

Latest buzz or
effective method
of oversight?

COMPLIANCE PHILOSOPHY

STORY BY LINDSEY MCFARREN

In recent years, the Federal Aviation Administration introduced “Compliance Philosophy,” a method of managing instances of noncompliance with regulations without immediately pursuing an investigation and resulting enforcement action. Compliance Philosophy, according to the agency, was born out of an effort to embrace “just culture,” which requires consideration be given to noncompliance as a result of honest errors. In the context of a safety management system, just culture creates a nonpunitive environment in which true mistakes are not penalized, while willful actions or negligence may be penalized.

Compliance Philosophy goes a step further than just culture in that it applies even in instances of noncompliance resulting from flawed procedures, lack of understanding, or diminished skills. The FAA has typically held certificated entities to a “knew or should have known” standard; that is, if a certificated entity knew or should have known the applicable regulations and was noncompliant with those regulations, an investigation and enforcement action was appropriate. Although Compliance Philosophy may apply to a scenario in which the certificated entity should have known the regulation in question, the initiative would not apply in an instance where the certificated entity is knowingly and willingly

noncompliant. An investigation and enforcement action may still be pursued if a certificated entity knows it is noncompliant and continues that activity.

Some in the industry think Compliance Philosophy is the kinder, gentler FAA. Others are still skeptical, concerned it is an FAA headquarters buzzword and impractical or not embraced in the inspector ranks.

How does Compliance Philosophy work in the field?

Compliance Philosophy Process

Compliance Philosophy is used in instances of noncompliance without immediate safety ramifications. For example, inadequate training records, which might have resulted in a letter of investigation in the past, might now result in action through the Compliance Philosophy process. In this process, the certificate holder – whether an airman, mechanic, air carrier, repair station or other entity – is advised by an FAA inspector of a compliance concern. The concern may be presented in any number of ways, including through a letter, a verbal discussion or even handwritten on the Compliance Philosophy brochure. This begins the compliance action, which is meant to be a collaborative process between the FAA and the certificated entity.

The certificated entity must then provide the FAA with a reasonable corrective action plan. If the corrective action is completed properly, the inspector is to accept that action in lieu of penalty, such as a civil penalty or certificate action including suspension or revocation.

Interfacing Programs

If you're familiar with the Voluntary Disclosure Reporting Program or Aviation Safety Action Program, then this process might sound familiar. There are two key differences between the VDRP and ASAP process and Compliance Philosophy. In Compliance Philosophy, typically the FAA has identified an error rather than the certificated entity self-disclosing, and the process is far less formal.

VDRP is available to air carriers, repair stations, fractional ownership programs, and certain other certificated entities, and is based on self-identification and disclosure of compliance matters, followed by corrective action to come into compliance. ASAP, a voluntary safety reporting program that encourages exchange of safety information in a just culture context, also requires similar corrective action plans to resolve compliance or safety concerns.

How do VDRP and ASAP interface with Compliance Philosophy? Why would a certificated entity self-disclose an instance of noncompliance through ASAP or VDRP and risk a more-formal, complex process, if Compliance Philosophy would have covered the event anyway?

FAA Notice N 8900.352, "Aviation Safety Action Program, Voluntary Disclosure Reporting Program and the New Compliance Philosophy," addresses these questions, as ASAP and VDRP processes have changed to more appropriately fit with Compliance Philosophy.

First, disclosure through ASAP or VDRP still might be advisable. Remember, for an action to be covered under Compliance Philosophy, the certificated entity must not be knowingly noncompliant, which implies a desire to correct the error, not continue the activity or hide it until an inspector finds it. If you discover an error and then attempt to hide it, the violation will likely not fit within the Compliance Philosophy initiative.

Second, the web-based VDRP system has been revised, removing requirements for inspectors to assign identifying

numbers and determine phases within the Enforcement Information System or opening an Enforcement Investigative Report. This demonstrates a desire for a cultural change in which inspectors focus on the goal of Compliance Philosophy and not enforcement.

Third, accepted ASAP reports, which used to be documented within the Enforcement Information System and may have resulted in administrative action, will no longer be documented in the Enforcement Information System or be subject to administrative action.

Also, ASAP data is de-identified, aggregated, and shared with other ASAP participants, with the intent of sharing safety-related concerns and corrections in order to improve safety industry-wide. If the ASAP report is never made, the industry loses the opportunity to learn from the event.

Although these changes seem merely procedural, the intent is clear: Self-disclosed compliance errors that are not willful, intentional violations of regulation should initially be dealt with through Compliance Philosophy, resorting to enforcement proceedings only if the certificated entity is uncooperative in resolving the incident of noncompliance.

COMPLIANCE PHILOSOPHY IS USED IN INSTANCES OF NONCOMPLIANCE WITHOUT IMMEDIATE SAFETY RAMIFICATIONS. FOR EXAMPLE, INADEQUATE TRAINING RECORDS, WHICH MIGHT HAVE RESULTED IN A LETTER OF INVESTIGATION IN THE PAST, MIGHT NOW RESULT IN ACTION THROUGH THE COMPLIANCE PHILOSOPHY PROCESS.

Does Compliance Philosophy Work?

"In the past, some inspectors have informally employed this type of process by using discretion in which violations will be investigated and which will simply be corrected," said Kent Jackson, founder of Jetlaw, an aviation law firm in Washington, D.C., and Kansas City. "Now they have encouragement and support from headquarters."

Although Compliance Philosophy is the official agency policy, not merely a recommendation, some offices in the FAA have yet to embrace it. The Drug Abatement and Hazardous Materials Divisions are two examples.

"Flight Standards has taken this to heart, but some other offices are not as enthusiastic," said Chris Poreda, attorney at Law Offices of Paul A. Lange LLC, in Stratford, Connecticut, and former regional counsel for the FAA's New England region. "For example, the Drug Abatement Office has a list of offenses and corresponding penalties, which agents must follow. That approach to enforcement is diametrically opposed

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to Compliance Philosophy, which dictates that each offense be viewed in the context of its own circumstances.”

FAA sources listing enforcement actions, whether civil penalties or

certification action, support this view, as the vast majority of enforcement actions during the past few years have resulted from just a few divisions of the FAA.

However, a recent advisory circular, AC No. 120-117, “Voluntary Disclosure Reporting Program for Apparent Violations of the Drug and Alcohol

Testing Regulations,” encourages employers or contractors regulated under drug and alcohol testing requirements of Part 120 to disclose violations through the VDRP and suggests these voluntarily reported violations should be handled through Compliance Philosophy initiative. The real-world impact of this AC is not yet known.

Poreda also notes Compliance Philosophy does not apply to questions of certification or qualification, so some inspectors jump to re-examination (the dreaded “709 ride”) of certificated airmen instead of pursuing Compliance Philosophy, essentially circumventing the Compliance Philosophy process.

Key FAA officials, including head of Flight Standards John Duncan, insist Compliance Philosophy is here to stay and is not merely lip speak. But has that message reached the field?

According to Jackson, Compliance Philosophy seems to be working.

There are countless anecdotal examples of Compliance Philosophy working to resolve a violation without formal investigation or penalty, but it’s impossible to know the number of investigations avoided because of this initiative, partly because so many violations were informally pursued with no significant documentation or formal record in the past.

“If you’re cynical about the apparent change in heart with the FAA enforcement branch, think of it as a money-saving approach,” Jackson said. “This approach is considerably less expensive than a formal investigation, which can drag on for months or years, and which risks the additional cost of responding to appeals.”

With Compliance Philosophy, the focus is on improvement of aviation in the U.S. as a whole and the improvement is seen more quickly because of the corrective action requirement, compared to both parties focusing on the investigation or penalty phase.

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If the FAA's goal is to improve compliance and safety – not mete out penalties – this cooperative process may achieve that goal.

Compliance Philosophy Challenges

In addition to the few divisions that have yet to warm to Compliance Philosophy, the initiative faces a few challenges.

Poreda cautions pilots on a related concern – the Pilots Bill of Rights, which applies to pilots and mechanics but not to other certificated entities such as repair stations or air carriers. The Pilots Bill of Rights requires inspectors to issue a warning similar to a Miranda warning (“You have the right to remain silent”) when contacting a pilot to discuss an alleged violation.

According to Poreda, pilots sometimes respond by refusing to talk to the inspector. Without cooperation between the airman and the inspector, Compliance Philosophy is not an option for resolution, so an investigation may be opened at that time.

Other certificated entities might be unfamiliar with or untrusting of the informal presentation of compliance actions. The alleged violation may be presented in a letter, email, conversation, or even handwritten on a tri-fold brochure about Compliance Philosophy. It is unlikely to come in a formal letter sent by certified mail requiring signature of receipt, as a letter of investigation would have been in the past.

Regardless of the FAA's presentation of the alleged violation to you, do not be lulled into casual complacency. Be sure to respond with a proposed corrective action plan and then follow through as you promised.

Compliance Philosophy is not a “Get Out of Jail Free” card. Not following up on your end of the bargain will likely result in a more-traditional investigation and enforcement action. □



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