Preserving the Safety Benefits of Voluntary Disclosure Programs

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Background

- Former FAA Chief Counsel and Counselor to the Secretary of Transportation.
- Current General Counsel & Secretary of Flight Safety Foundation and Pillsbury Partner.
- Represent many airlines, aerospace companies, and repair stations in FAA enforcement actions and litigation.
- Helped put together the first voluntary disclosure reporting programs (“VDRP”) under FAA Administrator Busey in 1990.
- Early 1990’s, highly adversarial relationship existed among airlines, pilots and FAA arising from automatic suspensions and civil penalties for safety and security violations, resulting in high fines, extensive litigation, and over burdened staff.
- Violations often kept from governmental review unless “detected.”
FAA’s Voluntary Programs - Changing the Culture of U.S. Aviation Safety

- With far fewer accidents and better data, FAA/industry moved from a forensic investigative approach to a diagnostic and proactive method, with demonstrable safety benefits.

- In 1996, 30 major commercial jet accidents worldwide; in 2006, 11. No major accident in the U.S. since 11/12/01 AA 587.

- Decline can be attributed to proactive measures by the FAA and industry to create programs to deal with common flight errors, namely VDRP, ASAP, and FOQA.

- Working in partnership with airlines, aerospace companies, pilots, and repair stations on safety noncompliance through administrative action permits better route cause and trend analysis, yields critical safety information, and avoids spending time and money looking backward, before ALJs or court.

- With 3,859 FAA inspectors, FAA simply cannot obtain relevant safety data it needs to detect trends and prevent accidents on its own.
Flight Operations Quality Assurance (FOQA)

- Recent FAA/industry incidents and congressional investigations did not uncover any problems with FOQA, which is a voluntary airline program for collection and analysis of digital flight data from line operations.
- Provides objective information on adverse safety trends by aggregating data from flights.
- Requires airline to provide adverse safety trends revealed and their corrective action with less or no enforcement action for violations.
- Data has been used to identify unstable approaches that have occurred with frequency at every airport in the world.
- Allows the FAA and airline to identify the problem, develop a fix, and monitor the effectiveness.

Aviation Safety Action Program (ASAP)

- Recent FAA/industry problems did not implicate ASAP programs, which were designed in 1996 to identify and correct adverse safety events uncovered by employees of a regulated entity (airlines first, expanded to repair stations).
- Along with FOQA, ASAP has obtained vital information that has identified systematic discrepancies that would not have been discovered or corrected.
- ASAP report will not result in either the FAA or the employer initiating or supporting disciplinary action against an individual employee; the employee who committed the error holds the information for a truly comprehensive solution.
- Represents a vital shift in the administration of safety and compliance; a change in the philosophy from compliance to collaboration, which ought to be welcomed.
- Problems exist in the protection of ASAP data from disclosure and its use in court.
Improving on ASAP

- Comparing organizations with and without ASAP programs -- no statistical difference in the willingness to report errors. However, employees in organizations with ASAP programs tend to trust their supervisors significantly more.

- 44% of individuals with ASAP programs do not believe their current programs are being used to full potential; improved communication and training regarding criteria could lead to better utilization.

- Among organizations with ASAP programs about 71% support stronger communication regarding ASAP programs, including publicizing the success stories and standardizing the process.

Source: Manoj S. Patankar, Ph.D & David Driscoll, Factors Affecting the Success or Failure of Aviation Safety Action Programs in Aviation Maintenance Organizations, Saint Louis University (2004).
Regulatory Partnerships Are Very Common Throughout the Federal Government

- Federal regimes
  - Dep’t of Agriculture
  - Occupational Safety and Health Administration
  - Environmental Protection Agency
  - Nuclear Regulatory Commission
  - Dep’t of Veterans’ Affairs
  - Dep’t of Defense
  - Securities and Exchange Commission
  - Dep’t of Health and Human Services
Advantages of Self-disclosure Regimes

- **U.S. EPA:** “There are real benefits to the public and the environment when the regulated community audits their own compliance status and corrects their environmental violations.”

- **OSHA:** “Cooperation...complements the agency's enforcement activity without replacing it, allowing the agency to focus its inspection resources on higher-risk establishments.”

- **Self-disclosing companies with good track records realized a much lower probability of violations compared to non-disclosing companies with similar track records.** See Toffel & Short (2008)
Other Federal Voluntary Disclosure Programs

- **NRC**: If problem requiring corrective action was self-identified and corrective action is promptly taken, the NRC will not assess a civil penalty.
  - Reduced civil penalties only apply to parties without any problems within the previous two years
  - Nuclear licensees are required to report occurrences of certain events with “active adverse impact”
  - If the problem is not self-identified and no corrective action is promptly taken, a double civil penalty is imposed

- **OSHA**: companies must have good track records before they are accepted into the voluntary protection programs (implying no history of repeat violations).
Environmental Protection Agency Audit Program

- EPA lowers civil penalties for self-reported violations, provided the violations are promptly disclosed and corrected.
- No criminal charges.
  - Policy does not apply when corporate officials are consciously involved in or willfully blind to violations, or conceal or condone noncompliance.
- Relief is precluded for repeat violations, those that result in “actual harm to the environment,” and violations that may present an “imminent and substantial endangerment” to human health or the environment.
- Violation must be discovered and identified before government agency likely would have identified the problem through its own investigation or through a third party.
Disclosure must occur within 21 calendar days of when corporation has an “objectively reasonable basis” for believing a violation may have occurred.

Entity must correct violation within 60 calendar days from date of discovery or as expeditiously as possible.

Violation must be discovered and identified before government agency likely would have identified the problem through its own investigation or through a third party.

EPA opposed to audit privilege and statutory immunity for self-disclosers, leaving parties open to the possibility of state enforcement actions.
International Examples - Australia

- Aviation Self Reporting Scheme (ASRS)
  - Instituted in 2004.
  - Allows for self-disclosure of unintentional regulatory breaches by Civil Aviation Authorization holders seeking to claim protection from administrative action from the Civil Aviation Safety Authority.
  - Report must be filed within 10 days of the breach.
  - Reporters can claim protection from administrative action once every 5 years.
  - Self-reporting scheme does not replace mandatory reporting scheme of certain events.
  - Breach cannot be deliberate, fraudulent, or cause or contribute to an accident or serious incident.
Danish Air Traffic Control – Mandating Disclosure

- Concerns over Danish Air Safety were raised in early 2000 by key stakeholders and were aired on national prime-time television.

- In May of 2001 Parliament passed a law mandating that Air Traffic Controllers report all adverse events. In return controllers are assured:
  - Indemnity against prosecution or disciplinary consequences; confidentiality

- To educate employees, an extensive briefing campaign discussed concerns and questions. Upper management sent memos to all employees describing the new system.

- Results: After one year 980 reports had been filed; the previous year there were 15 – much more safety information.
Evaluating Corrective Actions

- CAAs hold the key; do not close the case with Letter of Correction until satisfied with permanent corrective fix.
- Unfair to both sides to leave cases pending for months or years.
- Other agencies require that the problem be corrected within a specified period of time or evaluate the corrective action themselves.
- EPA: Entity must correct violation within 60 calendar days from date of discovery or as expeditiously as possible.
- NRC: Violations must be corrected “promptly”.
Response to IG Recommendations

- Second level supervisory review before corrective actions deemed sufficient to “close” matter.
  - Represents administrative burden, but implement review in more complex or controversial cases

- Be careful not to call into question self disclosures with more likely rejections, as it will have chilling effect on the flow of safety information.

- Identify public as stakeholder.
  - Superficial but significant, sending appropriate message to regulator

- Rotating Supervisory inspector.
  - Rotation can be helpful to address both too close and too adversarial relationship, and avoid implication that if removed it was “interference from headquarters.” Resource and expertise implications
“Cooling-Off” Period

- DOT OIG recommends prohibiting FAA inspectors from acting in any type of liaison capacity between FAA and carrier for 2 years after leaving FAA.
- Federal agencies adopt “cooling-off” period, but it is generally limited to senior, highly-paid employees. *(See 18 USC sec. 207)*
- “Cooling off” period should not be overly broad or extensive, so as to preclude employment with regulated entity, but serving as chief liaison back to FAA within short period of time (< 1 year) can be problematic and should be prohibited.
Timeliness of Disclosure

- Generally, U.S. air carriers must report within 24 hours of becoming aware of noncompliance.
- This can be an issue difficult to meet—gotcha games.
- EPA requires regulated entities to disclose violation within 21 days (increased from 10 days in 2000).
- Australia’s Aviation Self Reporting Scheme requires air carriers to report noncompliance within 10 days of breach.
- Nuclear Regulatory Commission requires misadministration of nuclear facility to be reported within the next working day.
- CAAs should generally adopt a 10 day disclosure rule, which permits regulated entity to more fully understand situation, determine whether non-compliance occurred, and begin formulating corrective action (i.e. grounding, quarantine, disciplinary action).
More Safety Organizations Are Moving Toward Just Culture Initiatives

- More safety data is needed to prevent catastrophic consequences, so more aggressively avoid “Blame game”.
- International initiative based on the assumption that feedback on accidents and incidents serves entire industry and its regulators.
- Aims to provide increase in reporting; not to justify absence of reporting.
- Relies on attitudinal as well as structural changes promoting informed, flexible, and just managers and employees.
- Although “just culture” has been a hot topic among the aviation industry for years, and presented and debated at multiple international conferences, it’s concept has not been formalized by any government.
Conclusion

- Regulatory partnership programs have had demonstrable safety benefits.
- Voluntary self disclosure programs are widespread throughout the federal government and internationally.
- These compliance programs should not be dismantled or radically changed due to isolated instances of alleged misuse.
- Such programs allow CAAs and regulated entities to work collaboratively to promote safe practices and improvements—they save lives.
- Need legislative action to breathe further life in these programs by providing statutory protection for non-disclosure.
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