keep track of what records exist and use the process to correct any errors or omissions in those records
  - FAA's expunction policy has been suspended by Act of Congress
- Employment and Aviation Services Contracts
  - Both parties must read and know what is in the contracts
    - Put it all in writing
  - Get competent advice to know what is being contracted and what protections are in place
- Insurance coverage and requirements
  - What you can afford, know the terms and comply
  - Protect against a claim or liability: act reasonably and maintain quality control, keep educated/proficient, appropriate organizational structures; releases

# Thank you!

## Questions?

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# ASRP – “NASA Report”

(Yes, it's still a thing)

- ASRP gets rid of certificate suspension
- Background - real reason for ASRP
- Uses NASA to preserve anonymity and confidentiality
- Time critical - Report must be filed within 10 days of violation, or became aware was a violation
  - By mail or on-line – get receipt
- If FAA takes action, NASA report cannot prevent FAA from making a finding of violation
- Appealable to NTSB

# ASRP eligibility:

- Not an accident\* - but see the generally recognized definition in NTSB's regulations
- Not a criminal offense\*
  - \*no anonymity or confidentiality
- Must be “inadvertent and not deliberate”
- No lack of competency or qualification - revocation
- No finding of violation five years prior to violation
  - frequently misunderstood to mean can only file a report once every 5 years – NOT TRUE