

Your Rights When the FAA Comes Knocking



By Paul A. Lange

Editor's note: This is part one of a two-part article on dealing with FAA inspections. Part two will appear in the 4th quarter edition of *Aviation Business Journal*.

What do you do when the Federal Aviation Administration (FAA) comes knocking? Have you thought about it in advance? Do you have a plan? Do you know *which* FAA is knocking on your door? (There's more than one). As a certificate holder, your FAA experiences will vary depending on the type or types of certificates that you hold and the types of operations that you conduct. For example, the ramp inspection of a private pilot is relatively short and simple. A comprehensive inspection of an air carrier or repair station, on the other hand, involves many more documents, issues, and considerations. Regardless of what certificates you hold and the nature of your business, the basic advice starts the same and is consistent for all. Due to their larger size and complexity, aviation businesses simply have additional issues to address when the FAA comes knocking to conduct an investigation.

The FAA Enforcement Process

The FAA enforcement process can take a variety of forms. These processes are described in Part 13 of the FARs. The most prominent are certificate ac-

tions and civil penalties. Regardless of which path the FAA takes, the investigation stage is the same. What differs is who is doing the digging, how deep are they digging, and whether the investigation is random or targeted.

The FAA's enforcement authority derives from enabling legislation. These federal statutes are written into the U.S. Code and prior to 1994 were known as the Federal Aviation Act of 1958. The FAA implements these statutes by writing detailed regulations published in the Code of Federal Regulations—what are commonly referred to as the FARs. As mentioned above, Part 13 of the FARs defines the scope of what the FAA is permitted to do toward enforcing its regulations. For additional guidance and to direct its employees in how to conduct their activities, the FAA publishes handbooks and orders. Order 2150.3B is the FAA's Compliance and Enforcement Program and provides the greatest level of detail with respect to the enforcement process.

How It All Starts

Let's start with the simplest investigation, the random ramp inspection of a pilot and aircraft. We were taught early in flight training what documents are required to be on board an aircraft at all times: airworthiness certificate, aircraft registration, radio station license (for flights outside the U.S.), oper-

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FAA Inspections

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ating limitations, and weight and balance. Pretty simple. These are required by the FARs, and you're required to produce these documents to an FAA inspector upon request.

Are you required to speak to an inspector during a ramp inspection? You're definitely better off being polite, but the FARs don't require you to actually speak to an inspector during a ramp inspection. The best advice is to treat the inquiry as if you're being interrogated by the police or by an opposing lawyer at a deposition or trial. Politely answer the question posed as honestly and succinctly as possible, but don't volunteer anything. If the questions go beyond what you're required to carry on the flight, the flight plan, whether the flight is operated under Part 91 or 135, and who has operational control, politely suggest that you need to discuss the details further with management or your counsel.

What should you do when your principal inspector appears at your air carrier or repair station for a

What about base inspections? Base inspections are when the FAA shows up at your base of operations to conduct a comprehensive, in-depth inspection. They are typically scheduled and can be conducted by either the principal inspectors or "independent" inspectors from other FAA offices. Knowing who is coming to visit can make a significant difference in how you approach the inspection. Is this a routine, periodic in-depth base inspection conducted by the FAA district office assigned to oversee your organization? If so, then you can justifiably avoid immediately and loudly ringing the alarm bells. Are the inspectors from another office? If so, FAA management may have some concerns about the level of oversight that the assigned district office is conducting with respect to your certificate. FAA has an institutional paranoia over its inspectors becoming too close with those whom they regulate and thereby failing to be as diligent as they should in their regulatory responsibilities. As a result, FAA sometimes inspects its own district offices. Unfortunately, that is done by auditing how the district office conducts its inspections of your business, resulting in even more disruption and risk to you.

Most concerning is the targeted inspection. Like a base inspection, a targeted inspection is generally performed by at least several FAA inspectors. It is an in-depth inspection but may not comprehensively cover all areas of your certification. The inspection teams have often been created on an *ad hoc*, temporary-duty basis. In the past several years, however, FAA has created a team based in Dallas, Tex., that was initially referred to as the Charter Quest team due to its focus on operational control issues. FAA now refers to this team as the Special Emphasis Inspection Team, or SEIT. High-level FAA management has publicly referred to the assigned inspectors as "pit bulls." In these special-emphasis inspections, the team's goal is to find something wrong. Even in the best-run organizations, you're likely to find something if you look hard enough. This is like an IRS audit. Your best chance of coming out unscathed (or at least only a little scratched up) is to start with the basics: be impeccably polite, be honest, be concise, and by all means don't volunteer anything. You can further minimize your risk by preparing in advance for such an inspection in the ways described below.

What Are Your Rights?

The FAA conveniently describes the roles and responsibilities of its investigative personnel in

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routine, *ad hoc* inspection? The advice is essentially the same, though here you have an established working relationship with the inspector, are in the process of establishing one, or otherwise need to maintain the best relationship possible even if it requires effort. The principal inspector is often your best advocate back in the depths of FAA bureaucracy if you have a good relationship. Remember that the principal inspector initiates most routine enforcement actions and has tremendous discretion in determining just how to approach the matter and what type of sanction to pursue. Ask the principal inspector, and all visitors, to sign in. Always. Then keep the log.

Chapter 4 of the Compliance and Enforcement Program, Order 2150.3B (order). The order is available for free at www.faa.gov. Chapter 4 of the order further describes to an inspector how to go about conducting his or her investigation. In the course of explanations that span 43 pages, the FAA describes what its inspectors can and cannot do during an investigation as well as what certificate holders can and cannot do.

What is the FAA's authority to conduct inspections? The FAA has general statutory authority to conduct inspections pursuant to 49 U.S.C. Sections 44703, 44709 and 40113. The FAA also has a variety of implementing regulations that specifically authorize inspections, such as FAR 119.59, which starts, "At any time or place, the Administrator may conduct an inspection or test to determine whether a certificate holder under this part is complying with title 49 of the United States Code, applicable regulations, the certificate, or the certificate holder's operations specifications."

Are there limits to the FAA's authority? There are. The Fourth Amendment to the U.S. Constitution, for example, prohibits unreasonable searches and seizures. Even the FAA recognizes this and tells its inspectors that they may not force their way onto private property if refused access unless they first obtain a search warrant issued by a judge. Having said that, the order cites FAR 119.59 as an example of where the FAA states that it has a right to enter private property to conduct inspections.

What happens if the FAA is denied access to the premises? The FAA may enlist help from a U.S. Attorney in asking a federal court to issue an Administrative Inspection Warrant. More likely, however, the FAA may simply issue an Administrative Subpoena ordering individuals to appear and give testimony at an FAA office under oath before a court reporter and in response to deposition-type questions from an FAA lawyer. The FAA can issue an Administrative Subpoena on its own without consulting a U.S. Attorney or involving a federal court. Alternatively, the FAA may simply issue an emergency order of suspension or revocation of the relevant certificate, claiming that it has no basis upon which to determine continued compliance with the FARs.

A recent example of this involves the highly publicized case of Air Trek. The facts relevant to this issue are that FAA inspectors appeared unannounced at Air Trek's premises for a follow-up inspection after the carrier was grounded by an Emergency Order of Suspension. Air Trek asked the inspectors to wait while it sought guidance from its counsel,

given that the FAA and Air Trek were already engaged in litigation and subject to the NTSB's Rules of Practice in Air Safety Proceedings with respect to discovery. While Air Trek's counsel was discussing the issue with FAA counsel, the inspectors left the premises claiming that Air Trek refused them access to the premises. At trial, the NTSB Administrative Law Judge ruled that Air Trek violated the FARs by refusing FAA inspectors access to the premises. Air Trek did not raise that issue as part of its appeal.

A controversial ruling? Definitely. Lacking clear guidance? Definitely. How would the full NTSB have decided the issue on appeal? We obviously won't know until the next case comes along and the board is presented with the issue on appeal. In the meantime, the moral is to tread carefully in these situations, as the analysis is heavily fact dependant.

Are there time limits for the FAA to conduct an investigation? Sure. The order says that inspectors should strive to complete an investigation and the related Enforcement Investigative Report (EIR) within 75 days of the date that the FAA learned of the apparent violation. The order also states that the NTSB Rules of Practice require that any certificate action be brought within six months of that date unless the FAA can show good cause for its delay (i.e., late discovery of a violation) or alleges a lack of qualifications. (The FAA can be very creative in alleging a lack of qualifications.) Most civil penalty actions against businesses are required to be brought within two years, though certain civil penalty actions have a five-year limitations period.

Who has the burden of proof? The FAA. In short, the FAA is required to establish by a preponderance of the evidence that each element of the charged violation(s) has been proven. While this may be the lowest evidentiary standard in the law (the highest standard is the beyond-a-reasonable-doubt standard used in criminal proceedings), you're still innocent until proven guilty. You also have the right to confront the FAA's evidence against you in a hearing before an administrative law judge if the investigation results in enforcement action. Inspectors are directed to send a Letter of Investigation (LOI) notifying the subject of the investigation that it is being investigated for a particular reason or reasons and inviting a response. You have a right to respond to the LOI, but you would be well advised to have counsel respond on your behalf because anything stated in your response may be an admission that is used against you.

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Does the FAA have the right to interview witnesses? There's nothing in the FARs that specifically requires individuals to talk to the FAA. As a practical matter, however, it's often difficult to demonstrate compliance without producing one or more of your employees for FAA interviews. Moreover, the FAA can issue an administrative subpoena compelling the testimony of a reluctant witness. While the FAA cannot enforce its own subpoenas to compel a witness to testify, refusal to do so will most certainly result in a nearby U.S. Attorney's office utilizing the power of a federal court to compel the testimony. The witness' rights in this regard are that the FAA must have a reasonable basis to believe that the witness has information that is material and relevant to its investigation of a violation of the FARs. A low standard indeed, but a standard nonetheless to which rights attach.


Does a witness have a right to refuse to testify based on his or her Fifth Amendment rights against self incrimination? Absolutely. But that right must have a reasonable basis in law and fact. Moreover, if you assert that right, the administrative law judge may make a negative inference against you as a matter of law. Therefore, you want to only assert that right in extraordinary circumstances and after careful consideration with counsel.

Does the FAA have a right to your records? The FAA has a right to the records that the FARs require you to keep. Do they have a right to more? Not at the initial investigatory stage. Can they seek more in discovery if the matter is litigated? Sure. Will they get the documents? That's a facts-and-circumstances test as much as it is at the discretion of a judge. You do have certain privacy rights in your records, however. These rights emanate primarily from the Freedom of Information Act and the Privacy Act. Chapter 4, paragraph 2.b. of the order states, "The Privacy Act prohibits FAA investigators from disclosing information contained in an EIR about an individual to third parties without prior written authorization from that individual or without the disclosure being made pursuant to a FOIA request. Release under FOIA occurs only after an analysis balancing privacy concerns with the public's need for disclosure."

Financial records are also protected from disclosure under FOIA, as are documents prepared for use in litigation. There are other protections available to documents under FOIA as well, but they are beyond the scope of this article. For all practical purposes, the FAA, in general, carefully follows the Privacy Act in protecting from disclo-

sure personal information relating to an individual. The FAA is also generally cautious about disclosing your documents even in the face of a FOIA request when they know that you consider the documents privileged. Your job is to insure that the FAA knows that the documents it takes from you are proprietary and confidential. A practical way to do this is to stamp all documents provided by the FAA with a prominent marking that labels them as privileged and confidential. If a FOIA request for the documents is made, another FAA order requires the FAA to notify you of the request and permit you reasonable time to seek a protective order from a court if you wish to block disclosure.

Does an FAA inspector need to act within the course and scope of his or her employment? Yes. You have the right to expect that an inspector acts appropriately toward you and does not do anything that is beyond what the FAA permits him or her to do in his or her job description. If an inspector does stray, a suit against the inspector for civil rights violations pursuant to 42 U.S.C. 1983 is possible. Not surprisingly, the order does not discuss this subject. While a detailed discussion of the issue is beyond the scope of this article, the aviation industry has had a difficult time prevailing in the small number of such cases that have been initiated over the years against inspectors.

Lastly, the FAA states in its own publications that it will treat those whom it regulates with fairness, timeliness, mutual respect, integrity, a clear explanation of decisions, an environment without fear of retribution if you challenge their decisions, and clear guidance on how you can elevate your concerns to the next higher level of authority. While these guiding principles are best stated within the FAA's Customer Service Initiative on its website, they are nonetheless found, in whole or in part, in various places throughout FAA orders, including in the Compliance and Enforcement Program. As a last resort, these principles can at least provide some comfort that the FAA has a policy to follow and that the farther away from that policy an individual inspector deviates, the more difficult his or her actions will be to justify. 

In the next issue of *Aviation Business Journal*: practical advice that will help you during an FAA investigation.

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Practical Advice

What can you do to help yourself during an FAA investigation? Some suggestions follow.

Sign-in Sheet

First, have a sign-in sheet that visitors to your premises are required to sign, including the date and time of their visit as well as the time that the visitor leaves your premises. In other words, use the same type of sign-in sheet that you're required to sign when you visit an FAA facility. Use it for all visitors, FAA included. This allows you to keep track of which FAA inspector is on your premises, how often, and for how long.

Designated Management Representatives

Next, it's rather clear that if you don't speak to an inspector who comes knocking, you're virtually guaranteed trouble. This is notwithstanding that there's no specific requirement in the FARs for you to speak to such an inspector. The way to address inspector inquiries, however, is to have a designated management representative and/or counsel available to answer inspectors' questions on behalf of the company and to be present during interviews of employees. This allows you to provide correct and consistent responses.

Designated Administrative Representative, Stamp Your Documents As Confidential, and Most Importantly, Keep Copies

You should also have an administrative person assigned and available to be responsive to all the inspectors' needs while on site—most especially to gather documents requested and to make copies of what is requested. That person should also be charged with making a copy for the company of anything that the inspectors take away with them. All documents that leave the premises should be

marked with a rubber or digital stamp, or an adhesive backed label, created in advance stating the following: "Privileged and Confidential: Not to be disclosed to anyone other than FAA personnel without written permission of XYZ Company." What if the inspectors bring their own scanners? Keep track of everything that they are looking at and everything that they are scanning. Keep a log. Send a letter immediately following the inspection confirming what they scanned when they were at your premises. Specifically identify each document and ask if they scanned anything in addition to what you identify. Remind them that you view these documents as privileged and confidential, and that they should not be disclosed to anyone outside the FAA without the company's express written permission.

Video and Audio Recording

Can you record an FAA inspection using video, audio, or both? There's nothing in the FARs precluding it. Should you? That's a more difficult question. And the answer is, it depends. "On what," you say? First, let's start with video recording of your premises generally. Many states have laws governing employer's conduct when it comes to video recording. As a general matter, these laws preclude video recording of private areas such as bathrooms, locker rooms, and designated employee break areas. While video surveillance in public areas is generally permissible, notice is typically required in the form of signs or a signed acknowledgement from everyone on the premises that they are aware surveillance is taking place. Repair stations that perform a mix of military and civilian work often have surveillance systems on site and use them as a matter of course for security purposes. FAA inspectors routinely show up for inspections of these facilities, are recorded on video, and the surveillance is typically not an issue in those circumstances.

What happens, however, if your premises are not


as secure as a military contractor and you have no day-to-day need for video surveillance? Can you follow the inspectors around with a video camera and also record everything that they discuss? That's a tricky one. Engaging in such activity is not going to endear you to anyone at the FAA—neither the folks performing the inspection on site nor FAA management. If you choose this course, you need to have a very good reason for doing so. You must also make the conscious decision that having video and audio evidence of inspectors' conduct outweighs the risk of antagonizing the FAA. If you antagonize the FAA, you risk that they will exercise their discretion in a manner that is wholly contrary to your interests.

Should you decide that it's worth the risk, you're likely already experiencing problems and expecting more problems in short order. In that case, be prepared and have your counsel briefed and available—preferably in person, on site—but at the very least available by phone during the inspection. When gearing up for this battle, expect that the FAA inspectors will be consulting their own lawyers and using everything in their arsenal to stop you from recording their activities. There are no hard and fast rules here, but expect that the inspectors will tell you that you're impeding and interfering with their investigation. And if you don't stop, they will have no choice but to consider your business in noncompliance with the FARs until you can demonstrate that it is. Depending on the circumstances, the FAA might figuratively blink and allow their activities to be recorded. If not, you should expect an emergency suspension or revocation of the company's certificate within the next few days. In that case, plan for your business to be shut down completely and immediately whenever the emergency order is delivered.

There are cases where following the inspector around with a video camera may well be warranted notwithstanding these risks. When you encounter the FAA's latest rogue inspector and he or she has made the destruction of you and your company their sole mission in life, behaving badly and unprofessionally in the process, that's a good reason to seriously consider video and audio recording of the inspection. Before doing so, however, and if time permits, you should consider raising the issue in an appropriate fashion with FAA management, possibly through the FAA's Customer Service Initiative (CSI). Though time consuming and often without timely feedback from FAA management, CSI has the benefit of alerting FAA management to their rogue employee prior to you starting a war. Having said that, there have been circumstances

where video surveillance of an inspector's improper and unprofessional behavior has actually accelerated the pace of resolving the problem—and in fact provided FAA management the evidence that they needed to properly discipline the inspector.

Conclusion

Whether you're a pilot who is the recipient of a random ramp check or a large air carrier or a repair station facing what you believe to be the next Spanish Inquisition, there are some basic rules to keep in mind during any FAA inspection. Be eminently polite. Be truthful and honest. Be concise in your answers. Don't volunteer information. And by all means, protect the integrity of your data by knowing exactly what the FAA is taking away with them and stamping each of those records as confidential to make your privacy interests known. 

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