KMA ZUCKERT

Air Carriers and Shippers: Beware the Well-Meaning Employee

David Endersbee and Barbara Marrin
KMA Zuckert LLC

Air carriers, foreign air carriers, indirect air carriers, and certified cargo screening facilities are subject to the jurisdiction of the Transportation Security Administration ("TSA") with respect to civil aviation security for their operations to, from, and within the United States. Air carriers, foreign air carriers, and shippers are also subject to the jurisdiction of the Federal Aviation Administration ("FAA") with respect to the offering, acceptance, and shipment of hazardous materials ("HAZMAT") to, from, and within the United States. As a consequence, regulated entities are faced with myriad overlapping safety and security obligations. To address these obligations, most of these commercial entities employ personnel whose job is to supervise regulated activity, in some cases liaison with federal inspectors, train employees, respond to routine governmental requests, and implement other aspects of the required safety and security programs. While one expects supervisory or management employees in charge of highly-regulated activities to understand and be trained to carry out their responsibilities and to observe and implement regulatory obligations imposed by TSA and FAA, what about "when things go wrong" and the TSA or FAA get involved in an investigation and enforcement context? In this article we briefly (i) discuss the risks posed by the "well-meaning employee" who takes it upon him- or herself to directly respond to an agency inquiry or investigation without coordinating with counsel and (ii) suggest some best practices to protect

The firm's practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on defense of federal agency enforcement actions including DOT, FAA, TSA, and CBP.

For further information regarding the matters discussed in this article, please contact any of the following attorneys:

David M. Endersbee
(202) 973-7935
dendersbee@kmazuckert.com

Barbara M. Marrin
(202) 973-7961
bmarrin@kmazuckert.com

KMA Zuckert LLC
888 17th Street, NW, Suite 700
Washington, D.C. 20006
Telephone: (202) 298-8660
Fax: (202) 342-0683
www.kmazuckert.com

regulated entities. This is intended as a high-level overview and is not a comprehensive discussion of the enforcement process; rather, the goal of this article is to make regulated entities aware of their risks and to keep them out of the enforcement process or otherwise minimize its impact.

The enforcement procedures for both TSA and FAA follow the same general format. If, through an investigation, audit, report, or incident, one of the agencies discovers a potential violation, broadly speaking the agency will pursue one of two enforcement avenues: (i) informal administrative action (such as a warning or letter of correction) or (ii) formal enforcement action. In the case of informal administrative action, such as a warning, there is no formal finding of violation. But the warning will remain on the record of the regulated entity (the "Respondent") and may be considered as an aggravating factor in future cases, potentially leading to formal enforcement action and/or higher proposed civil penalties if violations persist after the warning and/or corrective action is not taken.

If agency personnel determine that legal enforcement action may be necessary (typically in cases where there is intentional or reckless conduct, a risk to safety or security, a failure to implement corrective action, or repeated violations of the same nature), they will send a Letter of Investigation ("LOI") to the Respondent. The LOI describes the activity being investigated and provides detail about the apparent violation sufficient for the entity to respond. After reviewing the response to the LOI, agency personnel will document the issues and alleged violations and may refer the matter to agency enforcement counsel. If agency enforcement counsel believes enforcement action is necessary, an enforcement investigative report ("EIR")[1] will be created. The EIR is essentially the case file and record of the matter. It includes such information as the facts and circumstances of the incident or investigation, the regulations or security program elements alleged to have been violated, the LOI and Respondent's response (if any) and the recommended sanction. Other information in the EIR includes the Respondent's prior enforcement history (if any), its size and level of sophistication, and any evidence gathered (such as photographs). With this information the agency will determine whether to proceed with enforcement, and, if so, will issue a Notice of Proposed Civil Penalty ("NPCP"). For purposes of this discussion we focus on the NPCP.

The NPCP formally sets forth a summary of the facts, the alleged violations (e.g., regulations, specific sections of security plans and related implementing documents, etc.)

[1] Respondents are entitled to request a copy of the releasable portions of the EIR (i.e., those portions not protected under a Freedom of Information Act exception, generally 5 U.S.C. § 552(b)(5), the so-called "deliberative process privilege", which protects, among other things, intra-agency communications, such as a Transportation Security Inspector's recommendations to TSA enforcement counsel).

and provides the Respondent a specific time period in which to respond (normally 30 days). Generally, the options for responding to an NPCP include (i) paying the proposed penalty; (ii) submitting written information demonstrating that a violation did not occur or that the amount of the penalty is not warranted; (iii) submitting information indicating the proposed penalty would pose a hardship or prevent the entity from continuing its business; (iv) requesting an informal conference to discuss the matter with the agency attorney; or, (v) requesting a formal hearing before an administrative law judge.

With this broad background in mind, does your company have clear procedures for immediately notifying in-house or external counsel when your employees receive an LOI (or even the results of an inspection or audit that identifies potential issues in advance of agency action)? Does your company have clear procedures for counsel to review and approve correspondence in response to an LOI from TSA or FAA (or better yet, prepare a response strategy before a letter is written)? As a matter of best practices, companies should adopt such procedures. Far too often a "well-meaning employee" who is not an attorney, and with a goal of being responsive to the regulator (after all, the subject of the inquiry is the employee's bailiwick), will (i) respond to an LOI and simply admit that the violations occurred without the benefit of a careful and thoughtful legal strategy, (ii) provide too much information (or the wrong kind of information), (iii) not realize that an alleged violation may not have occurred (e.g., an inspector may have mistaken the facts and/or applicable law), or (iv) will entirely omit strategic considerations relevant to the disposition of the case (e.g., appropriate remedial action, which is generally given more weight by the agency if it is taken before the issuance of an NPCP). Such well-intentioned responses frequently escalate minor issues into enforcement actions instead of informal administrative action such as a warning, simple cases into complex ones, and may totally eliminate the possibility of closing a case without a finding of violation and without an assessed civil penalty. The agency, armed with a "layperson's" response to an LOI, frequently is presented with a clearer basis for bypassing informal administrative action and proceeding directly to an NPCP, often with a higher proposed penalty.

An uncoordinated and unsophisticated response to an LOI could be as simple as an admission that an event occurred exactly as the agency described, that the employee(s) involved have been reprimanded, and the respondent assures the agency that the event will not reoccur. Such a response – well-intentioned though it may be – may lead an agency inspector to more easily determine that a violation occurred and would thus be more likely to result in a referral to an agency enforcement attorney. In contrast, a sophisticated and well-planned reply might concede that an event occurred as alleged, but that the Respondent (i) has no violation history, (ii) reviewed and updated its procedures to specifically prevent such incidents from reoccurring, (iii) provided refresher training to all employees involved in the conduct at issue, (iv) initiated audits to ensure compliance, and so on. Appropriate remedial action before an agency issues a NPCP is,

of course, weighted more heavily by agency counsel, as it is (in theory) taken at the initiative of the respondent and not in reaction to a proposed civil penalty.

We are frequently presented with situations where an employee has, independent of counsel, prepared and submitted a response to an agency LOI. That "well-meaning employee", who has in good faith simply tried to respond to their regulator, can unintentionally set up their employer for an expensive NPCP, which requires counsel's involvement for an optimal defense and outcome. Besides the obvious financial pain of defending against an enforcement case and paying a civil penalty, future violations involving the same regulations or requirements will generally involve increased penalties.[2]

In sum, in-house or external counsel for regulated entities should be involved at the very beginning of the enforcement process, even if it starts as informal correspondence from the regulator or a site check or audit. Such entities should adopt policies and procedures to ensure counsel is able to work in tandem with "front line" employees and managers in order to craft sophisticated responses and develop strategies that are designed to protect the company. Such involvement should not come "at the last minute" with the issuance of a NPCP, because by that point (absent some egregious error in fact or law) the facts and alleged violations have been tentatively established by the agency enforcement attorney (and frequently admitted by the Respondent) and it is much more difficult to persuade the agency to defer enforcement or significantly reduce civil penalties.

[2] See, e.g., TSA's Enforcement Sanction Guidance Policy at 1 which discusses "a philosophy of progressive enforcement, [in which] the sanction generally increases with each repeated violation or based upon other aggravating factors."