

# FAA'S NEW PHILOSOPHY: LESS ENFORCEMENT, MORE COMPLIANCE

BY SHELLEY A. EWALT

In June of this year, the FAA announced a new national policy regarding regulatory compliance and enforcement. The policy, issued in the form of mandatory Order 8000.373 entitled “Federal Aviation Administration Compliance Philosophy,” received little attention. The aviation industry should be aware of it because it has significant implications for repair stations, charter operators, individual pilots and mechanics, as well as all other regulated entities.

The new enforcement policy came to the attention of some in the aviation industry when FAA Administrator Huerta mentioned it in passing during a Q&A session

at EAA AirVenture. As reported in AINonline on July 26<sup>th</sup>, an audience member asked “why his mechanic had to spend so much time worrying about complying with complex regulations and not ‘doing the right thing’ when maintaining his airplane.” Administrator Huerta referred to the recently released “Compliance Philosophy” as a new approach to ensure that regulated entities meet the regulatory standards. He explained that the new policy is a “big cultural change” for the FAA as well as for regulated entities, and he characterized it as a guiding framework for approaching all regulatory activities. Administrator Huerta went on to state that the current

legal approach “creates a bit of a chilling effect” and the goal of the FAA’s new framework was to focus on assessing and mitigating risk.

The new Compliance Philosophy is the overarching guidance for implementing the FAA’s strategic oversight approach. Administrator Huerta explained that the FAA’s safety system is presently, and will continue to be, based on voluntary compliance with regulatory standards. Industry has a legal obligation to comply with all established regulatory standards by developing and using processes and procedures that prevent deviation from regulatory standards. None of this is new to the aviation

Continued on page 69

## FAA's New Philosophy: Less Enforcement, More Compliance

Continued from page 67

industry. What is new is that there is a Compliance Philosophy apart from enforcement and it emphasizes the use of Safety Management System (SMS) principles, which rely on the transparent sharing of data between industry and the FAA. The FAA believes that the new Compliance Philosophy, in conjunction with an established safety culture, and open and transparent sharing of data, is key in ensuring compliance, identifying hazards, and managing risks.

The Compliance Philosophy explains that when deviations occur, the “FAA’s goal is to use the most effective means to return an individual or entity...to full compliance and to prevent recurrence.” The FAA acknowledges that deviations may occur due to “flawed procedures, simple mistakes, lack of understanding, or diminished skills” and believes that the most effective way to correct these deviations is through root cause analysis and training, education or other improvement to procedures or training programs for regulated entities. It points out, however, that failure to adopt improved methods or instances of repeated deviations could result in enforcement. “Intentional or reckless deviations” or deviations that are an unacceptable risk to safety continue to be the highest concern and will thus be subject to strong enforcement.

The aviation industry is well aware that new policies or standards issued in Washington D.C. have no actual effect, whether good or bad, until the local regions, FSDOs and inspectors have bought into them. Introducing a significant cultural change to the FAA’s workforce, who are spread across different regulatory branches,

broadly separated by geography, and steeped in a culture that has emphasized enforcement, is no small task. It appears that groundwork for implementing the new Compliance Philosophy began many months before the issuance of the policy. Two of the employee unions—National Air Traffic Controllers Association and the Professional Aviation Safety Specialists—were provided informational briefings in January 2015. There have been coordination meetings between divisions, development of standardized terminology, and identification of best internal and external safety oversight practices. In his speech at EAA, Administrator Huerta stated that the FAA was in the process of communicating the new Compliance Philosophy to every one of its 47,000 employees.

The FAA’s primary approach for decades has been enforcement. The agency’s authority to impose civil penalties, and suspend or revoke a regulated entities’ operating authority (such as a repair station or charter operator certificate) is a big hammer in the enforcement toolbox; one that some may feel has been wielded without much common sense. An enforcement policy is akin to the concept of prosecutorial discretion: the FAA has the authority to either impose fines on a company or take a person’s ability to earn a living, whereas the prosecutor in a criminal case has the authority to either impose fines or incarcerate a person. In a big shift, Administrator Huerta explained that now the “objective is not to enforce; the object is to ensure compliance.” Although enforcement is one tool in the

toolbox, he stated that there are a lot others that should be looked at first.

Perhaps most importantly, the FAA is in the process of updating FAA Order 2150.3B (Compliance and Enforcement Program). This Order was last substantively updated in 2007 and is mandatory for all agency personnel who investigate, report, and process enforcement actions. The Enforcement Manual, as it is more commonly called, is several hundred pages long, and includes (among many things) investigation procedures, sanction recommendations for various types of violations and violators (e.g., small or large business), as well as civil penalty factors and certificate sanction guidance.

You will note that the term “Compliance” is in the title. Additionally, there is a chapter devoted to Compliance and Enforcement Policy and Objectives (chapter 2). In spite of its title, this chapter has little discussion of compliance, or of a philosophy towards compliance versus enforcement. In contrast, the FAA’s new Compliance Philosophy recognizes that compliance and enforcement are two separate things.

Presently the compliance and enforcement philosophy section in the Enforcement Manual is contradictory and is without the overarching guidance that is stated in the new Compliance Philosophy. Additionally, the current Enforcement Manual arguably imposes a zero tolerance strict compliance standard that leads inevitably to enforcement actions rather than a common sense approach towards preventing future

Continued on page 71

## FAA's New Philosophy: Less Enforcement, More Compliance

Continued from page 69

deviations. For instance, the key elements of its current compliance and enforcement philosophy are surveillance, detection, investigation, and reporting. Once violations are identified, enforcement personnel are required to investigate and address every apparent or alleged violation. The potential responses include: oral or written counseling, administrative action (including remedial training, civil penalties, and certificate suspension or revocation), legal enforcement, and referral for criminal prosecution. While the Enforcement Manual includes “remedial training” as one option, it is given much less emphasis than the administrative and legal enforcement options.

In a number of instances, the Enforcement Manual currently conflates the terms “compliance” and “enforcement” and interprets them to mean one and the same thing. For example, where the Enforcement Manual explains its “Responses to Violations and Purposes for Compliance and Enforcement” (chapter 2, subsection 3(f)) it gives a list of its potential enforcement actions, but nowhere does it explain or give examples on how such actions promote voluntary compliance.

In the same section, the Enforcement Manual says that its “compliance and enforcement program must be fair and reasonable and should be perceived as fair by those subject to regulation.” This is another example in which compliance and enforcement are lumped together when the text is really referring only to enforcement actions. Additionally, there is no standard given for “fair and reasonable” except to state that

the “apparent violator” should be afforded objective and evenhanded consideration of all circumstances before a final action is taken. Once again, this is an enforcement mindset, rather than beginning with a starting point of cultivating compliance.

In the current Enforcement Manual, “voluntary compliance” receives minimal attention—there is a short statement that says the safety of aviation depends on voluntary adherence to legal requirements and that the FAA administers programs to promote awareness and understanding of the applicable law and regulations. No one in industry would argue against the premise that voluntary compliance is critical to safety. Acceptance of this concept is a basic premise of the aviation industry. The FAA has many laudable outreach programs to individual pilots and maintenance technicians that explain the regulations in day-to-day applications, such as WINGS and FAAST team programs. By comparison, regulated entities such as repair stations and charter operators are subject to surveillance that is focused on finding deviations. Once a deviation is uncovered, the current Enforcement Manual allows individual inspectors little flexibility to use training and education to correct procedures rather than to pursue enforcement actions.

Many anecdotal reports from repair stations and charter operators point out the frustrating process of undergoing audits from FAA inspectors. Inevitably, a discrepancy or violation is discovered. Even though it was inadvertent, led to no actual safety issue, and the regulated entity proceeds to fix the process or

procedure that led to the discrepancy, an enforcement action is pursued nonetheless. In fact, the current Enforcement Manual leaves individual inspectors little option but to pursue enforcement of some kind.

For repair stations and charter operators, these enforcement actions often take the form of fines. The philosophy behind fines is that they are intended to “hurt” and get the attention of the regulated entity in order to motivate it to not violate again. Fines are ratcheted up depending upon the size of the business, reaching hundreds of thousands of dollars for the largest regulated entities. Quarterly reports of closed civil penalty actions are available online, and all actions are listed—those involving large and small entities, major and minor infractions, substantial and de minimus fines.

Another key element for implementation of the new Compliance Philosophy is a reorganization of the FAA Regional Counsel offices. As reported by Avweb.com on August 2, 2015, there are currently nine separate Regional Counsel Offices. Under the new organization, there will be five enforcement regions, each headed by an experienced senior managing attorney and supported by attorneys dedicated solely to enforcement. The FAA believes that attorneys who are solely enforcement specialists will help to resolve longstanding complaints of inconsistent actions and sanctions between the regions. Reggie Govan, the FAA's Chief Counsel, attended EAA this summer and explained the new Compliance Philosophy. Mr. Govan was appointed

Continued on page 73

## FAA's New Philosophy: Less Enforcement, More Compliance

Continued from page 71

to this position in January 2015. He stated that certificate holders should have the opportunity to learn from unintentional mistakes, get retraining or education, and that monetary sanctions should be utilized in limited cases. Under the new Compliance Philosophy, enforcement proceedings will be focused on serious safety risks, falsifications, failure to implement corrective actions, and lack of commitment of resources to make effective risk-based solutions, which is a nod to SMS principles.

With this approach, it is expected that most alleged violations would be resolved at the FSDO level, before FAA lawyers are involved. Here, a cultural shift on the part of the certificate holder will be required to make this new philosophy work for everyone. A certificate holder must be willing to openly and transparently share information regarding the alleged violation. For some, that shift will be difficult. Certificate holders, presumably acting on advice of counsel, have traditionally shared only required information with regulators in order to force the FAA to "prove" its case.

Regulated entities are not yet privy to all of the internal communications going on at the FAA while this significant culture shift is underway. Once published, a major update to the Enforcement Manual will be the clearest signal that the shift is truly underway as well as providing the details of what it will mean for industry. Further, the shift to resolving more alleged regulatory violations at the FSDO level will be a big change for both the agency and regulated entities. This will mean more involvement with and interaction with FSDO-level inspectors rather than attorneys. The organizational change to the enforcement attorney structure could mean that when an alleged violation is escalated to the FAA's legal level, the alleged violation is one that the FAA believes is a significant safety violation for which it will pursue the most serious tools in its toolbox. The Administrator's new Compliance Philosophy emphasizes that compliance is a framework and a mindset that encourages a safety culture while recognizing hazards and mitigating risks. It also relies on the principles

of SMS as a core element. Let's hope that the new Compliance Philosophy will mean that inadvertent violations are resolved through education and procedural changes, recognizing and implementing SMS principles for both the FAA and the regulated entities. **A**

Shelley A. Ewalt is an attorney for McBreen & Kopko and is based in Princeton, NJ. Ms. Ewalt's practice focuses on aviation and airport law with a focus on transactions and regulatory compliance. She represents scheduled and charter air carriers, private flight departments, FBOs, repair stations, completion centers, airport operators, terminal and concession operators, and aviation service support providers. Ms. Ewalt frequently advises clients on airport leases, aircraft transactions, grant assurances, DOT and FAA formal and informal proceedings, licensing, regulatory requirements and compliance. She is an active general aviation pilot and can be reached at [sewalt@mklawny.com](mailto:sewalt@mklawny.com).