

CORPORATE counsel

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Turbulent Skies Ahead

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When the Federal Aviation Administration fined Southwest Airlines Co. in March for failing to conduct timely safety inspections, the carrier's in-house counsel sprang into action. Their job was to try to negotiate a settlement of the \$10.2 million penalty, the largest that the FAA had ever levied. But some observers think that lawyers at all airlines should get involved *before* the regulators come knocking.

Is Southwest contemplating such a change? Madeleine Johnson, who will become general counsel at the Dallas-based company May 19, says it's too soon to say. But Johnson allows: "I feel certain that we will be having a dialogue" about the FAA's safety directives.

Other carriers may need to do the same. In April the FAA announced that voluntary disclosures about regulatory compliance will now have to be made by "senior airline officials," guaranteeing that they'll be in the loop.

Should one of those officials be a carrier's general counsel? The FAA hasn't specified. But Brian Alexander, a partner at Kreindler & Kreindler, thinks so. Alexander isn't always on the best terms with the airlines, since his New York-based plaintiffs firm specializes in suing them. But to him, it just makes sense for airline lawyers to take a more hands-on approach to compliance. "If I'm corporate counsel," Alexander says, "I want to make sure I have a role in the process before my airline gets fined."

Southwest's problems began more than a year ago. On March 15, 2007, the carrier informed the FAA that it had failed to inspect some of its planes for fuselage cracks within the time frame set by the agency. But Southwest then compounded the problem by continuing to fly 46 uninspected planes for another eight days. By the time these planes were inspected, six were found to have small fatigue cracks.

This spring the FAA finally meted out its punishment. On March 6 it fined the airline \$200,000 for missing the inspection deadline, and \$10 million for continuing to fly the planes even after the lapse was discovered.

On April 3 the FAA itself came under fire at a hearing of the House Transportation and Infrastructure Committee. Lawmakers took the agency to task for what they viewed as its excessively cozy relationship with the airline industry. Later that month, under the eye of the newly chastened FAA, a host of carriers grounded scores of planes. American Airlines, the hardest hit, had to cancel thousands of flights.

Compliance with FAA airworthiness directives—which require airlines to address unsafe conditions on their planes—is generally left in the hands of operations employees. At Southwest, this task is the responsibility of the maintenance and engineering department.

No one currently at Southwest was willing to discuss whether its lawyers should be involved in the process. But Deborah Ackerman, who retired last October after six years as the company's GC, says attorneys aren't qualified to address technical issues like airworthiness. Asked whether lawyers should be called to assess the legal and reputational risks, Ackerman responds: "There's a big difference between a legal risk and an operational risk." Lawyers are qualified to tackle the first, she adds, but not necessarily the second.

Southwest executive chairman Herb Kelleher and CEO Gary Kelly appeared at the House hearing in April. They testified that they didn't learn of Southwest's 2007 inspection problem until they read a magazine article in February 2008. The execs added that Southwest is reorganizing its compliance process, and has placed three compliance employees on leave. A company spokeswoman declined to name the employees. But Clay Foushee, the House transportation committee staffer who headed its investigation, says one is Paul Comeau, who manages regulatory compliance for Southwest.

Comeau's name figured prominently in the testimony of whistle-blower Bobby Boutris, an FAA inspector who was the House

hearing's star witness. Boutris testified that Comeau joined Southwest directly from his previous job-as an FAA inspector who had oversight responsibility for Southwest. Foushee adds that Comeau joined Southwest within days of leaving the FAA. (Comeau did not respond to a request for comment.) In April the Department of Transportation announced a new rule that will require a cooling-off period before FAA inspectors can work for an airline they oversaw.

Foushee, who did stints at the FAA and Northwest Airlines Corporation before moving to Capitol Hill, says he's sure the House hearing got attention. "My guess," he says, "is that every major airline is having a discussion now about how they're going to reform."