



AVIATION REGULATION AND ENFORCEMENT OVERVIEW

BY JUSTINE A. HARRISON, ESQ.

For those of us in the bar who fly — whether as an adjunct to our law practices or purely for pleasure — or who have clients that do, a full understanding of the FAA’s salutary role and regulatory function within the aviation community is crucial. This article provides an overview of the FAA’s regulatory and enforcement structures, applicable to individuals and business entities alike.

FAA Certificates

The FAA issues certificates for many purposes, including certification of aircraft, individuals and business operations. Certificates are often (but not always) required to legally perform specific aviation operations, and each certificate category has different requirements, regulations and policies.

Certificates for Individuals

A variety of certificate types are issued to individuals, from medical fitness to competency, to pilot aircraft, repair aircraft and perform other aviation roles. Many individual certificate holders fall under the definition of airmen,¹ which includes pilots, flight instructors, flight engineers, aircraft dispatchers, mechanics, repairmen, parachute riggers and control tower operators. However, individual certificates are not always required. For example, piloting unmanned aerial vehicles for hobby or recreation purposes does not require a pilot certificate, nor does piloting a single seat ultralight.

Certificates for Business Operations

Certain aviation operations governed by Title 14 of the Code of Federal Regulations require FAA certificates, including Part 121: scheduled air carriers (e.g. Southwest Airlines), Part 135: on-demand air carriers (e.g. air tour companies, charter operators), Part 141: flight schools and Part 145: aircraft repair stations (which repair aircraft flown by Part 121 and Part 135 carriers). Certificates are not required for all aviation operations. For example, flight operations that are not conducted for compensation or hire, such as corporate flight departments within companies that use aviation as a business tool (e.g. to transport their company’s executives), a Part 91 operation, do not require an FAA operating certificate.

Enforcement

The FAA promulgates regulations and, when it alleges lack of regulatory compliance, uses the enforcement process as a method to compel compliance. FAA Order 2150.3B, as amended, establishes national policy, procedures and guidelines for the FAA compliance and enforcement program, including determining what categories of violations can be resolved via administrative versus legal methods and sanctioning recommendations.

Typical Compliance Pitfalls

Certificate holder compliance infractions most often arise out of:

1. Inspections and examinations,
2. Failure to comply with manuals, and
3. Reports of alleged violations made to, or generated by, the FAA.



1. Inspections and Examinations

Title 49 of the U.S. Code contains the FAA's general authority to conduct inspections and examinations for safety compliance purposes. This includes authorization to reinspect certificated operations as well as any civil aircraft, aircraft engine, propeller, appliance, air navigation facility or air agency. Individuals must present their pilot certificate, medical certificate, logbook or any other record required by 14 CFR Part 61 for inspection upon the FAA's reasonable request. The FAA routinely conducts unscheduled ramp checks of flight operations, and certificate holders must immediately provide all information required by law to be on board the aircraft and in possession of the flight crew. The FAA may also reexamine any civil airman.

2. Failure to Comply with Manuals

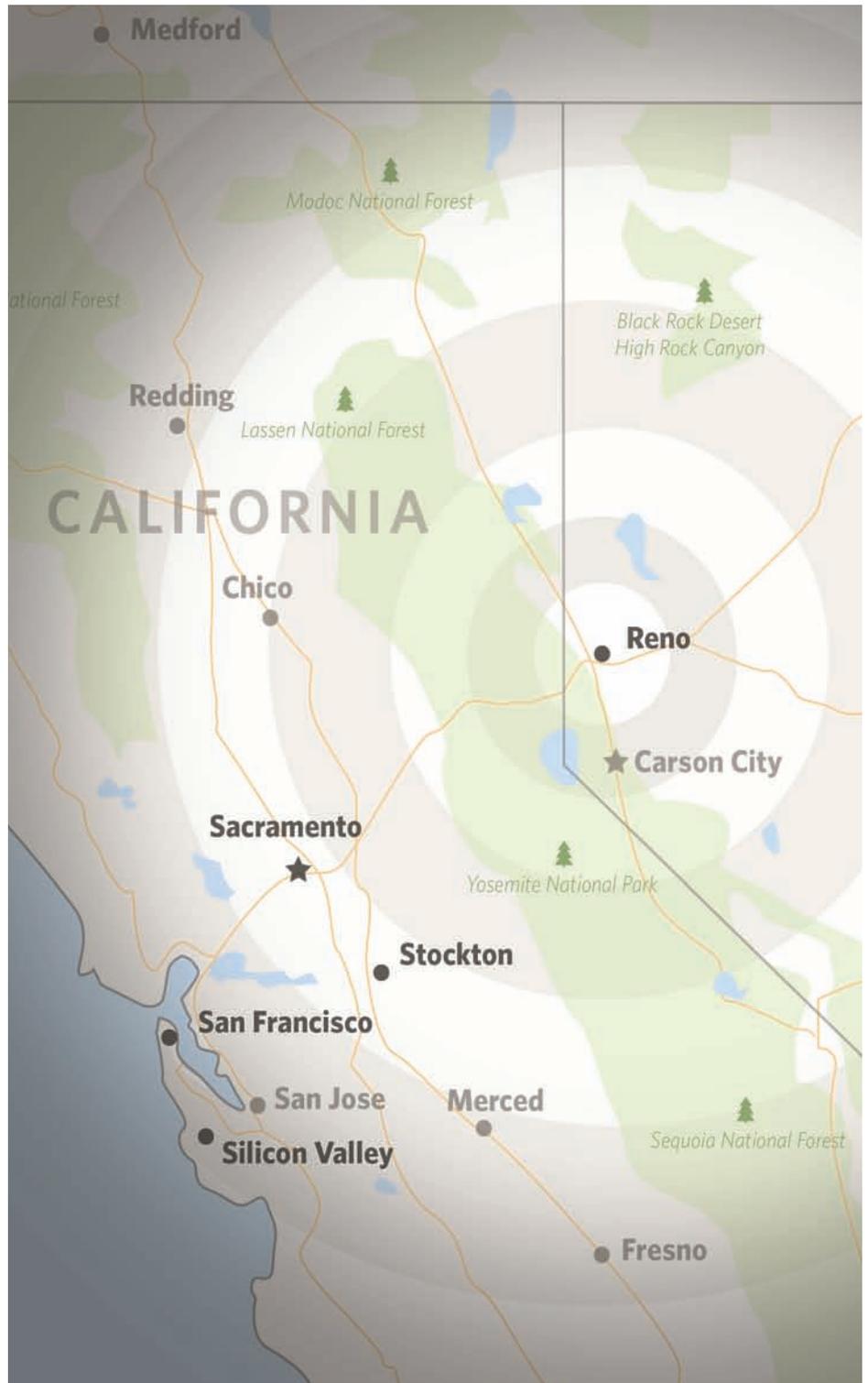
Whether an aviation operation can be conducted legally often depends upon compliance with applicable manuals. There are many types of manuals that may apply to operations, including company manuals for certificated business operations, aircraft flight manuals, aircraft maintenance manuals, and structural, overhaul and repair manuals.

3. Public Complaints and FAA Staff Reports

The FAA receives complaints and reports of alleged violations from members of the public as well as from its own personnel. For example, all air traffic organization employees are required to file Mandatory Occurrence Reports to report suspected unsafe air traffic occurrences such as:

- a. Reports of in-flight medical emergencies,
- b. The presence of an unexpected/unintended aircraft, vehicle or

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- pedestrian on any airport movement area or runway safety area, and
- c. When an aircraft enters airspace at an altitude, routing or airspeed other than an expected or intended.²

Investigations

When the FAA suspects that a certificate holder has not been in full compliance with applicable regulations, a flight standards district office (FSDO) may open an investigation and send affected parties a letter of investigation. If an affected party is an airman and the allegation involves the exercise of privileges under his/her airman certificate, he/she will concurrently receive a Pilots Bill of Rights³ notification. If the investigation findings

support the FAA's suspicions, then the FAA has multiple response options, including counseling, administrative action, reexamination and legal action. These options are not mutually exclusive and are sometimes combined (i.e. reexamination and legal action).

Enforcement

Administrative Action

The FAA may issue a warning letter or notice of correction to the certificate holder. These outcomes do not constitute a finding of violation on a certificate holder's record.

Reexamination

If a certificate holder's qualifications and competency are in

question, the FAA may issue a request for reexamination that is usually limited to specific reasons leading to the request (i.e. retesting a specific skill set). Failure or refusal to submit to reexamination will result in an emergency order of suspension certificate privileges. The FAA considers reexamination to be remedial, not punitive, and it does not constitute a finding of violation on a certificate holder's record. However, successful reexamination outcomes do not bar subsequent legal action.

Legal Action

FAA legal counsel exercises broad prosecutorial discretion in the handling of legal enforcement actions, extending from initial determination of whether legal enforcement action is supportable through closure of a case. Most FAA legal actions involve certificate actions (i.e. suspension or revocation), and civil monetary penalties.⁴ Other legal remedies sought by the FAA include injunctions, cease-and-desist orders, aircraft liens or seizures, and referrals to the Department of Justice for criminal prosecution.

In non-emergency certificate action and civil monetary penalty cases, the FAA will send the affected party a notice of proposed certificate action/assessment and provide an opportunity for an informal conference with the FAA attorney. Emergency certificate actions skip this step. The FAA will next issue an order of suspension, revocation or assessment, that is appealable to the National Transportation Safety Board (NTSB) for a hearing before an Administrative Law Judge (ALJ).

Either party may further appeal from the initial decision of an ALJ to the NTSB itself. The NTSB's review in such appeals is limited to: consideration of whether a finding of material fact is erroneous; a necessary legal conclusion is without governing precedent or is a departure from or contrary to law, NTSB rules or precedent; a substantial

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and important question of law, policy or discretion is involved; or a prejudicial error has occurred. Unless the NTSB finds an FAA interpretation to be arbitrary, capricious or otherwise not according to law, it must defer to all validly adopted FAA interpretations of laws, regulations and FAA sanction guidance.

The Department of Transportation (through its FAA and NTSB), serves as both prosecutor and decision maker at ALJ hearings and NTSB appeals.⁵ Certain cases can be further appealed to federal court. For example, in emergency certificate action cases the NTSB can review the merits of an appeal from an FAA's emergency order but not the FAA's determination that an order should be immediately effective, a matter which must be appealed in a U.S. court of appeals. Predictably, statistics show that the FAA prevails in most ALJ hearings and NTSB appeals, and that most legal enforcement cases do not proceed to a hearing.

Leveling the Playing Field

Despite an enforcement process that favors the FAA, airmen should be aware of the law and programs that begin to level the playing field between airmen and the FAA. It should be noted that these apply to individual airmen, not certificated operations, such as Part 121, 135 and 145 certificate holders.

In 1975, the FAA instituted a voluntary Aviation Safety Reporting Program (ASRP) to encourage identification and reporting of aviation system deficiencies and discrepancies. If an airman has filed an ASRP report concerning an incident or occurrence involving a violation of federal aviation regulations (FARs), a finding of violation can still be made but the sanction will be waived (no civil penalty or certificate suspension will be imposed), provided that:

1. The violation was inadvertent and not deliberate;
2. The violation did not involve a criminal offense or disclose a lack of qualification or competency;

3. Within the preceding five years, the individual has not had a final order of violation of the FARs; and
4. The ASRP was filed within 10 days of the occurrence.

The 2012 Pilots Bill of Rights applies to all airmen, not just pilots. It requires timely written notification to individual airmen who are subjects of an investigation, stating: the nature of the investigation; informing the recipient that a response to the letter of investigation is not required and that no adverse inference will be taken if the individual does not respond; and stating that any response to a Letter of Investigation may be used against the individual. It also requires the NTSB to follow the Federal Rules of Civil Procedure and the Federal Rules of Evidence at its hearings, and to provide certain evidence to the individual under investigation. **NL**

1. 49 U.S.C. § 40102(8).
2. FAA Order JO 7210.632 effective January 30, 2012.
3. Public Law (PL) 112-153, 126 Statute 1159 (August 3, 2012).
4. FAA Civil Penalty actions are governed by the Rules of Practice, 14 C.F.R. §§ 13.16 and 13.201-13.235.
5. 14 C.F.R. §13.202.

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