The Pilot’s Bill of Rights: A Question of Fairness

By Kathleen Yodice

The Federal Aviation Administration (FAA) is the agency with statutory responsibility to provide for aviation safety. With that authority comes the responsibility to set forth minimum regulatory standards by which aircraft operate in our nation’s airspace, and the administrative power to enforce those rules. A large and visible part of the FAA’s enforcement program is the FAA’s authority to order a suspension or revocation of airman and air agency certificates it issues. The independent arbiter of the FAA’s decision to suspend or revoke a certificate and an airman’s or air agency’s objection to that decision is the National Transportation Safety Board (NTSB). For decades, practitioners have accused the FAA of unfair investigative and prosecutorial practices and argued that the NTSB’s review of an FAA order tends to unjustly favor the FAA. The degree of imbalance in the equities of truth and justice has waxed and waned over the years as the complement of NTSB members and general counsels changed and FAA chief counsels moved in and out, but, with the exception of a few statutory and regulatory amendments, the process itself has remained relatively unchanged and has consistently worked against the interests of the airman.

The catalyst for reforming this inequitable situation occurred in October 2010, when a U.S. senator found himself in the crosshairs of an FAA inspector’s viewfinder and experienced firsthand the challenges of trying to respond to an FAA investigation without the benefit of knowing pertinent and readily available information that could directly answer whether the airman’s conduct was appropriate, understandable, reasonable, intentional, wrong, misguided, or any other characterization. Senator James M. Inhofe (R-OK) had safely landed his aircraft on an established runway in Southern Texas that had been technically designated as closed because of work being done on the runway. Senator Inhofe not only claimed that he had never been advised of the closure but that air traffic control had informed him that he was cleared to land on the runway. When confronted by the FAA’s accusations that he landed on a closed runway, Senator Inhofe asked to see the Notice to Airmen of the closure, which the FAA said had been issued to prevent anyone from landing on the closed runway. Senator Inhofe also asked to listen to the air traffic control tapes to verify his clearance to land on the runway. The FAA denied his requests. Now, for the senator, how he operated the aircraft became a secondary consideration to the inexplicable unfairness with which he was treated in being denied access to government information that could establish whether his conduct was appropriate. It was an unfairness, he discovered, routinely suffered by many pilots.

When Senator Inhofe returned to Capitol Hill, he crafted legislation to remedy the unfairness that he believed no pilot should experience. He reached out to industry with his idea to introduce a Pilot’s Bill of Rights and incorporated some additional language to address a few other issues that were raised. This article describes the Pilot’s Bill of Rights (the Bill or Act) and the actions that the FAA and the NTSB have taken to date to implement it. The article then analyzes some of the Act’s specific requirements, including a few issues that may initially give rise to disputes over how to interpret the new law. The article concludes that the Act is effecting fundamental and necessary changes in FAA enforcement and how the NTSB reviews and adjudicates FAA enforcement actions against pilots.

The Bill’s Enactment into Law

The Bill was introduced in the Senate on July 6, 2011, and passed by unanimous consent on June 28, 2012. The Bill then passed on the House’s Suspension Calendar less than a month later. In other words, the Bill passed without objection and with bipartisan support. The president signed the Bill into law on August 3, 2012, only 13 months after it was introduced. The Bill was one of only about 240 pieces of legislation passed by the 112th Congress. It significantly changed the law and procedure related to FAA enforcement cases, especially against pilots, with the objective of injecting greater fairness into a system that had become imbalanced.

The law became effective immediately, and the FAA and NTSB initiated without delay rulemaking.

Kathleen Yodice (kathy.yodice@aopa.org) is managing partner of the Law Offices of Yodice Associates in Frederick, Maryland. Her practice includes representing clients in defense of FAA enforcement actions and providing legal counsel to the Aircraft Owners and Pilots Association (AOPA), including representing AOPA members’ interests to the FAA. Ms. Yodice assisted Senator Inhofe to identify issues to be included in the Bill and in explaining the need for the Bill’s provisions to members of Congress.
and policy changes to implement the law. NTSB Chief Administrative Law Judge Montano promptly issued an order noting the immediate effectiveness of the law and its impact on all pending and future NTSB proceedings at the administrative law judge level. About two-and-a-half months later, the NTSB promulgated an interim final rule to immediately implement the Act’s provisions in its proceedings, while at the same time also seeking comments on the rule for the NTSB to consider in adopting final amendments to its Rules of Practice in Air Safety Proceedings. The FAA published a notice to its inspectors on how to comply with the law. In addition, the FAA published a notice in the Federal Register explaining to airmen how and where to request air traffic data from government contractors with the assistance of the FAA through a “Pilot’s Bill of Rights” hyperlink on the www.faa.gov website.

The FRCP and FRE
Appeals to the NTSB from an FAA order of suspension or revocation of a certificate, as well as petitions to the NTSB for review of an FAA denial of an application for the issuance or renewal of an airman certificate, are now to be conducted, “to the extent practicable,” in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Prior to this change, the rules of evidence in NTSB proceedings were fairly lax in generally applying an admissibility standard of relevance, and even allowing hearsay and hearsay-within-hearsay to be admitted and relied upon in deciding a case. This prejudiced some infrequent practitioners before the NTSB who would expect the more formal rules used by district and state courts to apply. This laxity also undermined the quality of evidence used to support enforcement actions, including actions involving the FAA’s ultimate authority to revoke a certificate that put an airman or air agency immediately out of business. The FAA was generally the beneficiary of such laxity because it was able to prove its case without having to introduce a direct witness or demonstrate the reliability of a particular document. Practitioners should now be prepared to follow these rules, to the extent practicable, in cases currently pending before the NTSB, even if the matter was initiated or docketed prior to the Bill’s enactment. The change may be significant. For example, the Act’s reform of the long-standing NTSB procedural rule on the admissibility of hearsay and double hearsay is expected to have a major impact on hearings before the NTSB’s administrative law judges. Now, although parties may continue to seek to introduce hearsay evidence, they will be required to argue its admissibility under one of the exceptions to the hearsay rule set out in the Federal Rules of Evidence.

Required “Timely” Notification of Individuals
The FAA is now required to provide “timely, written notification to an individual who is the subject of an FAA investigation relating to the approval, denial, suspension, modification, or revocation of an airman certificate under chapter 447 of title 49, United States Code.” The FAA generally would inform airmen and air agencies that they were under investigation by sending a letter of investigation (LOI), but often would only issue the letter after the investigation was already in progress. Moreover, such letters tended to create an impression that the airman was required to respond. Such well-intentioned responses from persons desiring to be compliant often would contain unnecessary and damaging admissions that the FAA would use in its case. It was not obvious that a response was not legally required or that the information could be used against the airman or air agency. Further, if an airman made a request for air traffic data to understand the FAA’s reason for investigating a flight, the request would be denied on the basis that an investigation was ongoing; otherwise, absent an investigation, the data likely would be provided under the Freedom of Information Act. The new law specifically directs the FAA to give access to ATC data at the time of the investigation to allow the individual to “productively participate” in responding to the FAA, thereby prohibiting the FAA from denying requests for such information. In addition, the new law directs the FAA to provide a written notification that specifically informs the individual of the following:

1. the nature of the investigation,
2. that an oral or written response to a letter of investigation from the FAA Administrator is not required,
3. that no action or adverse inference can be taken against the individual for declining to respond to the LOI,
4. that any response to an LOI or any other FAA inquiry may be used in evidence against the individual,
5. that the releasable portion of the FAA’s investigative report will be available to the individual, and
6. that the individual is entitled to access and to obtain air traffic data that would facilitate the individual’s ability to productively participate in a proceeding relating to the investigation. The data include relevant air traffic communications tapes, radar information, ATC controller statements, flight data, investigative reports, and any other data that would be helpful to the individual.

Under an exception to this notification requirement, the FAA may delay timely notification if it could threaten the integrity of the investigation.

Unless an emergency exists, the FAA may not proceed against an individual during the 30-day period following the date on which the air traffic data are
made available to the individual. In its notice to its inspectors, the FAA states that it interprets this to mean that it may not issue an order within the 30-day period after it provided the data to the individual, and that the FAA will advise the airman at the time of a Notice of Proposed Certificate Action that these air traffic data are available. Because, however, the FAA does not issue a Notice of Proposed Certificate Action until after its investigation has been conducted and closed, the individual may not receive the air traffic data necessary to productively participate in the FAA’s investigation before the FAA proceeds with its action. This appears to conflict with the plain language of the Act, which requires the FAA to provide the available data at the time of the investigation in order to assist the individual in responding to the FAA (as the FAA’s letters of investigation specifically invite an airman to do). It also appears to conflict with the Act’s proscription that the FAA may not proceed against an individual during the 30-day period (commencing on the date on which the data were made available).

As to access to air traffic data, the new law cures the problem of the refusal of Lockheed Martin (the private contractor operating the FAA Flight Service Stations) to provide air traffic data (e.g., pre-flight briefings) to individuals under FAA investigation on the basis that Lockheed Martin is not the government and is not bound by the Freedom of Information Act. Specifically, the Bill provides that an individual is entitled to any air traffic data from a “government contractor that provides operational services to the Federal Aviation Administration, including control towers and flight service stations.” These data are obtainable by submitting a request to the FAA along with information identifying the data requested. The FAA has set up a hyperlink on its website to facilitate these requests for third-party air traffic data. The FAA cautions that any requests must be “expeditiously received” because data “is destroyed or otherwise disposed of within a few days or weeks after it is generated.” In addition, the FAA suggests that requests be as detailed as possible to facilitate the location, preservation, and provision of the data.

The FAA’s recently issued notice sets forth the forms and language to be provided to individuals who are the subject of an FAA investigation, including the language to be included with letters of investigation, reexamination requests, administrative action and remedial training letters, and the notification to be provided to individuals applying for a certificate. At first, many individuals receiving the notice may be confused or even alarmed, especially those individuals receiving the notification in response to their application for a new pilot certificate or rating or for a medical certificate. The language, however, may help individuals be more cautious and diligent in their responses to the FAA on such applications.

The NTSB Is No Longer Bound by FAA Interpretations

The NTSB is no longer statutorily bound by the FAA’s interpretations of the laws and regulations the FAA Administrator carries out. Prior to the Act’s passage, NTSB administrative law judges’ hands were tied when the FAA interpreted its regulations, including as a litigating position, and when the FAA cited its policy guidance relating to sanctions to be imposed in an FAA enforcement case. The new law, by contrast, allows judges to evaluate and decide how much deference to accord the FAA as a matter of administrative law. The FAA likely will argue that deference should continue to be accorded to its interpretations, orders, and litigating positions, as it argued prior to the statutory change that binds the NTSB. In support of its position, FAA attorneys have cited statements by Senator Jay Rockefeller (D-WV) (who was not the architect of the Bill) that the now-deleted statutory language that bound the NTSB to the FAA’s position was “redundant,” and thus it was general administrative law principles of deference, not the superseded statute, that required the NTSB to defer to the FAA’s interpretations of law and sanction. This appears to conflict with the Act’s intent to eliminate the “special deference” created in practice and precedent by the now-deleted language and to reestablish the applicability in this context of nothing more than the “due deference” generally owed to administrative agencies under Supreme Court and other precedent. Furthermore, the new law, in amending the statute, unquestionably was intended to effectuate a change, whereas the FAA’s position implausibly assumes that no change was intended.

Judicial Appeals

An individual substantially affected by an order of the NTSB upholding an FAA certificate action may, at the individual’s election, file an appeal in the federal district court in which the individual resides or in which the action in question occurred, or in the U.S. District Court for the District of Columbia. Alternatively, the individual may forgo any district court review and instead file an appeal from a full Board order in an appropriate federal court of appeals. In cases determined by the FAA to be emergencies, an FAA emergency order upheld by the NTSB shall remain in effect pending the exhaustion of any appeal to a federal district court unless the order is stayed by the NTSB. The standard of review in district court shall be a “full independent review . . . including substantive independent and expedited review of any decision by the Administrator to make such order effective immediately.” The court’s review shall include in evidence any record of the proceeding before the FAA and before the NTSB.
NOTAM Improvements

The FAA is required to begin a Notice to Airmen Improvement Program within six months of the Bill's passage.24 The FAA must establish a NOTAM Improvement Panel, comprised of private sector groups, that will advise the FAA on how to improve the system of providing airmen with pertinent and timely information regarding the national airspace system.25 The goals of the program are to decrease the overwhelming volume of NOTAMs; to make them more specific, relevant, and easily searchable; and to provide a filtering mechanism, similar to the one utilized by the Department of Defense, so that pilots can prioritize critical flight safety information relative to other airspace system information. The program will require archiving of previously issued NOTAMs in a single, publicly accessible location. The improvements are to be made within one year of the date of the law's enactment. The FAA had been working on improvements to its system, and this statutory deadline should help the FAA to finalize and implement those improvements.

Medical Certification

To obtain an FAA-issued medical certificate, an airmen must complete an FAA medical application form and submit to an examination by an FAA-designated aviation medical examiner in order to establish eligibility under the FAA’s medical standards. The Act directs the Government Accountability Office (GAO) to initiate an assessment of the FAA’s medical certification process and the associated medical standards and forms within six months of the enactment of the new law. The GAO must submit a report to Congress of the assessment. The goals of the medical certification process are newly defined in the Act to be an improved medical application form that is appropriate without being overly broad and is subject to a minimum amount of misinterpretation and mistaken responses, that contains only relevant questions that align with present-day medical judgment and practices, and that provides an appropriate and fair evaluation of an individual’s qualifications that also allows an individual to understand the basis for qualification. No later than one year after the issuance of the GAO report, the FAA shall establish a panel of industry representatives and medical experts to advise the FAA in carrying out the goals of the report and take appropriate action to respond to the report.26

Conclusion

How the Pilot’s Bill of Rights will ultimately change law, precedent, and practice remains to be seen as the law is implemented. There is still a lot of uncharted territory, and simmering disagreements are slowly rising to the surface. Nonetheless, many of the new law’s effects are being felt immediately and, for the most part, they are welcome improvements to a system that had lost its footing.

Endnotes

8. Id. § 2(b)(2).
9. Id. § 2(b)(3).
10. FAA Notice 8900.195, supra note 4, at 5.c.
11. Pilot’s Bill of Rights, supra note 7, § 2(b)(4).
12. Id. § 2(b)(4)(C).
13. Id.
17. Pilot’s Bill of Rights, supra note 7, § 2(c).
19. In any event, the FAA’s reliance on legislative history is redundant and unpersuasive because the language of the Act is unambiguous and therefore controlling. See, e.g., Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012); United States v. Gonzales, 520 U.S. 1 (1997); Ratzlaf v. United States, 510 U.S. 135 (1994); Gemsco, Inc. v. Walling, 324 U.S. 244 (1945) (the plain language of a statute is controlling and, absent ambiguity, consideration of legislative history is unnecessary in interpreting a statute).
20. Pilot’s Bill of Rights, supra note 7, § 2(d).
21. Id.
22. Id.
23. Id.
24. Id. § 3.
25. Id.
26. Id. § 4.