



Navigating TSA Civil Enforcement Actions

LISA A. HARIG

The Transportation Security Administration (TSA) was created in the aftermath of 9/11 by the Aviation and Transportation Security Act (ATSA), passed by the U.S. Congress and signed on Nov. 19, 2001.¹ The Homeland Security Act of 2002 transferred TSA from the Department of Transportation to the newly created Department of Homeland Security.² TSA's stated mission is to "protect the Nation's transportation systems to ensure freedom of movement for people and commerce."³ To that end, TSA is tasked with enforcing ATSA and the transportation security regulations promulgated thereunder.⁴ This article provides an overview of the TSA civil enforcement process, including the unique role that sensitive security information (SSI) plays in civil enforcement actions and TSA's voluntary disclosure program.

Investigation

An enforcement action from TSA generally results from a triggering event. A triggering event may be an accident or incident; a routine or special audit, investigation, or observation by TSA personnel; or a complaint submitted by law enforcement, air traffic control, the airport authority, or a member of the public. Triggering events may also include anonymous tips called in to an agency office or hotline.

The investigation usually begins with a letter of investigation (LOI) from TSA. The LOI will offer the recipient of the LOI (respondent) an opportunity to respond within a set amount of time, usually 10 to 30 days. At this stage in the process, there is normally no obligation to respond to the government agency. However, it should be noted that any response (be it a telephone call, letter, or email) will be recorded and maintained in the investigation file, so anything the respondent says or provides in writing will become part of the record.

Once the investigation is completed, there are four possible outcomes: (1) no action taken; (2) administrative action; (3) legal action or informal adjudication; and (4) referral for criminal prosecution. Clearly, the best possible outcome from the point of view of the company or individual being investigated is that no action is taken and the case is closed. The worst possible outcome is that the case is referred for criminal prosecution.

Administrative action can take the form of a letter of correction or letter of warning. While no fine or penalty is attached, administrative actions are nonappealable and become part of the violation history for the company or individual concerned. Legal action or informal adjudication generally involves the issuance of a Notice of Proposed Civil Penalty (notice), and the rest of the article will focus on this outcome.

Legal Action/Informal Adjudication

The notice will state the relevant facts, alleged violations, and proposed civil penalty (fine). The proposed fine is usually calculated based on aggravating and mitigating factors, including:

- Significance or degree of the security risk created by the violation.
- Nature of the violation (whether the violation was inadvertent, deliberate, or the result of gross negligence).
- Past violation history (compliance should be the norm, so lack of prior violations is not a mitigating factor).
- Respondent's level of experience.
- Attitude of the respondent, including the nature of any corrective action taken.
- Economic impact of the civil penalty on the respondent.
- Criminal sanctions already paid for the same incident.
- Disciplinary action by the respondent's employer for the same incident (in the case of an individual).
- Artful concealment.
- Fraud and intentional falsification.⁵

TSA will also consider respondent's status as a small business in determining the appropriate amount of the civil penalty.⁶ Depending on the type of business, small-business status is usually determined based on either the annual revenues, number of employees, or both. Because this information may not be readily available to the investigator prior to the issuance of a notice, it is up to the respondent to provide relevant evidence supporting small-business status.

The notice will also outline the respondent's options to respond, as well as clearly outline the deadline for the response (generally, 30 days). In TSA civil enforcement proceedings, respondents usually have the following options: (1) pay the penalty as proposed; (2) submit written information for consideration; (3) request that the civil penalty be assessed in a lesser amount; (4) request an informal conference with a TSA attorney; or (5) request a formal evidentiary hearing before a U.S. Coast Guard Administrative Law Judge (ALJ).

In paying the proposed civil penalty without submitting evidence for consideration (either in writing or via an informal conference or formal hearing), the respondent is, in essence, accepting the notice (facts, alleged violations, and proposed fine) "as is" and agreeing to pay the entire proposed civil penalty.

A respondent may request a reduction in the civil penalty amount without disputing the facts by providing proof of financial hardship. For business entities, such proof means cash-flow statements for the past 12 months, cash-flow projections for the next 12 months, a current balance sheet and profit and loss account, the most recent

annual report (for public companies) or tax return (for privately held companies), and other information that respondent feels would be helpful. For individuals, proof of financial hardship can be established through copies of the most recent tax return, last two pay stubs, latest bank statement, and other relevant information.

Submitting written information for consideration or requesting an informal conference with an agency attorney provides the respondent with the opportunity to present evidence of different (favorable) facts. If the respondent can establish that actual facts of a situation are different than outlined in the notice, proof of this might result in fewer regulatory violations or in less-serious violations being assessed. Because violations are tracked as part of a respondent's violation history and will impact the level of fines or penalties assessed in the future, this can be an important result.

Further, the respondent may present facts to support an argument that the proposed penalty amount is not warranted given the circumstances. Presenting mitigating factors may result in a lower fine or penalty (but not less-severe or fewer violations). Mitigating factors include corrective action implemented by the respondent, systematic changes to procedures designed to prevent future violations, and training and education designed to educate employees or update prior training. In addition to the financial impact of the fine, any civil penalty assessed will become part of respondent's violation history and may be considered an aggravating factor in calculating the severity of the proposed fine or penalty in future violations.

The informal conference is a meeting with a TSA attorney, either in person or via teleconference; respondent may have an attorney present for this conference. Rather than simply submitting written information to TSA for consideration, the informal conference allows respondent to present reasons why the agency should not proceed with the civil penalty action as proposed in the notice. Respondent may also propose a reduced civil penalty amount, along with supporting documentation for consideration.

If the parties are not able to reach a mutually acceptable outcome following the informal conference, respondent may request a formal hearing before an ALJ.⁷ At any such formal hearing, each side will have the opportunity to present witnesses and other evidence. TSA will bear the burden of proof. The ALJ will decide all matters of fact and law, and decide whether and in what amount a civil penalty will be assessed against respondent. Decisions of the ALJ are appealable to the TSA administrator, which are in turn appealable to the U.S. Court of Appeals.

Enforcement Investigative Report

When opting for either an informal conference or formal hearing, respondents may request a copy of the releasable portions of the Enforcement Investigative Report (EIR). The EIR is TSA's case file on the civil enforcement action. It is opened when a TSA inspector begins an investigation and contains the record of all contact with TSA, as well as the inspector's report(s), photos, and other evidence. It also includes a violation history of the respondent. TSA relies on the EIR when initiating and preparing an enforcement action.

Only certain portions of the EIR are releasable to the respondent. For instance, portions containing analysis, recommendations, and/or opinions of the TSA inspector are withheld as privileged based on the notion that they are deliberative, pre-decisional materials rendered by agency staff members in the course of reaching a final determination on a particular matter under consideration.⁸

Sensitive Security Information

The notice, EIR, and other correspondence and documents to or from TSA are likely to contain SSI, a specific category of sensitive but unclassified information. Documents containing SSI are protected from public disclosure by ATSA and the transportation security regulations.⁹ TSA has authority to prohibit disclosure of information that is developed or obtained in the course of carrying out security activities if disclosure of such information would be detrimental to the security of passengers in transportation.¹⁰

SSI is not classified national security information and is not subject to the intensive handling requirements governing such information. However, there are specific handling procedures for SSI, and unauthorized disclosure of SSI may result in civil penalties and other enforcement or corrective actions. First, SSI must be stored in a secure location (such as a locked file cabinet or drawer) when not in the physical possession of the recipient.¹¹ Second, SSI must be destroyed when no longer needed to preclude recognition or reconstruction of the information.¹² Finally, each page of any document containing SSI (even a small amount of SSI) must be marked with the following unaltered header and footer:

Header: Sensitive Security Information

*Footer: Warning: This record contains sensitive security information that is controlled under 49 CFR parts 15 and 1520. No part of this record may be disclosed to persons without a "need to know," as defined in 49 CFR parts 15 and 1520, except with the written permission of the Administrator of the Transportation Security Administration or the Secretary of Transportation. Unauthorized release may result in civil penalty or other action. For U.S. government agencies, public disclosure is governed by 5 U.S.C. 552 and 49 CFR parts 15 and 1520.*¹³

In addition, TSA recommends that when sending documents containing SSI via email, the SSI should be contained in a password-protected attachment rather than in the body of the email message. Passwords for such documents should be at least eight characters long and should be transmitted in a separate email message or by phone. If faxing SSI, the sender should verify the fax number before sending and confirm that the intended recipient will be available to promptly retrieve the fax. SSI sent by mail should be sent first class or by a traceable delivery service in an opaque envelope or box. The outer wrapping should not indicate that SSI is contained therein. Finally, SSI stored on computer networks should be password-protected.¹⁴

Because of the SSI component, TSA civil enforcement actions are not generally publicly reported in a similar way that penalties imposed by other federal agencies (i.e., Federal Aviation Administration, Customs and Border Protection, etc.) are handled. Thus, respondents do not usually have the benefit of knowing how TSA resolved similar cases in the past.

Voluntary Disclosure

Like many federal agencies, TSA has a voluntary disclosure program for entities (but not individuals). Under this program, aircraft operators, indirect air carriers, foreign air carriers, airports, and flight-training providers may report apparent violations of certain TSA regulations.¹⁵ As stated in the policy document, "The TSA policy of forgoing civil penalty actions when one of these entities de-

tections violations, promptly discloses the violations to TSA, and takes prompt corrective action to ensure that the same or similar violations do not recur is designed to encourage compliance with TSA regulations, foster secure practices, and encourage the development of internal evaluation programs.”¹⁶

TSA looks at five factors to determine whether a voluntary disclosure will qualify under the program, including: (1) whether the reporting entity has notified TSA of the apparent violation immediately after detecting it and before the agency has learned of it by other means; (2) whether the apparent violation was inadvertent; (3) whether the apparent violation indicates a lack or reasonable question of qualification or training on the part of the reporting entity; (4) whether immediate action satisfactory to TSA was taken upon discovery to terminate the conduct that resulted in the apparent violation; and (5) whether the reporting entity has developed or is developing a corrective action and schedule of implementation satisfactory to TSA. If these criteria are met, the reporting entity will generally receive a letter of correction in lieu of a civil penalty.

Conclusion

While similar to enforcement actions by other federal agencies, TSA civil enforcement actions do have some specific considerations, particularly with respect to SSI and the limited voluntary disclosure program. Understanding these unique issues, as well as the civil enforcement process generally, can lead to a better result for a company or individual subject to an enforcement action. ☉



Lisa A. Harig is a partner at McBreen & Kopko in Arlington, Virginia. She can be reached at LHarig@mklawdc.com. © 2015 Lisa A. Harig. All rights reserved.

Endnotes

¹Public Law 107-71, 115 Stat 628 (Nov. 19, 2001), codified at 49 U.S.C. 40101 *et seq.*

²Public Law 107-296, 116 Stat 2135 (Nov. 25, 2002), codified at 6 U.S.C. 101 *et seq.*

³www.tsa.gov/about-tsa/mission

⁴49 CFR part 1500 *et seq.* (transportation security regulations).

⁵See TSA's Enforcement Sanction Guidance Policy, www.tsa.gov/sites/default/files/assets/pdf/enforcement_sanction_guidance_policy.pdf.

⁶See 13 CFR part 121.

⁷49 CFR 1503.

⁸See *Tigue v. Department of Justice*, 312 F.3d 70, 76-77 (2d Cir. 2002).

⁹Specifically, 49 U.S.C. § 40119(b), 49 U.S.C. § 114(s), and 49 CFR Part 1520 relate to SSI.

¹⁰See *Public Citizen v. FAA*, 988 F.2d 186 (D.C. Cir. 1993); pursuant to ATSA, TSA assumed responsibility for all civil aviation security functions from the Federal Aviation Administration.

¹¹49 CFR 1520.9 (a)(1).

¹²49 CFR 1520.19.

¹³49 CFR 1520.13.

¹⁴See www.tsa.gov/sites/default/files/assets/pdf/ssi/stakeholder_brochure.pdf.

¹⁵Regulations applicable to the Voluntary Disclosure Program include those in 49 CFR parts 1542 (Airport Security), 1544 (Aircraft Operator Security: Air Carriers and Commercial Operators), 1546 (Foreign Air Carrier Security), 1548 (Indirect Air Carrier Security), and 1550 (Aircraft Security Under General Operating and Flight Rules). The Certified Cargo Screening Program is excluded from the voluntary disclosure program.

¹⁶Transportation Security Administration Voluntary Disclosure Program Policy, www.tsa.gov/sites/default/files/assets/pdf/voluntary_disclosure_policy.pdf.

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