

When The FAA Investigates You

Some basic information on how to protect your rights...



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Introduction

To a certain extent, the Federal Aviation Administration (FAA) is the judge, jury, and executioner when it comes to all matters dealing with civil aviation. If you are involved in an accident or incident, the FAA will investigate your actions to determine if administrative or legal action will be pursued against you. The FAA regulates activity pursuant to the Federal Aviation Regulations (FARs), and thus has the legal authority to investigate and prosecute you for violations of FARs.

In the unfortunate event that you or a loved one was involved in an airplane or helicopter accident, the decisions that you make will likely impact the remainder of your life. The death of a loved one in a plane crash is a horrible tragedy. The pain, loss, and emptiness that you experience may only be minimized by the passage of time. We know this, because our attorneys have represented people who have lost loved ones in plane crashes. We have recovered significant damages for family members of accident victims. During this very difficult time, you may be asked to make a decision that jeopardizes your legal rights. You need to make sure that your counsel is very familiar with aviation accidents, as they are not the same as typical accident cases.

This booklet is meant to give you basic information and checklists to help you in the unfortunate event that you are involved in an aviation accident or incident leading to a possible enforcement action by the FAA. Aviation accident and enforcement cases can be quite complex. While maybe not a comprehensive primer, this booklet still contains helpful information for victims of aviation incidents from the author's college textbook *Aviation Law*.

This booklet is not to be taken as legal advice. It is helpful information for those who may have been in an aviation accident or are the subjects of an FAA enforcement action proceeding. Since each situation differs, legal advice can come only in the context of an attorney-client relationship. No attorney-client relationship is formed by ordering or receiving this book. We enter into such attorney-client relationships only through formal written agreements with clients.

Accidents

The accident section of this booklet discusses two situations. The first is what you should do if a loved one has been involved in a serious or fatal aviation accident. We then discuss what airmen should do if they are involved in accidents.

What should you do when an accident happens?

Aviation accidents differ greatly from the typical accident or injury cases. In order to make sure that the matter is handled correctly, the family of someone injured or killed in an airplane or helicopter accident should contact an attorney who is well versed in aviation law. Failure to do so may result in the loss of crucial evidence, or in the worst case, having your case dismissed due to complex jurisdictional and legal issues with which a “non-aviation qualified” lawyer is simply not familiar.

A few examples of steps that an experienced aviation attorney will take after an accident has occurred are as follows:

1. Preserve wreckage;
2. Collect Air Traffic Control (ATC) radar information, airworthiness directives files, service bulletins, Technical Standard Orders (TSOs), Advisory Circulars and other FAA Orders, and Tape Recordings of all communications relevant to the accident flight, not just the usual five minutes before and five minutes after contact with the accident aircraft;
3. Interview witnesses;
4. Preserve all Air Traffic Control recordings, Terminal Radar Approach Control (TRACON) Radar Raw Data generated by Automated Radar Terminal System (ARTS), and National Track Analysis Program (NTAP) Radar Raw data from the Air Route Traffic Control Centers (ARTCC);
5. Locate key witnesses;
6. Identify jurisdictional issues (domestic and international);

7. Evaluate liability of the parties responsible for the crash;
8. Protect the client's rights during initial interviews with authorities; and
9. Undertake behind-the-scenes work involving document review and analysis to properly prepare your case.

Keep in mind that each case is independent and has its own special jurisdictional and legal concerns. International accident cases are practically and legally different than domestic ones. You must look for an attorney who is knowledgeable in aviation, as it is his or her particular skill as a lawyer coupled with aviation experience that gets results.

What should you look for in an aviation attorney?

Many top aviation lawyers are more than lawyers with a pilot's license. Aviation attorneys are experienced in dealing with: 1) the FAA, which heavily regulates the aviation industry; 2) the National Transportation Safety Board (NTSB), which controls the investigation of all serious civilian accidents in the United States; 3) aviation insurers, who provide the money to settle these cases; and 4) experts, who are knowledgeable and credible in the fields of metallurgy, accident reconstruction, meteorology, air traffic control, avionics, etc.

You should look for an attorney who is intimately familiar with the way the FAA operates, as oftentimes essential evidence can be lost. In addition, there may be air traffic control or other government liability. Remember, an attorney's aviation experience and credentials are crucial. Make sure that you retain an attorney with the proper background to fully understand the complex aviation issues specific to your case. Speak with the attorney first, not just a member of his or her staff, and make sure that the attorney understands your issues and will be relentless and unyielding in pursuing the matter to a successful conclusion.

Why is aviation accident law different?

Aviation law is different from other forms of personal injury law, because most injury law is based on state law. In aviation law, federal entities (the FAA and the NTSB) have regulations in place that may preempt

state laws. Other regulations can influence aviation law as well. If the case is international, then the Montreal Convention may control the litigation. Your attorney needs to already understand these issues instead of learning the complexity that exists in aviation accident cases while dealing with your case.

[Who is entitled to compensation when an accident occurs?](#)

Passengers, family members of victims, persons injured on the ground (or the family members of persons killed on the ground), and pilots (if it is proven that pilot error was not the sole cause of the aircraft accident) may be entitled to compensation for the tragic event.

If a crash occurs within a state's boundaries, then the law will generally allow damages for medical and funeral expenses, loss of a victim's anticipated earnings in the future, loss of pension benefits (or some inheritances) caused by the victim's death, pain and suffering or mental anguish to the survivors, and loss of care, protection or companionship (consortium) to survivors. Knowing which laws apply to the specific situation allows an attorney to properly prepare clients for what to expect and maximize the potential recovery for family members of air accident victims.

Flight crew members, airline owners, manufacturers, maintenance personnel, airport operators, and air traffic controllers are the ones most frequently named as defendants.

[What should you do?](#)

If you or a loved one has been involved in an aviation accident of any kind, then you should contact an attorney experienced in aviation law as soon as possible to discuss your potential case. The time period during which to file claims is limited, often six months to two years after the date of the incident. You need to file a claim before the expiration of this period, or your claim will likely be barred forever.

Make sure that you are able to recover everything that you are owed by speaking with an experienced aviation lawyer as soon as possible.

Airmen and Accidents

The National Transportation Safety Board (NTSB) is an independent Federal agency charged by Congress to investigate every civil aviation accident in the United States as well as significant accidents in the other modes of transportation—highway, marine, pipeline, and railroad. The NTSB also issues safety recommendations intended to prevent future accidents. The agency's authority is derived from Title 49 of the United States Code, Chapter 11, and is governed under 49 Code of Federal Regulations (C.F.R.).

If you believe that you have been involved in an aviation accident in your role as an airman, then you must first read NTSB Regulation 49 C.F.R. Part 830, and determine whether the situation is indeed an accident as defined by the NTSB. Section 830.2 defines the criteria that the NTSB uses to classify accidents and incidents. Most pilots are surprised when they actually read Section 830.2, as the NTSB regulations are not necessarily instinctive.

If you are indeed involved in an NTSB defined accident, then you should take immediate steps to determine who is aware of the accident and who has provided any form of statement, whether written or verbal, to the FAA, NTSB, or any other person or entity. Keep in mind that you are not required to discuss the accident with the NTSB or the FAA. The only requirement is the initial notification and subsequent report or statement under section 830.5 and 830.15 of the NTSB regulations. Under the FARs, sections 91.3 and 91.123, the FAA only requires a report if an emergency was declared or priority given your aircraft by air traffic control. With the exception of these requirements, as stated in FAA and NTSB regulations, you should not provide any further written or verbal statements. There is no requirement to report an aircraft accident to the FAA.



The FAA often has dual roles in aviation accidents. The FAA may investigate the accident in the role of an accident investigator on behalf of the NTSB. The NTSB has delegated a limited amount of authority for the FAA to investigate certain aviation accidents, although the NTSB always determines the “probable cause” of the accident. The FAA still maintains

enforcement authority in the event of an aviation accident. Therefore, you must be very careful in responding to FAA/NTSB inquiries in the event that you are involved in an accident.

If the event does not meet the NTSB definition, then submit the National Aeronautics and Space Administration (NASA) form. The FAA Aviation Safety Reporting Program (ASRP) utilizes NASA as a third party to receive and process Aviation Safety Reports. This cooperative safety-reporting program invites pilots, controllers, Flight Attendants (F/A), maintenance personnel, dispatchers, and other users of the National Airspace System (NAS), or any other person, to report to NASA actual or potential discrepancies and deficiencies involving the safety of aviation operations. The effectiveness of this program in improving safety depends on the free, unrestricted flow of information from the users of the NAS. Based on information obtained from this program, the FAA takes corrective action as necessary to remedy defects or deficiencies in the NAS. The NASA form is a report of an incident or event which does not come under the NTSB definition of "aircraft accident." If the event meets NTSB Part 830's definition of "aircraft accident" (substantial damage, etc.), **do not** submit the NASA form. The filing of a report with NASA concerning an incident or occurrence involving a violation of 49 U.S.C. Subtitle IV, or the FARs, is considered by FAA to be indicative of a constructive attitude. Such an attitude will tend to prevent future violations. Accordingly, although a violation may be found, neither a civil penalty nor certificate suspension will be imposed if:

1. The violation was inadvertent and not deliberate;
2. The violation did not involve a criminal offense, **or accident**, or action under 49 U.S.C. Section 44709, which discloses a lack of qualification or competency, wholly excluded from this policy; and
3. The person has not been found in any prior FAA enforcement action to have committed a violation of 49 U.S.C. Subtitle VIII, or any regulation promulgated there for a period of five years prior to the date of the occurrence.

Airmen are required to provide documentation on request to the FAA or NTSB. Pilot, medical, and aircraft certificates and pilot and aircraft logbooks must be presented for inspection according to FARs §§ 61.3,

61.51, 91.203, and 91.417. Never allow the NTSB or FAA to take original documents. If necessary, provide copies.

What can an aviation attorney do?

Among other things, an experienced aviation attorney can help you prepare your 49 C.F.R. Part 830 preliminary accident and crew member statements, determine aircraft insurance ramifications, identify provisions in aircraft rental agreements that may create financial liability for the airman, discuss potential litigation by or against the airman as a result of the accident, attempt to identify other parties/factors that may be responsible for the accident, undertake an independent investigation (that is not discoverable in future litigation) for the benefit of the airman, and represent the pilot's interests before the FAA and NTSB.

Enforcement Actions

A restricted amount of legislative, executive, and judicial authority has been delegated to the FAA, pursuant to the Federal Aviation Act of 1958. This Act transferred air safety regulation from the Civil Aeronautics Board to the new FAA, and also gave the FAA sole responsibility for a common civil-military system of air navigation and air traffic control.



Accordingly, the FAA is the administrative agency responsible for promulgating, as well as enforcing, regulations related to civil aviation. The delegation of authority, through the Federal Aviation Act of 1958, allows FAA inspectors to engage in compliance and enforcement activities. In a sense, the FAA has broad authority in civil aviation matters, with the exception of suspected criminal violations. The FAA refers suspected criminal offenses to the Department of Transportation Office of the Inspector General (OIG) for possible prosecution.

An FAA enforcement action is an administrative action taken against a certificate holder (one who holds a license to engage in an activity regulated by the FAA) for alleged violations of the FARs. The FAA utilizes statutes, regulations, and internal administrative orders in the investigation and prosecution of enforcement actions. FAA Order 2150.3B is the internal administrative order containing the policies, procedures, and guidelines used

by the FAA regarding compliance and enforcement actions.¹ This order also articulates the FAA's philosophy for using various remedies, including education, corrective action, informal action, remedial training, administrative action, and legal enforcement action in addressing alleged noncompliance with statutory and regulatory requirements.

The initiation of the compliance and enforcement process typically comes about as the result of routine surveillance or inspection, public complaints, accident and incident investigations, or reports from air traffic controllers. Controllers often use the term “pilot deviation” when referring to potential violations of the federal aviation regulations leading to an enforcement action.

The FAA’s compliance and enforcement method of investigation may eventually lead to an Enforcement Investigative Report (EIR) that is used to substantiate any contemplated enforcement action. The Enforcement Decision Tool (EDT) is an analytical system used by FAA inspectors to assist in determining the appropriate recommended action for a suspected violation of the FARs. It was developed for the avowed purpose of matching the safety risk posed by an alleged act with the type of conduct involved. The EIR, EDT worksheet, and many other sample forms used by investigators are available in the author’s text, *Aviation Law*, published by Cengage Publishing, which will become available in 2013.

[The “Typical” Enforcement Action Case](#)

The steps involved in enforcement actions vary based on the party or entity under investigation and the remedy sought by the FAA. The typical certificate action against a pilot for an alleged violation of the FARs involves the steps below. Comments following the FAA’s typical actions include suggested responses by the pilot under investigation.

Keep in mind that the sample scenario below is meant to illustrate a typical FAA enforcement action against a pilot and is not intended to be

¹ The FAA revised this Order in 2007 and change 4 became effective 5/1/12. The current version is 2150.3B and certain portions of this Order are located in the author’s text, *Aviation Law*, published by Cengage Publishing. Many FAA Orders are also available online.

legal advice. Depending on the nature and/or severity of the event, it may be advisable to seek the legal counsel of an individual who is intimately familiar with the enforcement action procedure prior to taking any action. An enforcement action typically involves the following actions:

1. **NOTIFICATION:** The pilot is notified by an air traffic control facility (en route, terminal radar approach control, or tower) of a possible incident that could lead to an enforcement action. The phraseology that controllers use is “possible pilot deviation, advise you contact (FAA Facility Name) at 234-555-1212.” Regardless of the exact phrasing, you will know if you are the subject of a potential enforcement action if an air traffic controller gives you a number to call when reaching the destination airport. You are not required by the FARs to make the call to the air traffic facility. As a general rule of thumb in situations that do not involve serious matters, other aircraft, or restricted airspace, a phone call combined with a compliant attitude may put the matter to rest immediately. That is, the matter may not result in a referral to the local Flight Standards District Office (FSDO). In the event that an enforcement action is going to be processed by the FAA, air traffic controllers are required to submit preliminary pilot deviation information to FSDO within twelve hours of the occurrence and a final report within ten days.
 - a. At this stage, it is critical that the airman correctly determine if the inquiry by the FAA facility is a non-serious matter that can be handled informally via a telephone call to the appropriate FAA facility. If you are not positive regarding the nature of the incident, you must protect your legal rights and should not make any statements that may undermine your legal position in the future. Lawyers call such statements “admissions against interest.” In the event that you call the FAA facility, you must keep in mind that your conversation will be recorded.

- b. Immediately file a **NASA ASRS Form 277** in a timely manner, if appropriate.² Take this action within ten days of the incident, whether you believe you have settled the matter informally, as outlined above, or not. Make sure that you have proof that the form was filed within the ten-day period. There are some exceptions to this suggestion.³

2. **PILOT ANALYSIS:** The pilot should immediately review National Transportation Safety Board (NTSB) Part 830 to determine if he or she was involved in an “Incident” or “Accident.”⁴ You should do this before contacting the FAA facility.

- a. If you are involved in an incident: File a **NASA ASRS Form 277** in a timely manner, if appropriate.⁵
- b. If you are involved in an accident: Seek legal assistance prior to giving any substantive interview to the FAA or NTSB. While NTSB Part 830.5 requires that you contact an NTSB field office “[...] immediately, and by the most expeditious means available,” do not file an NTSB Form 6020.1, NASA ASRS Form 277, or divulge detailed information reference Part 830.6 (h) (regarding the nature of the accident) prior to consulting with a qualified aviation attorney. In the event of an accident or intentional

² NTSB Form 6020.1 and NASA Form 277, for Pilots, Dispatchers, & Airport Personnel.

³ Many actions taken by pilots may be excluded from the program including: *Administrator v. Sumler*, EA-5323 (2008) (intentional low passes in aircraft excluded from the program), *Administrator v. Thompson et. al.*, EA-4800 (1999) (low flight in a balloon intentional), *Administrator v. Blose*, EA-4656 (1998) (decision to depart without checking on the status of an air show excluded), *Administrator v. Russo*, EA-3800 (1993) (intentional decision to bypass alternate airport), *Administrator v. Copsey*, 7 NTSB 1316 (1991) (decision to fly unworthy aircraft was deliberate), *Administrator v. Wood*, 5 NTSB 2390 (1987) (low passes over residential area were not inadvertent).

⁴ CFR Title 49 Part 830.

⁵ NTSB Form 6020.1 and NASA Form 277, for Pilots, Dispatchers, & Airport Personnel.

disregard for the FARs, the data in NASA Form 277 will not be confidential.⁶

3. **FAA INVESTIGATION:** Receipt of a Letter of Investigation (LOI). The LOI must inform the pilot:
- (A) of the nature of the investigation;
 - (B) that an oral or written response to a[n] [LOI] . . . is not required;
 - (C) that no adverse inference can be taken against the individual for declining to respond to a[n] LOI . . . ;
 - (D) that any response to a[n] [LOI] or to an inquiry made by a representative of the Administrator by the individual may be used as evidence against the individual;
 - (E) that the releasable portions of the Administrator's investigative report will be available to the individual; and
 - (F) that the individual is entitled to access . . . [certain] air traffic data.

The air traffic data available to pilots is broad. The Bill of Rights requires the FAA to make available: “(i) relevant air traffic communication tapes; (ii) radar information; (iii) air traffic controller statements; (iv) flight data; (v) investigative reports; and (vi) any other air traffic data or flight data in the [FAA’s] possession that would facilitate the individual’s ability to productively participate in the proceeding.” This last provision is particularly broad and seems to encompass a lot of data the FAA may possess. However, because the law is so new, it is still unclear just how much information the FAA will be required to disclose. What is clear, however, is that an LOI will contain substantial information regarding what rights are available to a pilot under investigation. In addition to the FAA having to provide its internal air traffic control data, the FAA is also responsible for obtaining and providing air traffic data that is held by third party contractors. Government contractors that provide operational services to the FAA, like Lockheed Martin, should be cooperative in providing data even though they are not the government and thus not bound by the Freedom of Information Act. The Pilot’s Bill of Rights allows a pilot to

⁶ NASA Advisory Circular 00-46E,

request third-party data from the FAA, and once a request for the data is received, the FAA must “request the contractor to provide the requested information” and then provide that information to the pilot “in a timely manner.”

- a. Once the FAA begins an investigation, the FAA FSDO inspector will send out a form letter, requiring that the FAA wait for a period of time before proceeding against a pilot in an enforcement action. The law states that the FAA “may not proceed against an individual that is the subject of an investigation . . . during the 30-day period beginning on the date on which the air traffic data required under [the Pilot’s Bill of Rights] is made available to the individual.” This allows a pilot to obtain the data he is entitled to with enough time to review it and better assess his position. This provision does not apply in cases of an emergency, as defined by statute.
 - i. As with recorded conversations with air traffic control facilities, any response to this letter will be treated as an admission against your interest.⁷ You are not required by the FARs to respond to this letter. You should only respond if you have irrefutable evidence that you did not commit a violation of the FARs.
 - ii. Unless you have exculpatory evidence (evidence that is favorable to you), you should wait for the “Informal Conference” to explain your story, including any factors that would tend to persuade the FAA not to undertake formal enforcement.

4. FAA ACTION:

- b. **Enforcement Actions:** Stay on the airman’s record for at least five years. Clear violations of the FARs

⁷ *Administrator v. Goodman*, NTSB Order No. EA-5146 (2005) (later repudiation of statements made in responses to LOI ineffective); *Administrator v. Funk*, 6 NTSB 1016 (1989) (responses to LOI’s are admissible in evidence).

will almost certainly lead to an initial determination that an enforcement action is necessary.

- i. Notice of Proposed Certificate Action or Civil Penalty Assessment: Once a pilot receives this, several options exist.
 1. Request an “Informal Conference”⁸: This is the preferred course of action, and prior to attending the airman should seek the FAA’s EIR utilizing a Freedom of Information Act (FOIA) request or, preferably, from the FAA attorney assigned to the matter, as it is much more expeditious. The informal conference is an attempt to settle the case by reducing or eliminating the sanction. Contradictory statements made during such “informal” proceedings can be used against the pilot in any subsequent proceeding, such as a hearing before an administrative law judge (ALJ).
 2. Write a letter of explanation: Anything in this letter is subject to being used against the airman’s interest, and, therefore, such a course of action is rarely suggested or successful.
 3. Turn in your certificate: Admitting to the infraction and losing your privileges to operate under the certificate for a defined period.
 4. Pay the civil fine: Admitting to the infraction and paying a set amount of money to the U.S. Government.
- c. **Administrative Actions:** Stay on the airman’s record for two years. In the form of a warning letter or letter

⁸ *Oceanair v. NTSB*, 888 F.2d 767 (11th Cir. 1989) (statutory right to an informal conference), *Administrator v. Jolly*, EA-5307 (2007) (right to attend an informal conference is not unqualified), *Administrator v. Fleischman*, 6 NTSB 1227 (1989) (there is no right to tape record an informal conference).

of correction (likely following remedial training) if the matter is minor and not intentional.⁹ Considering the other possibilities, this is by far the best outcome.

- d. **Reexamination:** This is not an enforcement action, and the FAA can take this action anytime it has “reasonable cause.” An airman must comply, or he or she may have privileges revoked.¹⁰ Pilots are required to pay for this. Successfully passing the reexamination does not mean that the FAA will not assert an enforcement action. Therefore, the pilot should not discuss the facts or circumstances regarding the incident during the reexamination itself.

5. **FAA ORDER OF SUSPENSION, REVOCATION, OR CIVIL PENALTY ASSESSMENT:**

- a. These are effective immediately, unless a timely appeal is filed. Filing a timely appeal stays non-emergency orders, allowing pilots to continue flying pending the appeal process.
 - i. Emergency Orders must be appealed within 48 hours.

6. **APPEAL:** Appeal of the FAA’s Initial Determination in the case of an enforcement action.

- b. The FAA files a “Complaint” after an appeal is filed. Usually, this Complaint is a cover letter stating that the Notice serves as the Complaint.
- c. The pilot/appellant must file an Answer in a timely manner.¹¹

⁹ *Administrator v. Machado*, EA-4116 (1994) (warning letters are not appealable to the NTSB).

¹⁰ *Administrator v. Gamble*, EA-4789 (1999) (FAA request must be reasonable, and a failure to submit warrants an emergency suspension).

¹¹ *Administrator v. Corrao*, EA-5448 (2009) (ASRS defenses must be pled in the answer as an affirmative defense), *Administrator v. Coughlan*, EA-5197 (2005) (affirmative defenses must be identified in the answer), *Administrator v. Ocampo*, EA-5113 (2004) (the notice of appeal functioned as an answer), *Administrator v. Sanderson*, 6 NTSB 748 (1988) (late answer deemed admission of complaint).

7. HEARING BEFORE AN NTSB JUDGE:¹²

- d. Occurs before an NTSB Administrative Law Judge (ALJ).
- e. This is the only step in the process where the pilot gets to present his case through evidence and witnesses before a judge. There is no jury.

8. APPEAL TO THE FULL NTSB:

- f. If either party is not satisfied with the ALJ's determination, then the next level of appeal is to the entire NTSB.
- g. In almost all cases, the appeal only involves the hearing judge's application of the law to the facts.
- h. There is not another opportunity for the parties to present evidence or witnesses (deemed a "de novo" review). The full board's determination is made after considering the written legal positions (called "briefs") of the parties.
- i. The full board will not overrule the ALJ's decision unless the full board finds as a matter of law that the ALJ's decision was arbitrary or capricious.¹³

9. JUDICIAL REVIEW:

- j. If either party is not satisfied with the full board's determination, then the next level of appeal is to the U.S. Court of Appeals or a U.S. District Court

¹² *Andrzejewski v. FAA*, 563 F.3d 796 (9th Cir. 2009) (the administrative law judge's credibility findings are entitled to deference before the NTSB), *Administrator v. Lackey*, EA-5419 (2008) (the ALJ is not bound by evidentiary or procedural rules that apply in other courts, including the Federal Rules of Evidence; the judge's erroneous rulings on evidence reviewed only for an abuse of discretion and prejudice must be shown), *Administrator v. Repacholi*, EA-3888 (1993) (multiple hearsay is admissible), *Administrator v. Lindstam*, 41 CAB 841 (1964) (the FAA may establish carelessness by circumstantial evidence).

¹³ *Administrator v. Smith*, 5 NTSB 1560, 1563 (1986); see also *Administrator v. Nickl*, NTSB Order No. EA-5287 (2007); *Administrator v. Crocker*, NTSB Order No. EA-4565 at 6 (1997).

for a de novo review. In the case of an appeal to the U.S. Court of Appeals:

- k. The parties brief the Court. There is no opportunity to present witnesses or evidence. Oral argument may be asked for, yet it is discretionary by the Court.
- l. The Court must find as a matter of law that the NTSB's decision on appeal was arbitrary or capricious in order to overrule the NTSB's decision.¹⁴ As a practical matter, this is very difficult to obtain. Therefore, the great majority of NTSB decisions are not overturned on appeal. However, in the case of an appeal in a U.S. District Court:
 - m. The District Court shall give full independent review of a denial, suspension, or revocation ordered by the Administrator, including substantive independent and expedited review of any decision by the Administrator to make such order effective immediately.
 - n. A U.S. District Court's review shall include in evidence any record of the proceeding before the Administrator and any record of the proceeding before the NTSB, including hearing testimony, transcripts, exhibits, decisions, and briefs submitted by the parties.

10.FURTHER APPEAL: Technically, another level of appeal is available to the U.S. Supreme Court via writ of certiorari. However, it is highly unlikely that the Court would hear the case. At least four of the nine Justices of the Supreme Court must agree to grant the petition for certiorari. A petition for certiorari is granted by the Court in select cases, numbering less than 100 per year.

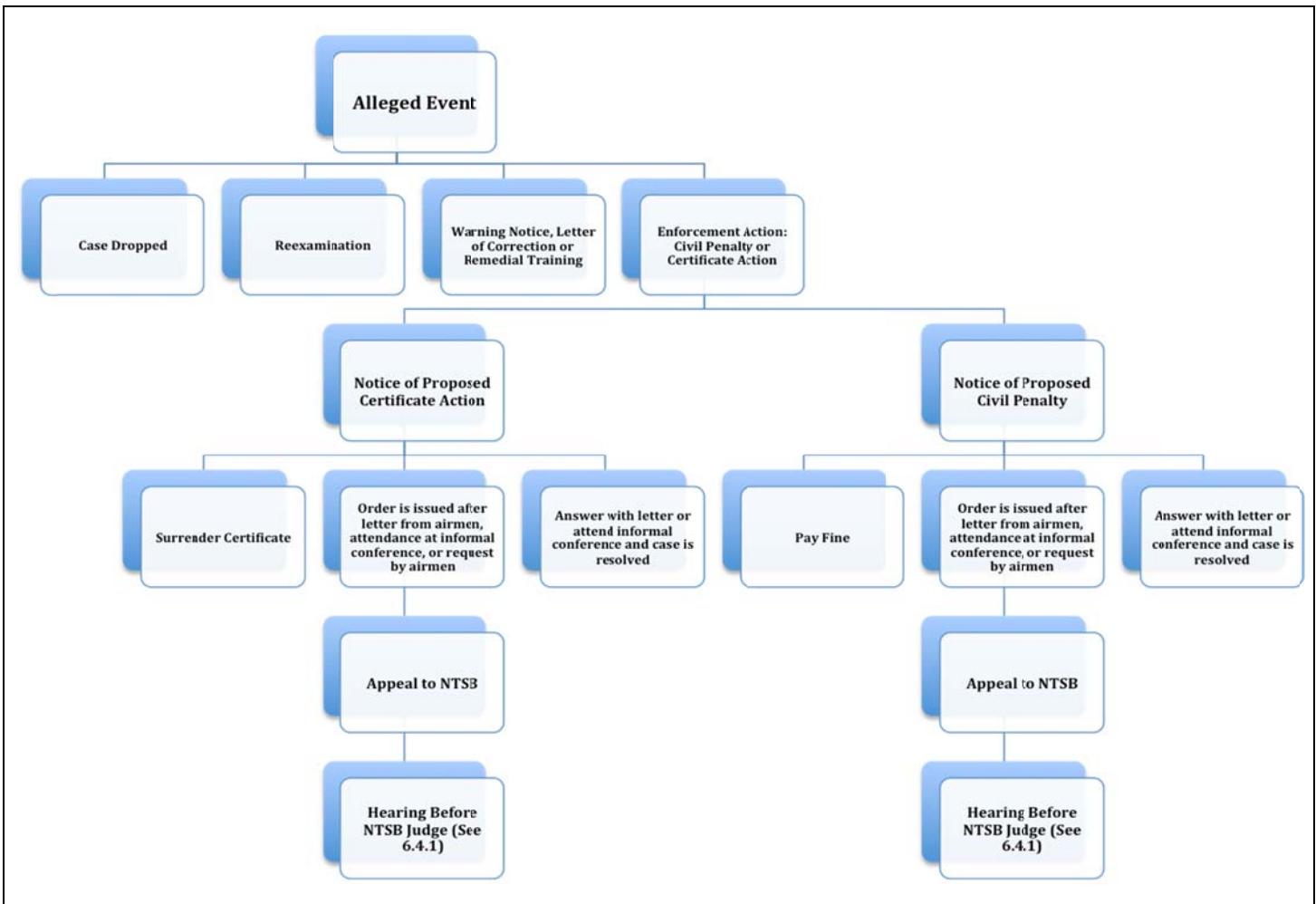
Keep in mind that the enforcement action process varies depending on the person or entity alleged to have violated the FARs and the amount or

¹⁴ *Blackmun v. Busey*, 938 F 2d659 (6th Cir. 1991) (court owes NTSB deference).

type of sanction sought by the FAA. The FAA can also order an emergency revocation of a certificate. In cases where the penalty sought exceeds \$50,000.00 or is against an airline or other entity, an administrative law judge does not hear the case. In the event that the charged party cannot settle the matter with the FAA, the FAA brings suit in the appropriate District Court in order to enforce its proposed civil penalty order. Each of the scenarios, depending on the specific party and type of enforcement action, is explored in the author’s text, *Aviation Law*. The next section of this booklet has a flowchart illustrating the basic enforcement action process.

Enforcement Action Flow Chart

Flowchart from the textbook *Aviation Law*, illustrating the basic enforcement action process:



Emergency Revocation or Suspensions

In some cases, a certificate holder will not receive a Notice of Proposed Certificate Action or the opportunity to engage in the informal conference proceedings prior to the certificate being revoked or suspended. The FAA uses this “emergency” revocation or suspension when it wants the airman to immediately surrender the certificate(s). These cases involve situations in which the FAA determines that allowing a pilot to continue to fly, while the typical enforcement proceeding progresses, would create an unreasonable safety risk. The FAA only uses this process in situations it considers dangerous.

If an airman receives an emergency revocation order, then he or she has two days (48 hours) to ask, or “petition,” the NTSB to review the FAA’s “emergency” designation. The request may be as simple as a letter, yet a copy of the Administrator’s order, from which review of the emergency determination is sought, must be attached to the petition. If a copy of the order is not attached to the petition, the NTSB will dismiss it.

Although the letter or petition only needs to request that the NTSB review the FAA’s emergency designation, it is advisable that the airman outline detailed reasoning as to why the FAA’s determination is not warranted in the “interest of aviation safety.”

Three copies of the Notice of Appeal must be sent. The rules require that the petition must be filed with the Board by overnight delivery service or facsimile and simultaneously served on the Administrator by the same means. It is highly recommended that the petition documents be faxed as well as mailed.

Within 48 hours of receipt, the chief law judge (or, if the case has been assigned to a law judge, the law judge to whom the case is assigned) will consider written arguments from both sides, regarding whether or not an emergency truly exists. He or she will then render a decision within five days of the original filing. During the emergency review, the revocation remains in effect. That means that you cannot exercise the privileges of your certificate. There is no opportunity for a hearing at this stage, although the NTSB judge may solicit verbal input from the parties. The law judge’s ruling regarding whether or not the action should be considered an emergency is final and not appealable to the full Board.

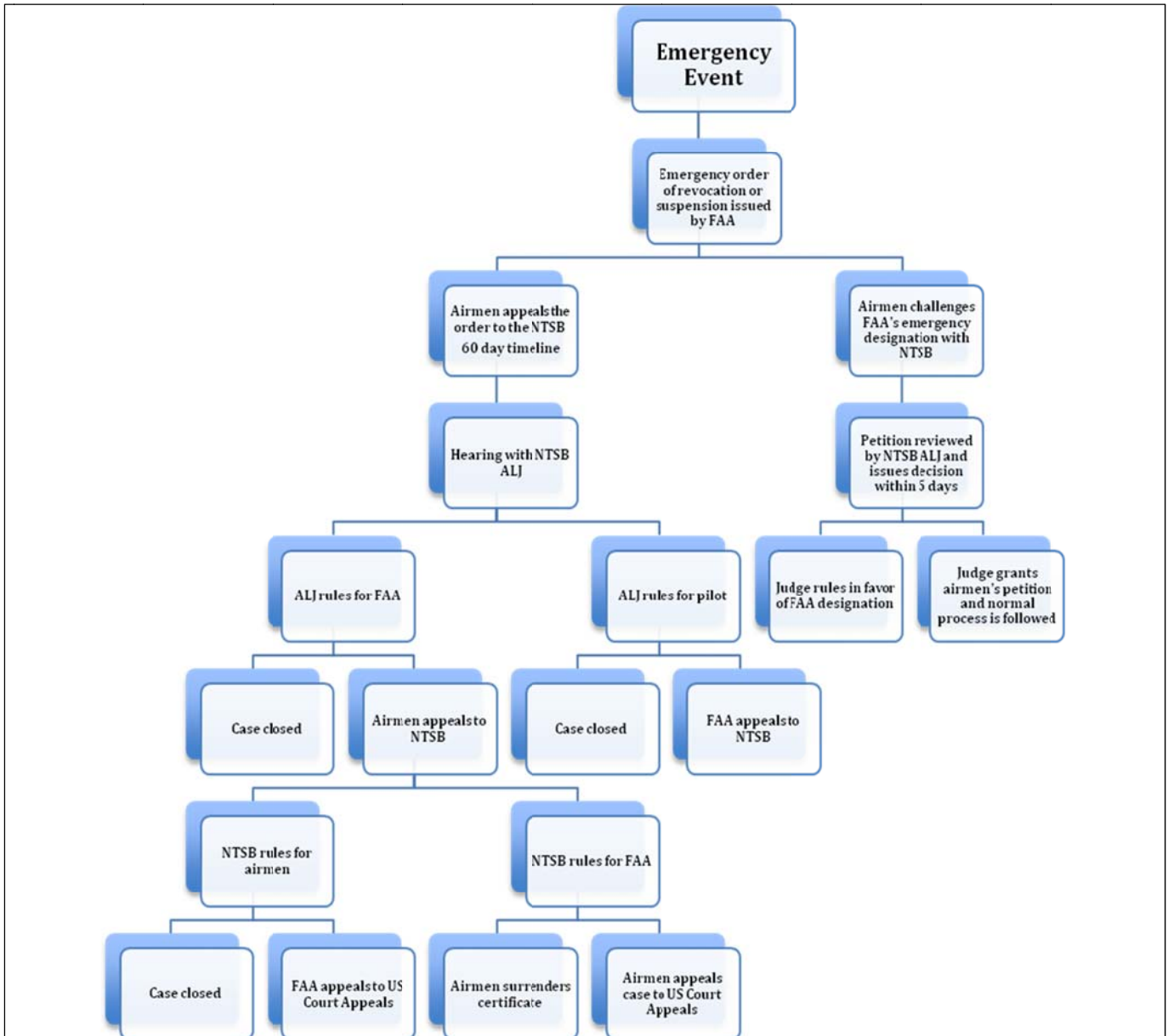
If the board determines that there is no emergency, then the revocation order is temporarily stayed, and the airman can continue flying. The revocation process against the airman continues, however, on an expedited (60-day) appeal process. The stay does not conclude the proceeding, but simply prevents revocation prior to a hearing. The certificate holder must still defend the revocation before an NTSB law judge, while continuing to exercise the privileges of his certificate. The NTSB's authority under the statute is limited to determining whether an "emergency" exists; the Board does not have authority to determine at this stage whether the complaint is factually founded, or even whether the facts alleged in the complaint would constitute grounds for revocation.

If the NTSB decides that there is indeed an emergency, then the revocation remains in effect and the pilot cannot fly while the case is decided based on the merits. This is different than the standard enforcement action process, where you are allowed to fly pending the process.

The hearing before an NTSB law judge on the merits of the FAA's claim usually occurs very quickly after the emergency order has been received by the certificate holder, since the entire process, including an appeal to the full Board, must happen within 60 days from the date the pilot files the notice of appeal. The expedited schedule can cause time problems for the airman, because it greatly limits the time available to prepare for the hearing before the NTSB judge. The flowchart below, from the author's textbook, *Aviation Law*, outlines the emergency enforcement action process.

Emergency Enforcement Action Flow Chart

Flowchart from the textbook *Aviation Law*, illustrating the emergency enforcement action process:



Clearing Your Record

Expunction or expungement is the removal, or deletion, of certain enforcement actions from an airman's record after the appropriate period of time has lapsed.

Expunction time frames of formal enforcement cases are based upon the final adjudication date or the final action date and not the date of the violation. Expunction will not occur if another "intervening case" is filed and becomes pending against the airman. The first case will not expunge until the second or intervening case becomes eligible for, and is in fact, expunged. The current policy is that cases closed without enforcement action being taken are deleted from the airman's record within 90 days of the action being closed. Administrative actions (warning notices and letters of correction) are deleted from the airman's record after two years, and enforcement actions resulting in certificate suspension are deleted after five years.

Orders of Revocation and Orders of Suspension that lead to, and result in, an Order of Revocation are never expunged by the FAA. These will remain on an airman's record indefinitely.

What To Do If You Are Involved In An Enforcement Proceeding

Each person's situation is different. Orders of Suspension require a certificate holder to refrain from exercising the privileges of the airman's certificate for the entire period of the suspension. In addition, legal enforcement actions remain on an airman's record for five years and must be disclosed in all future employment applications. If you determine that legal counsel is necessary, then make sure you retain an aviation lawyer with intimate working knowledge of the FAA as well as the enforcement action process. All lawyers are not the same. Our hope is that this booklet gives you basic guidance regarding your situation. If you have any questions or would like to speak with us about retaining our services feel free to call. We look forward to it.

About the Author

Michael Pearson has been around, or directly involved in, aviation since his youth. Mr. Pearson has worked as an air traffic control specialist in the TRACON and Tower environments (at several different facilities) for over 26 years. He also worked as a Quality Assurance Specialist for the Federal Aviation Administration, where he gained intimate knowledge regarding the FAA's enforcement action program and accident protocol. He is a graduate of many FAA classes, including the Department of Transportation aviation accident investigation program, where he gained valuable practical and technical insight into aviation accidents. Mr. Pearson is a reviewer for the *Journal of Air Transportation World Wide*. He also wrote a monthly column for a national aviation magazine. He just recently finished writing an aviation law textbook, *Aviation Law*, for a major academic publisher which will become available in 2013.

Mr. Pearson completed his undergraduate degree, summa cum laude, at the University of Houston, and his MBA and Juris Doctorate degrees, with high honors, at Arizona State University. While attending law school, he was nominated as a Pedrick Scholar due to academic excellence, and awarded honors in legal writing and research. He graduated at the top of his class.

Mr. Pearson has taught aviation law, aviation regulations, and other subjects at Arizona State University since 1993, and is currently an Associate Professor. Prior to accepting his academic appointment at Arizona State University, he taught at Embry-Riddle Aeronautical University.

Mr. Pearson has extensive civil litigation experience, focusing his practice on trial law. He handles matters that include wrongful death cases (including aircraft and helicopter accidents), enforcement action cases, complex litigation, and serious personal injury matters. He has handled litigation cases for international airlines such as Air France and Zest Airways. He has been interviewed by ABC, NBC, CBS, Fox News, Fox Business News, PBS and a multitude of print media sources on various issues due to his expertise regarding aviation law. He is currently a member at Curry, Pearson & Wooten, PLC. Martindale Hubbell rates Mr. Pearson, and the firm, "AV." In addition, he is listed in the Bar Register as a Preeminent Lawyer.

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