

Big Changes in FAA's Policies Concerning FAA Enforcement Actions

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It's a new day at the FAA regarding enforcement actions. This podcast discusses a new option the FAA has to deal with a pilot's problem, incident, or occurrence. Compliance actions can save your pilot's license and keep you flying. Drone operators: this includes you!

TRANSCRIPT

Calhoun: So I understand that there have been some big changes in FAA's policies concerning enforcement actions. Let's start at the beginning with the types of licenses and certificates that fall under the FAA's watch. If I understand correctly, this impacts anyone with an FAA certificate, approval, authorization or license.

Page: That's true. So what we're talking about today is a radical change in the FAA's what's called Compliance Philosophy. It applies to pilots, mechanics and others who hold an FAA certificate, approval, authorization, permit or license and so it's quite broad. These changes have to do with FAA's attitude, or they call it Compliance Philosophy, with regard to violations of the Federal Aviation Regulations and the FAA's response to those violations.

Calhoun: So when we're talking about the people that are subject to sanctions, if they're not compliant, what are some examples of non-compliant behavior?

Page: Non-compliant behavior runs the gamut from minor to major ones. An example I use a lot when I speak about this to various audiences is a scene from the Top Gun movie from 1986. In that movie, if you recall, there was a low pass by Tom Cruise past the control tower that was occupied at the time by the Commander of the field who was holding a cup of hot, black coffee. And when Cruise made his pass by the tower, that Commander dumped his coffee on his chest and Tom Cruise paid the price for that. He was grounded for a few days. That's what's called an Intentional Violation of some airport or federal aviation rule or regulation. In that case it was the custom and practice of not flying real close to the control tower. But, there are many others and that's what the FAA focuses on. Some of the common ones are, for example, running out of fuel. We call that Fuel Exhaustion. It can be landing with your gear up when it should be down. And, finally, another common example is entering what is called Class Bravo Airspace without approval from the air traffic control facility that controls that particular air space. And then another popular violation that we saw recently with Pope Francis's visit to the United States and the establishment of temporary flight restrictions around Philadelphia, Washington, D.C., and New York were pilots who entered that area of air space around where Pope Francis was located without an appropriate clearance. And so the FAA prosecutes those people through an enforcement action to fix or correct that and ensure that it doesn't happen again.

Calhoun: So how have they traditionally handled these types of sanctions? And what is changing with how the sanctions will be handled going forward?

Page: So in the past the FAA, after discovering a potential violation, would do an investigation or inquiry. And so all of these inquiries or FAA investigations start with either an incident, an occurrence, or a problem. Often times the occurrence, incident or problem is called an accident. Those are the easiest ones. They'll generate an FAA and sometimes an NTSB (National Transportation Safety Board), inquiry into what happened. Why was there a crash? Why was there an incident at the airport and the like? And so once that fact finding gets going the FAA and sometimes, as I said, the NTSB is involved. And they go out and look at the aircraft, they interview witnesses, they talk to the pilot, they do what lawyers call Fact Finding to assess and determine was there a violation of the Federal Aviation Regulations at 14 CFR 91 or 61 or another part of the Code of Federal Regulations. And who was at fault? Who was the pilot in command? And what should we do if the FAA detects that there was a violation? So in the past, before June of 2015, if the investigation revealed, for example, that the pilot had entered Class Bravo Airspace without permission, the FAA would try to identify that pilot and that aircraft, do its investigation and figure out why the pilot had entered Class Bravo Airspace without permission. Sometimes they would send that pilot what's called a Ten Day Letter, meaning you have 10 days to tell us your side of the story. And the pilot might tell their side of the story, hopefully in consultation with an aviation lawyer who might counsel them to be careful and

cautious about what you tell the FAA because it can be used against you under what's called the Pilot's Bill of Rights. But also, they would be filing what's called a NASA Report.

Calhoun: Can you tell us a little bit more about what a NASA Report is?

Page: Federal law permits a pilot who's being scrutinized and who thinks he has or she has violated an applicable regulation to file the NASA Report within certain time limits, which serves to report not to the FAA but to NASA, an entirely different agency, that the pilot made a mistake. They don't work for intentional violations, they don't work for accidents that are defined under federal law, and they don't work for criminal actions where the violation might involve a violation of federal or state criminal law, but for the most part for carelessness and the like they work. How they work is that they inoculate. I tell pilots that it's like giving yourself a flu shot. They inoculate you from the FAA, not investigating, but from imposing a sanction on you. You can file as many of these as you want, but you can only use one every five years to prevent the FAA from suspending or taking your pilot certificate.

So, the new change that's afoot here is what happens after the FAA finishes its investigation and they are looking at *what should we do about this*. We'll use for our talk today a violation of Class Bravo Airspace, which is just a fancy way of saying that there's a giant wedding cake that goes from the surface around many busy airports up to a certain AGL, or Above Ground Level altitude. Most of the time it's around 10,000 feet and it extends out from the perimeter of the airport a certain distance as well. Pilots oftentimes fly too close or within that piece of imaginary wedding cake without talking to air traffic control and so they get themselves in trouble. These are never "who done its" because you are on radar and air traffic control follows that pilot until they land at that very airport or to another airport and engages in some fact finding to find out who was flying, or in effect driving the plane, and the N-number – it could be N-12345, the identifier for that airplane – so these are never who done its, they are just really *what happened* and *how did you enter that Class Bravo Airspace?* Hopefully accidentally.

So, the new revolutionary changes that the FAA has undertaken since June 26, 2015, when the administrator announced them are that the options for the FAA are now broader than they were before June 2015. Before June, the FAA had what's called an Enforcement Action, in other words a Certificate Action, where that FAA would try to take or suspend your pilot or medical certificate as punishment for the violation of the Class Bravo Airspace, or many other violations too numerous here to detail. We're using Class Bravo because it's a frequent violation that I see a lot in my aviation practice here at Carlton Fields Jordan Burt in Tampa, but I have a nationwide clientele of pilots that I service and represent in these matters and a Class Bravo Airspace Violation is probably in the top five of what I see. So the FAA before June of 2015 would say, I'm going to take your pilot certificate through a Certificate Action, and they had a couple of other options called Administrative Actions. Pilots love Administrative Actions because nothing happens. My analogy is to the traffic policeman

who stops someone on the side of the road for speeding and issues the driver, and by analogy the FAA would issue this to the pilot despite a violation of the rules, the regulations, what's called a Warning Notice or one bump up from that would be what's called a Letter of Correction. A Warning Notice and a Letter of Correction are what are called Administrative Actions. You don't go to court, you don't lose your pilot or medical certificate, they're just in a way the FAA's manner and way of telling you don't let it happen again. So, the full complement before June 2015 for the FAA was take your pilot or medical certificate, or mechanic's certificate, airplane and power plant or inspection authorization, or these other licenses, for example, your approval, your authorization, your permit, or whatever other certificate the FAA had granted you through its discretionary issuance of these authorizations and approvals and certificates, let's take that or suspend it for a period of up to six months. So to sum up, the FAA had limited options to deal with violations of the rules before June of 2015 and they were administrative or an enforcement actions.

"Administrative" again meant Warning Notice or a Letter of Correction. Or, an Enforcement Action where I would try to suspend or sometimes, in extreme cases, revoke, meaning take away for good until you earned it back, your pilot's certificate.

The radical change that occurred in the summer of 2015 is revolutionary for pilots, mechanics and others who have FAA approvals, authorizations, permits, etc., because it introduced for the first time a new Compliance Philosophy through a national policy that the FAA adopted in [FAA Order 8000.373](#), or if I was to follow the pronunciation that I'm supposed to use under the Airman's Information Manual, eight thousand point tree seven tree and that's said as follows: the subject in this new order (the FAA speaks through orders because it's an administrative agency, courts of law speak through orders), but this is one that you can Google yourself because it's not enough just to listen to this and hear this for the first time. You need to look at this and if you're interacting with the FAA or think you might be, you need to know of this new change in compliance philosophy 'cause it's that dramatic, that revolutionary, and that important in the practice of what you're doing in any aviation-related industry. The FAA called this the Federal Aviation Administration Compliance Philosophy.

To boil it down, I'm going to read from one of the paragraphs. Paragraph 4D as in Delta, it said: when deviations from regulatory standards DO occur, the FAA's goal is to use the most effective means to return an individual, or entity, that holds an FAA certificate, approval, authorization, permit, or license to full compliance and to prevent reoccurrence. And again in a following paragraph, the FAA through its administrator, Michael P. Huerta, the top man at the FAA, wrote as follows: the agency believes that deviations of this nature can most effectively be corrected through root cause analysis and training education or other appropriate improvements to procedures or training programs for regulated entities as long as they're documented and verified to ensure effectiveness. So, for the first time in the FAA's arsenal of tools designed and written to regulate pilots when they violate the rules, we added this new compliance philosophy to say (these are my words) if you fix yourself and

you fix what I call the root cause of the problem that led to the FAA violation, we're not gonna suspend your certificates, we're not gonna revoke them, we're not gonna send you a warning letter, we're not gonna send you a letter of correction. We're going to require you to fix the root cause that led to this violation, show us that you did so, and we're going away, we're closing the case, we're not continuing it. And that's the radical change that occurred, and since then the FAA speaks through orders that it issues administratively, that it's empowered to do so.

Calhoun: So would you say then that the focus has shifted from punishing violations to improving compliance?

Page: They have dramatically changed how they look at pilot deviation and violations of the rules and their terms are now as follows: "Many deviations from regulatory compliance are caused by factors such as flawed procedures, simple mistakes, lack of understanding or diminished skills." When FAA personnel determine that a person is both willing and able to comply with regulatory standards, they, meaning the FAA personnel, may use, for the first time ever, a Compliance Action to address the underlying root cause of non-compliance through such means as airman training, counseling, or education, and/or appropriate improvements to a regulated person's procedures, training or other programs. So let's analogize this to the traffic cop catching you on the side of the road going 80 in a 65. No more warning letters, no more warning tickets. Instead he would say, you're gonna have to take a driver improvement class, but I'm not going to give you a ticket, I'm not going to suspend your driver's license, I'm not going to do anything if you fix yourself and document to me that you have.

Calhoun: That really is revolutionary.

Page: For pilots it's huge, but we tend to think in just the pilot community but these are mechanics, these are drone operators. The revolutionary change here by the FAA extends not only to pilots but it extends to people who control or manipulate aircraft and the NTSB ruled in a decision in early 2015 that an Unmanned Aerial Aircraft System, we call them drones for short, is indeed an airplane or an aircraft that the FAA may regulate. And so this new manner of enforcement goes to not only pilots, mechanics, and others, air traffic controllers, a whole host of people, but it also goes to drone operators as well and that's why it's important to know that because these things come up very quickly. No one wants to think that they'll ever be scrutinized by the FAA, but it happens. We have landings with gears up, we have fuel exhaustion cases, we have, just look at your newspaper... on a daily basis you'll see incidents that happen with aircraft all the time, and those lead to FAA inquiries or scrutiny to determine did the pilot and was there a violation of a federal violation rule or regulation.

Calhoun: I can see where this would be a very welcome change for anyone in the industry. You mentioned that drones fall under the FAA rules and there seem to be a lot of hobbyists who would

really be completely unaware of some of the regulations that would be governing their actions with regard to drone operations.

Page: Yes, because they're not really embedded or part of the pilot community. All they are, are what I call them are really "buy and fly" kind of pilots. They go to the mall, they go on the Internet, they buy the drone, they're operating it, and then some misfortune happens. The drone lands, for example we've read on the White House gardens, or the drone might go, for example, in an airport area or be operated too close to the airport and the like. But the drone operator needs to know that this new Compliance Philosophy applies to them as well. They need to be able to avail themselves of, you know, their rights. Hopefully you'll see the FAA coming around to this because the administrator has spoken through these orders. But, it takes a while for an agency as big as the FAA to shift, you see, from pure enforcement to this new Compliance Philosophy. I'm aware because I have people that I work with in my cases, you know, inside of the FAA that this is a major development and the FAA is devoting a lot of training to this new Compliance Philosophy that Administrator Huerta's undertaken in how to implement it, what to do, what not to do, etc. And one important exception here is that the new Compliance Philosophy has a couple of lynch pins that are important to talk about. That is, in order to be able to get yourself in a position where you can avail yourself of the new Compliance Philosophy, you have to be what's called "willing and able" to fix the root cause and the new [2150 3B change 9](#) and [change 10](#) address what "willing and able" means.

"Willing" means the person must acknowledge responsibility for the event and it means that the person "openly shares information with the FAA to determine the root cause of the event," and finally it means that the person promptly implements the corrective actions. That's what willing means. But you also have to be able to fix yourself and address the root cause and so this change order, change 9 in 2150 3B says what the definition of "able" is. Able means that the person has the resources sufficient to implement the necessary corrective action, and number two, it means that the person has or has the ability to develop through corrective action the knowledge and technical competence required of the certificate they hold. And finally, it means that the person has access to data equipment facilities necessary to comply with the regulatory requirements and appropriately manage risk. In other words, if you need to fix yourself by taking a training course online and you want to print out a certificate, if you don't have a computer or some device that allows you to do that, you may not be able within the meaning of this order to take advantage of this new Compliance Philosophy. It seems like a small impediment that we could readily fix, I'll go to a public library, I'll read a book, I'll do something, but that's how the FAA has set the requirements to gain access to this new option called Compliance Action. Pilots should be thrilled, should be happy. Really embrace this new Compliance Philosophy that the FAA has adopted because it meaningfully changes their rights and obligations and options when the FAA is, as I say, comes knocking and wants to know why did you violate the rules and regulations.

Calhoun: So it seems as long as you admit your fault and you are willing to do whatever it takes to correct the issues and address why it happened in the first place, the FAA is now kinder, more understanding and forgiving. It's a new day.

Page: It's a new day. However, let's add a caveat here. So, in some situations, and I talk about this at the seminars on FAA violations that I present a lot to aviation groups, my talk is called *The ABC's of FAA Enforcement Actions*, you need to be discerning... the pilot, mechanic, or other who holds an approval authorization or permit or license, needs to be discerning at that outset of the interactions of the FAA. This new FAA Compliance Philosophy does not mean at the very outset that you have to tell all, be complete, give the entire story surrounding the FAA or potential FAA violation of the rules and regulations. It means that ultimately you need to acknowledge responsibility for the event and openly share information with the FAA to determine the root cause of the event and then promptly implement the corrective action. This does not mean, however, that when the FAA, or the cop by analogy pulls you over at the side of the road and is prepared to give you a ticket, that you volunteer that yes, I had a case of beer and that I don't know where I am and I don't know how I got here, and no I'm not taking your field sobriety tests because I'm just totally incapacitated. By analogy, the same goes for the pilot. This does not mean in the first interaction with the FAA that you have to confess a violation, that you have to confess every single fact about that violation and that you have to put it in writing or the like. And we know this because the FAA, through legislative action a few years ago adopted what's called the Pilot's Bill of Rights. It's the legal equivalent of the Miranda warnings for pilots and the FAA is now obligated to tell pilots and others, certificate holders, people with approvals and authorizations, at the outset of their inquiry that it's conducting an inquiry and anything you say can and will be used against you in that inquiry.

So the headline here on the top of the fold in the newspaper is be careful of what you tell others regarding your conduct and behavior. That doesn't mean that at the outset you have to confess, admit to something and fully describe it. It means that ultimately, after looking at the situation and deciding what is your best option, you must acknowledge responsibility for the event and openly share information and implement the corrective action. But if the pilot talks too much, what may appear as mere carelessness or negligence might transform through the pilot's utter and complete candor from negligence and carelessness to recklessness and intentional conduct, and even the FAA new Compliance Philosophy does not extend to recklessness and it does not extend to intentional conduct. Our example, remember, was Tom Cruise and the low pass by the control tower. Tom Cruise in that situation doesn't get to say, I wanna do a compliance action, and he doesn't get to avail himself of a NASA form even though he can file one. He can't avail himself of his rights under that. So it's important to be cautious and careful and discerning when you're interacting with the FAA so that you don't lose the rights that these new orders that we've been talking about, that you don't lose those or undermine your ability to use them at the appropriate time.

Calhoun: So even though the FAA has instituted a more forgiving approach, it still seems wise to consult with someone who is knowledgeable about aviation law if you're faced with an investigation or enforcement action.

Page: That would be my high suggestion because what happens is when the FAA comes knocking, when you've been involved in an accident, an occurrence, or an incident, here's what happens: your emotions hijack your brain and the pilot, the airman, the mechanic, and others are simply incapable of assessing the approach that they should take with the FAA. I see this all the time after, unfortunately, the airman or the pilot has spoken with the FAA or written their own explanation or the like, where they've undermined their ability to maneuver and successfully navigate through the landmines that we've been talking about in compliance actions. And so yes, I think it's important at least at the outset before speaking with the FAA at length other than giving the FAA your name, your rank, your serial number, your address, your pilot certificate number, things that the FAA could obtain anyway, to speak with legal counsel so that there can be a careful and cautious approach to that initial interaction so that the pilot doesn't lose important rights that they might not otherwise lose.

RELATED DOCUMENTS

- [FAA Order 800.973](#)
- [FAA Order 2150.3B CHG 9](#)
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Presented By



Edward J. Page

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