

The devil is in the deadline

■ This issue, Lisa Harig looks at the subject of navigating administrative enforcement actions.

United States Customs and Border Protection (CBP) recently announced that it plans to amend its mitigation guidelines for fines, penalties, forfeitures and liquidated damages in order to, amongst other things, tighten its policy with respect to late petitions. In calculating the fees for filing a late petition, CBP will now base such late fees on the full assessed amount of the claim rather than the mitigated amount. In some cases, this could mean an exponential increase in late fees, even if the mitigated penalty is relatively low. As governments look increasingly to civil penalties and fines to regulate activities at airports, it is important to remember that this enforcement activity will have a significant long-term impact on aviation service providers at airports. Meeting deadlines in enforcement actions is critical to mitigating costs and successfully navigating an administrative enforcement action.

An enforcement action generally results from a triggering event, which can be anything from an accident or incident to an audit, investigation or observation to a complaint or anonymous tip-off. The investigation usually begins with a letter of investigation from the relevant agency. This document will offer you an opportunity to respond within a set amount of time, usually ten to 30 days. At this stage in the process, there is normally no obligation to respond to the government agency. It should be noted that any response (be it a telephone call, letter or e-mail) will be recorded and maintained in the investigation file, so that anything you say or write will become part of the record.

Once the investigation is over, there are four possible conclusions: (1) no action taken; (2) administrative action; (3) legal action or informal adjudication; or (4) referral for criminal prosecution. The best possible outcome is one in which no action is taken and the case is closed. Administrative action can take the form of a Letter of Correction or Letter of Warning. While there is no fine or penalty attached, administrative actions are non-appealable and become part of your violation history (although, depending on the agency, some may be removed or expunged after a certain period of time has elapsed).

Legal action or informal adjudication generally involves the issuance of a Notice of Penalty or Notice of Proposed Penalty, and it is here that deadlines really start to matter.

The worst possible outcome is that where the case is referred for criminal prosecution, but this is a rare occurrence.

If you receive a Notice of Penalty or Notice of Proposed Penalty, it is time to consult an attorney. Although informal, the civil penalty process is quasi-legal and may have a lasting effect on your business. In addition to the financial impact of the fine, any civil penalty assessed will become part of your violation history and will be considered an aggravating factor in calculating the severity of the proposed fine or penalty in future violations.

The Notice will state the relevant facts, alleged violations, and proposed civil penalty (ie fine). The proposed fine is usually calculated based on aggravating and mitigating factors, including the nature and circumstances of the violation, the alleged violator's level of experience, the significance or degree of risk created by the violation, the attitude of the alleged violator, the prior violation history, the extent of damage or harm to persons or property, any criminal sanctions already paid, and the economic impact of the alleged violator.

The Notice will also outline your options for responding, as well as clearly outline the deadline for the response. Depending on the agency, you will have several of the following options when you receive the Notice. You may pay the penalty as proposed; submit written information for consideration; request that the civil penalty be assessed in a lesser amount; request an informal conference with an agency attorney; or request a formal evidentiary hearing before an Administrative Law Judge.

Deadlines at the post-investigative stage are set forth in regulations and are generally mandatory. Missing a deadline at this stage is tantamount to accepting the Notice (facts, alleged violations and proposed fine) "as is" and agreeing to pay the entire proposed civil penalty. This is almost never the best option.

Submitting written information for consideration or requesting an informal conference with an agency attorney gives you the opportunity to present evidence of different (favourable) facts and/or mitigating factors. If the actual facts of a situation are different from those outlined in the Notice, proof of this might result in fewer regulatory violations or in less serious violations being assessed. This is obviously helpful, since any violation is tracked as part of your

violation history and will impact the level of fines or penalties assessed in the future. Presenting mitigating factors may result in a lower fine or penalty (but not less severe or fewer violations). Mitigating factors include corrective action you have implemented, systematic changes to procedures in order to prevent future violations and training and education designed to educate employees or update prior training.

Regardless of the nature of the violation and/or the amount of the proposed penalty, you will have a number of options available to you under the applicable regulations. However, if you miss a deadline in the process, certain options will disappear.

So pay attention to deadlines in enforcement actions - your company's financial health and reputation may depend on it.



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