13-20 FAR Amt 13-20
See 13-20A

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 13 and 14

[Docket No. 25690; Amdt. No. 13-20; Amdt. No. 14-1]

Rules of Practice for FAA Civil Penalty Actions

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This final rule adopts changes to the rules of practice in FAA civil penalty actions not exceeding $50,000 for a violation of the Federal Aviation Act of 1958, or of any rule, regulation, or order issued thereunder, and in actions regardless of amount for a violation of the Hazardous Materials Transportation Act, or any rule, regulation, or order issued thereunder. In response to a commitment made to the Subcommittee on Aviation of the House Committee on Public Works and Transportation, the FAA issued a notice of proposed rulemaking soliciting comment on specific objections to the rules of practice raised by individuals and by organizations representing air carriers, airport operators, and pilots. In addition to soliciting written comments, the FAA also held a public meeting to allow interested persons to comment orally on the proposed changes and several policy issues.

The final rule is intended to fulfill the agency's commitment to the Subcommittee, to respond to the concerns of the aviation community, and to adopt specific changes to the rules of practice recommended by the Committee on Adjudication of the Administrative Conference of the United States. The changes adopted herein will apply to all pending cases as explained more fully in the preamble. The FAA also issued concurrently with this final rule a notice of proposed rulemaking, setting forth the rules of practice in their entirety; that notice is published in a separate part of today's Federal Register.

DATES: *Effective date:* April 20, 1990.
Effective date suspended: April 20, 1990, until further notice published in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Denise Daniels Ross, Special Counsel to the Chief Counsel (AGC-3), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3773

SUPPLEMENTARY INFORMATION

Availability of the Final Rule

Any person may obtain a copy of this final rule by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center (APA-430), 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Communications must identify the amendment number of this final rule. Persons interested in being placed on the mailing list for future NPRMs or final rules also should request a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

Background

On August 31, 1988, by final rule, the Federal Aviation Administration (FAA) promulgated rules of practice for civil penalty actions conducted under a statutory amendment (Pub. L. 100-223; December 30, 1987) to the Federal Aviation Act of 1958. 53 FR 34646; September 7, 1988. That statutory amendment empowers the Administrator to assess civil penalties, not to exceed $50,000, for violations of the Federal Aviation Act and the FAA's safety regulations promulgated thereunder. Under this authority, a civil penalty may be assessed only after notice and an opportunity for a hearing on the record. In the final rule, the FAA invited interested persons to comment on the rules of practice.

On March 17, 1989, the FAA issued a detailed disposition of the comments submitted on the rules of practice, responding to the commenters' objections to specific provisions of the rules of practice. 54 FR 11914; March 22, 1989. In the disposition of comments, the agency explained the purpose of the rules of practice and discussed its expectations of the manner in which cases would proceed under those rules.

The Air Transport Association of America filed a petition for review in the United States Court of Appeals for the District of Columbia (No. 89-1195), challenging the agency's promulgation of the final rule and the rules of practice for civil penalty actions. Several persons in their individual capacity, the Aircraft Owners and Pilots Association, the National Air Carrier Association, the Air Line Pilots Association, and America West intervened in support of the Air Transport Association's petition for review. As the agency stated, this rulemaking was not intended to address the legal issues or arguments involved in that case. Nevertheless, the preamble to this rule discusses legal issues to the extent they were raised by the commenters.

The Subcommittee on Aviation of the House Public Works and Transportation Committee held a hearing on November 15, 1989, to consider an extension of the FAA's authority to assess civil penalties administratively. The FAA and representatives of the aviation industry, among others, testified about the FAA's authority and the rules of practice implementing that authority. On November 22, 1989, shortly before Congress concluded its legislative session, a 4-month extension of the FAA's authority was passed. The President signed that bill into law on December 15, 1989 (Pub. L. 101-236). Under that law, the FAA's authority to assess civil penalties will expire on April 30, 1990, unless further extended by Congress.

At the conclusion of the congressional hearing, the FAA promised to issue an NPRM, soliciting public comment on proposals to address several objections to the rules of practice raised by those who commented previously on the rules and who testified at the hearing. The FAA issued the NPRM on February 28, 1990. 55 FR 7980; March 6, 1990. In light of the significant interest associated with the civil penalty program, the FAA took extraordinary steps to ensure wide and prompt distribution of the NPRM, including a mass mailing of copies to aviation industry groups and those persons who had commented previously on the rules of practice. The FAA also delivered copies of the NPRM to several members of Congress who expressed an interest in the civil penalty program or whose constituents had written to Congress about the program.

On March 13, 1990, the Chairman of the Administrative Conference of the United States (hereinafter Administrative Conference) transmitted to Congress the recommendation of the Committee on Adjudication regarding extension of the FAA's civil penalty assessment authority. The Committee's primary conclusion is that the civil penalty assessment program should be continued, albeit with some recommended procedural modifications to the rules of practice. The Committee recommended permanent authorization of a system for administrative imposition of civil penalties for violations of the Federal Aviation Act and the regulations. Recommendation of the Committee on Adjudication of the Administrative Conference at 1 (March 8, 1990) (hereinafter Adj.Com.Rec.). The changes proposed in the NPRM and adopted herein address the procedural modifications suggested by the

Amdt. 13-20

Committee on Adjudication. Adj.Com.Rec. at 4 (March 8, 1990).

The Chairman also transmitted the report on the program and the rules of practice requested by the agency and prepared for the Office of the Chairman by Professor Richard Fallon of Harvard Law School (hereinafter "Fallon Report"). Professor Fallon's report supports continuation of a program of administratively-imposed civil money penalties for violations of aviation safety regulations. Professor Fallon, however, also suggested that responsibility for adjudication of the FAA's civil penalty cases should be transferred to the National Transportation Safety Board (NTSB). Professor Fallon also recommended specific changes to the rules of practice if the authority for administrative assessment of penalties is retained within the FAA. This final rule also addresses Professor Fallon's recommendations regarding the rules of practice.

The Committee on Adjudication held two public meetings to consider Professor Fallon's report. In the words of Marshall J. Breger, Chairman of the Administrative Conference, there was "vigorous participation and comment by affected groups" during the meetings. Chairman Breger's Letter to Congress at 1 (March 13, 1990). As noted by the Chairman, the Committee on Adjudication specifically addressed the issue of the appropriate forum to adjudicate FAA's civil penalty actions. After listening to comment from the aviation community and the agency, and after some deliberation, the Committee on Adjudication "was unable to decide whether a transfer of such responsibilities was warranted." The Committee noted that "[t]he Conference may at some time in the future address this issue if the program continues." Chairman Breger's Letter to Chairman Oberstar at 2 and 3 (March 26, 1990).

On April 13, 1990, the U.S. Court of Appeals for the District of Columbia issued its decision in *Air Transport Association* v. *Department of Transportation*. In a 2–1 decision, the court agreed with the petitioner that the FAA was obliged by section 553 of the Administrative Procedure Act to provide notice and comment before the rules of practice in civil penalty actions were promulgated. The court held that the procedural challenge to promulgation of the rules of practice in August 1988 was ripe for review and granted the petition for review on that ground. The court expressed no opinion on the ripeness or the merits of the Air Transport Association's several substantive challenges to the rules of practice.

The court ordered the FAA "not to initiate further prosecutions * * * until the agency has engaged in further rulemaking in accord with section 553." Slip op. at 21. In the exercise of its "equitable remedial powers," the court stated, "[T]he FAA is free to hold *pending* cases in abeyance while it engages in further rulemaking. If and when the FAA promulgates a final rule for adjudication of administrative penalty actions, it may then resume prosecution of these cases." *Id.* at 20–21.

In accordance with the court's decision, all FAA prosecuting attorneys will hold in abeyance all civil penalty cases initiated under the rules of practice and will not initiate any notice of proposed civil penalty until further notice. They also will not proceed even with informal procedures, such as informal conferences, until further notice. Chief Administrative Law Judge Mathias, of the Office of Hearings of the Department of Transportation, has also requested the administrative law judges to postpone hearings that had been scheduled and not to schedule any future hearings until further notice. The FAA and the Office of Hearings of the Department of Transportation will make every effort to notify all persons whose cases are pending of the court's decision, whether or not a hearing has been held, scheduled, or not yet scheduled.

In its opinion, the court stated that "Insofar as the FAA's pending notice of proposed rulemaking [issued on February 28, 1990 (55 FR 7980; March 6, 1990)] seeks public comment on the individual Rules that the agency intends to amend the agency may rely on the outcome of that rulemaking as a partial fulfillment of this mandate." Slip op. at 20. Concurrently with the publication of this final rule based on the February 28 NPRM, the FAA has published in a separate part of today's **Federal Register** another NPRM, setting forth the rules of practice in their entirety. Those rules of practice, published in the NPRM for comment, include the changes adopted pursuant to this final rule. In light of the court's decision, the FAA has suspended the effective date of the changes to the rules of practice amended by this final rule, pending further notification in the **Federal Register**.

Purpose of the Final Rule

This document is intended to complete the actions pledged by the FAA to the Subcommittee on Aviation of the House Committee on Public Works and Transportation at the hearing held on November 15, 1989. Pursuant to this commitment and in order to address the comments submitted on the rules and proposed changes, the FAA is amending the rules of practice either as proposed, as modified after review of the comments, or as suggested by different commenters.

As stated previously, the FAA believes that the rules of practice provide significant and substantial procedural safeguards and meet all requirements governing the procedural rights of persons and entities charged with violations.

Administrative adjudication of civil penalties is an effective and expeditious means of prosecuting aviation safety and security violations, and, in particular, is a far more efficacious procedure than one in which penalties may be adjudicated only in a U.S. district court. The authority granted by Congress contributes to the maintenance and improvement of aviation security and safety by providing swifter, more certain enforcement and increased accountability for violations of critical safety and security regulations.

Because the authority given to the Administrator was extended only temporarily, the FAA proceeded expeditiously with this rulemaking action. The aviation community's major objections to the rules of practice were directed at the issues raised in the NPRM. To the extent that swift rulemaking action addresses those concerns, the FAA believes that the public interest is served by issuing this final rule to adopt the amendments to the rules of practice contained herein, although the effective date of this final rule has been stayed pursuant to the court's order.

Discussion

Twenty-two comments were submitted on or before March 30, 1990, the closing date for receipt of comments specified in the NPRM. Three comments were received after the close of the comment period. The FAA considered all of these comments, including the material in the late-filed submissions.

The commenters include representatives of aviation entities regulated by the FAA, such as: The Air Transport Association of America (ATA); the National Business Aircraft Association (NBAA); Rocky Mountain Helicopters, Inc.; the National Air Transportation Association (NATA); the Experimental Aircraft Association (EAA); the National Air Carrier Association (NACA); the Aircraft Owners and Pilots Association (AOPA); the Airport Operators Council

International (AOCI) and the American Association of Airport Executives (AAAE) (joint comments); the Air Line Pilots Association (ALPA); the Allied Pilots Association (APA); America West Airlines, Inc. (endorsing the comments submitted by ATA); the Tobacco Institute; the Regional Airline Association (RAA); American Airlines; the NTSB Bar Association; Alaska Airlines; and Eastern Airlines. Several individuals and attorneys whose practice includes aviation-related enforcement actions also submitted comments on the NPRM.

Before the FAA issued the NPRM, the complaints of the aviation community focused on several areas of the rules of practice perceived to be biased in favor of the prosecution, to afford less process than desired in on-the-record hearings, or simply contrary to the interests of alleged violators. In this document, the FAA discusses the amendments to the rules of practice that (1) respond to the specific objections raised by various members and committees of Congress, by those who have commented previously, by those who testified at the hearing, and by those who commented on the NPRM and spoke at the public meeting; and (2) address the recommendations of Professor Fallon and the Committee on Adjudication.

1. Complaint

Objections had been raised that issuing an "order of civil penalty" as the complaint to initiate a hearing creates an apparent presumption of guilt before any hearing and may discourage alleged violators from contesting the allegations set forth in the complaint. In the NPRM, the FAA proposed to change the designation "order of civil penalty" to "complaint" throughout the rules of practice and redefine "complaint" in the definitions section. The FAA also proposed to revise § 13.16(h) to reflect that the agency will issue a "complaint" if a hearing is requested pursuant to the rules.

All but one of the commenters who address this issue agree with the FAA's proposal to change the designation of "order of civil penalty" to "complaint." In its support of the proposal, RAA notes that the word "complaint" is more descriptive of the actual nature of the document filed by the agency. Thus, the FAA is adopting the change as proposed. This change is consistent with the recommendation made by the Committee on Adjudication. Adj.Com.Rec. at 5 (March 8, 1990).

NATA also proposes that the FAA further change the definition of "complaint" to read, in part: "an alleged regulatory violation resulting in filing of a complaint with the Hearing Docket." Because NATA did not further explain its proposal, the FAA assumes that NATA wants the definition of complaint to show clearly that it contains only allegations of a violation of the Federal Aviation Act, the Hazardous Materials Act, or the regulations promulgated pursuant to those acts. The FAA agrees that such a change would clarify the definition and is amending the definition of "complaint" in § 13.202 (by adding the italicized language) so that the definition reads as follows:

> "Complaint" means a document issued by an agency attorney *alleging a violation of* the Federal Aviation Act of 1958, as amended, or a rule, regulation, or order issued thereunder, or the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder, which has been filed with the Hearing Docket after a hearing has been requested pursuant to § 13.16(e)(3) or § 13.16(g)(3) of this subpart.

In the NPRM the FAA proposed to modify § 13.16(l) and § 13.232 (a) and (d) to provide that an administrative law judge would issue a decision "that *affirms, modifies, or reverses* the allegations contained, or the civil penalty sought, in a complaint." ALPA suggests that the italicized terms be deleted, insofar as they refer to an administrative law judge's findings on the allegations contained in the complaint, because these terms are "customarily used when there has already been a decision or findings by an adjudicative body, which are being reviewed by a higher authority." ALPA also raises this concern in its comment regarding modification of a civil penalty. To address this concern, the agency is amending those sections to ensure further that the allegations in the complaint reflect only the agency's belief that it has sufficient evidence to bring the complaint and proceed with the civil penalty action. Thus, § 13.16(l) and § 13.232 (a) and (d) are revised further to provide that the administrative law judge would issue an initial decision that "contains findings or conclusions on the allegations contained, and the civil penalty sought, in the complaint." The FAA believes that this revision addresses ALPA's concern that the language of the previous rule might be read as according more "weight and validity" to the allegations and the proposed penalty than intended.

2. Separation of Functions

Many commenters continue to object to the separation of functions provided in the rules of practice, even if amended as proposed by the agency in the NPRM. Some of these commenters believe that placing prosecution and adjudication functions within the same agency creates an inherent problem of fairness or bias, that is eliminated only by transfer of adjudication either to the Federal courts or to the NTSB. Other commenters do not object to in-house adjudication *per se*, but recommend further separation to ensure a fair system of adjudication. Some recommend restrictions on the Administrator, some on the Chief Counsel, and some on the Assistant Chief Counsel for Litigation.

The agency has on four previous occasions explained the basis for the separation of functions contained in the rules of practice; on the last three occasions, it has responded to concerns that the separation is inadequate. On January 10, 1989, the agency announced how the separation would be implemented within the agency, and specifically within the Office of Chief Counsel. 54 FR 1335; January 13, 1989. On March 17, 1989, in its disposition of comments, the agency responded to the concerns expressed by commenters to the final rule issued on August 31, 1988. 54 FR 11914; March 22, 1989. On October 27, 1989, in the preamble to the final rule implementing the Equal Access to Justice Act (EAJA), the agency responded to similar concerns expressed by four commenters. 54 FR 46196; November 1, 1989.

In the NPRM, the agency proposed specifically to amend the rules of practice in the respects recommended by Professor Fallon. Professor Fallon recommended:

> [T]he FAA should consider expanding the prohibitions expressly stated within its separation-of-functions rule to incorporate the [Administrative Procedure Act's] prohibition against advice-giving, either to an [administrative law judge] or to the agency decisionmaker, by lawyers who have performed relevant investigative or prosecutorial functions.

Fallon Report at 42–44 (March 1990). In the notice, the agency proposed to amend § 13.203 to include the separation announced in the **Federal Register** in January 1989 and to prohibit agency employees who participate in an investigation from advising any person who performs adjudicative functions in a case, or a factually-similar case. 55 FR 7982; March 6, 1990.

The proposed rule satisfies the recommendation of the Committee on Adjudication of the Administrative Conference, which similarly suggests that the rules of practice "should make clear that employees with investigatory or prosecutorial responsibilities in a case in this program will not

communicate with the administrative law judge or agency decisionmaker in that case or a factually related case, except as counsel or a witness in the public proceedings." Adj.Com.Rec. at 5 (March 8, 1990).

Several commenters (RAA, AOCI and AAAE, AOPA) support the proposed changes, and no commenters object to them so far as they go. Therefore, to conform the rules of practice to the recommendations of Professor Fallon and the Committee on Adjudication, and to promote the appearance of fairness, the agency adopts these changes in this final rule. As amended, the rules of practice comply fully with the Administrative Procedure Act. Chairman Breger's Letter to Chairman Oberstar at 3 (March 26, 1990.) (Copies of Chairman Breger's letter to Chairman Oberstar, and a related letter from AOPA to Chairman Oberstar, have been placed in the docket. Copies of a similar letter from Chairman Breger, dated March 14, 1990, to Chairman Oberstar, and a related letter from a private aviation attorney to Chairman Oberstar, also have been placed in the docket.)

Much of the criticism of the current and proposed separation of functions concerns the responsibilities of the Chief Counsel. Some commenters believe the Chief Counsel should play no role in advising the Administrator. Others believe that if the Chief Counsel continues to advise the Administrator, he should play no role whatsoever in the prosecution of a case from its inception or in the setting of enforcement policy.

Several commenters continue to object to the responsibility of the Assistant Chief Counsel for Litigation under the rules of practice to advise the decisionmaker, and to function as the decisionmaker in a few minor procedural matters pursuant to a delegation from the Administrator.

Several commenters object to the Administrator's role in setting enforcement policy. This objection is tantamount to opposing any administrative imposition of civil penalties, regardless of the nature of the internal separation. Because it reflects the most fundamental disagreement with the separation of functions established within the FAA, this last objection will be addressed first.

a. *The view that any separation of functions is inadequate so long as both prosecutorial and adjudicative functions are housed within one agency.* As previously noted, some commenters are opposed to any combination of prosecutorial and adjudicative functions within the FAA. Several oppose a legislative extension of the agency's authority to assess civil penalties administratively primarily because of this combination of functions, and urge that the authority be transferred to the NTSB. These commenters believe strongly that in-house adjudication is inherently wrong. APA states that it amounts to an "inherent intrusion on procedural fairness." Another commenter argues that "Nothing is more fundamentally unfair than to allow one party to litigation to determine the propriety of its actions in a case." EAA writes, "The new attempts to separate functions of the prosecutor and the decision-maker are insignificant as long as both of these functions remain within the same chain of command." EAA's representative at the public meeting stated, "Fundamentally we are opposed to the concept of allowing the FAA to be the final arbiter as the final decisionmaker in these cases." NBAA concludes: "The separation of function issue cannot be resolved through any Chinese Wall no matter how broad or temporal in its coverage * * *. The only realistic solution to this issue is to allow a truly independent organization which has no investment in the correctness of the legal interpretation or the existence of the facts to hear cases and their appeals."

These objections are expressed in both legal as well as policy terms. A representative comment is the following from a private attorney:

> There is serious concern as to the constitutionality of the current administration of the [Program] in that the FAA has sole responsibility for the investigatory, prosecutorial and ad- judicatory functions of the Program and that, as a result, those charged with a violation and against whom the imposition of civil penalties are sought, are denied due process, and specifically, the opportunity for a fair and impartial hearing and appeal.

While the agency recognizes the sincerity with which these concerns have been expressed in this rulemaking and in previous submissions, the FAA believes these concerns are without substantive merit.

It has long been settled that placement of prosecutorial and adjudicative functions within the same agency does not violate principles of fairness or due process embedded in the U.S. Constitution. There are now over 200 statutes authorizing the assessment of civil penalties in which Congress has entrusted the prosecution and adjudication to one administrative agency. As the Chairman of the Administrative Conference has stated, "Such a system has never been held to violate basic principles of fairness or due process." Chairman Breger's Letter to Chairman Oberstar at 2 (March 26, 1990). "Although at least eleven Supreme Court opinions have dealt with problems about separation of functions, the Court has never held a system of combined functions to be a violation of due process." K. Davis, 3 *Administrative Law Treatise* 343 (2d ed. 1980). Professor Fallon states, "Today, there should be little doubt about the constitutionality of administrative assessment of civil money penalties for violations of the Federal Aviation Act and its implementing regulations." Fallon Report at 17 (March 1990).

Indeed, in his *1959* hornbook entitled *Administrative Law Text*, Professor Davis, one of the preeminent administrative law scholars in this country, wrote:

> We have moved well beyond the early crude thinking that failed to recognize that functions can be adequately separated within a single agency; we now recognize that an organization can properly perform inconsistent functions so long as the parts of the organization are kept sufficiently separate.

K. Davis, *Administrative Law Text* 243 (1959).

Administrative adjudication has long been advocated by the Administrative Conference as an expeditious, efficient, and effective, yet fair system of enforcing civil penalty regulatory schemes. The Administrative Conference first endorsed in-house adjudication in 1972. 1 CFR 305.72–6. Since that time, the statutes authorizing administrative adjudication have proliferated, to the point where today it is widely recognized as the standard, traditional method for civil penalty adjudication within the Federal government. The view expressed fervently by several commenters that the combination of prosecutorial and adjudicative functions within a single agency such as the FAA constitutes an inherent violation of basic constitutional norms is no longer considered a serious proposition of law.

b. *The view that the combination of adjudication and policymaking functions in the Administrator violates principles of fairness.* Two commenters object that if the Administrator is the decisionmaker under the rules of practice, he should have no role in setting enforcement policy. The representative of American Airlines at the public meeting stated, "If the Administrator is to be the final decisionmaker then he cannot be involved or should not be involved in the policies which lead to the initiation of the cases before him." American's written comments conclude that the "dual capacity of setting policy for the

agency *and* acting as appellate judge in cases brought to enforce the Administrator's policies . . . may create an appearance of conflict for the Administrator qua adjudicator."

NBAA believes that the agency's organizational structure and lines of authority make it

> difficult or impossible for the Administrator and his Counsel to initiate enforcement emphasis programs and to remain objective in their review of those same cases when they are appealed to the Administrator. It defies logic to believe that when the Administrator orders field personnel to pursue vigorously a certain set of cases, the Administrator's judgment on the law and the merits will be totally dispassionate when the very same fact pattern, which his original guidance indicated was a problem, is returned to him for review. It is axiomatic to postulate that he will be forced to affirm an action which his initial instructions caused to happen; to do otherwise would be to send a message which contradicts the Administrator's initial policy directive. Even if this is not the case, the perception it gives will taint the whole process.

These comments are fundamentally at odds with law and sound public policy. NBAA' s comments use the terms "programs" and "cases" interchangeably, and blur the distinction between fact, law and policy, without recognizing the basis for the separation of functions required by the Administrative Procedure Act. If read literally, these comments could call into question the integrity of the Administrator's discharge of his responsibilities.

The purpose of the requirement of separation of functions is to ensure a fair hearing by "some protection of the judging function." K. Davis, 3 *Administrative Law Treatise* 369 (2d ed. 1980). Fairness demands that the judicial function be free of improper influence. Under the rules of practice, the judging function reposed in administrative law judges is fully protected; indeed, as the Chairman of the Administrative Conference has noted, "the FAA program actually contains one form of separation of functions not found in most civil penalty regimes[:] * * * the [administrative law judges] who preside at the hearings in FAA civil penalty cases do not work for the FAA." Chairman Breger's Letter to Chairman Oberstar at 2 (March 26, 1990).

Adjudication is not rendered unfair because the adjudicator—either the administrative law judge or the Administrator—has previously formed an opinion of law or policy that may affect the outcome of a case before the adjudicator. What is required is impartiality in the determination of facts, the credibility of witnesses, and the application of the law to a particular set of circumstances. See K. Davis, 3 *Administrative Law Treatise* 371–389 (2d ed. 1980). The Administrator's prior pronouncements of agency enforcement policy, even should they affect a case brought before him, in no way render the Administrator unfit to decide the case fairly. Indeed, it is incumbent even on administrative law judges to apply faithfully the law and policy set forth as agency policy by the head of the agency. As Professor Bruff states, "Everyone agrees that [administrative law judges] must follow their agency's regulations and published policies as well as the statutes and caselaw." *"Restructuring Judicial Review in Administrative Law,"* at 22. (September 1, 1989) (draft report prepared for Federal Courts Study Committee and the Administrative Conference). See also, Zwerdling, *Reflections on the Role of an Administrative Law Judge, 25* Ad.L.Rev. 9, 12–13 (1973) ("Once we have stressed the importance of maintaining the administrative law judge's independence, however, the other side of the coin is recognition that he is governed and bound by his agency's rulings and directives * * *."). So it hardly seems unfair to the respondent that the head of the agency, on review of an administrative law judge's initial decision, applies that law or policy.

The Supreme Court's statement in *Morgan* v. *United States*, 313 U.S. 409, 421 (1941), is apropos.

> Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

This reasoning explains the exception of "a member or members of the body comprising the agency" from the separation of functions requirement of the Administrative Procedure Act.

5 U.S.C. 554(d)(2)(C). Simply put, the Administrator is not subject to the separation of functions requirement of the Administrative Procedure Act. Logically, this exception follows from the very nature of administrative agencies and of administrative adjudication. In an agency, the setting of policy is ultimately the responsibility and function of the head of the agency; administrative adjudication assumes that the final decisionmaker is the agency head or tribunal. Suggesting, as do American Airlines and NBAA, that the Administrator ought to be put to a choice, either to set policy or to adjudicate, runs counter to longstanding, previously-unquestioned administrative practice, and would be inconsistent with sound public policy.

The pre-adjudication actions, which NBAA believes prejudice the Administrator's capacity to decide cases "dispassionately," consist of "initiat[ing] enforcement emphasis programs," "order[ing] field personnel to pursue vigorously a certain set of cases," and issuing "guidance" and "policy directives." These activities are general and abstract, not specific to a case or person. They in no way interfere with the judging function; indeed, as noted above, they may properly inform the judging function. Even assuming that policy or guidance is issued as a result of a specific incident, or "fact pattern," there is nothing wrong with the Administrator's review of a subsequent case that fits the policy or guidance. An adjudicator must still find facts, and reach conclusions of law, in each case according to the testimony and other evidence in the record. Those findings and conclusions are subject to judicial scrutiny for reasonableness.

c. *The view that the Chief Counsel's role in (1) the general supervision of agency attorneys, (2) making and executing enforcement policy, or (3) participating in a case before it is initiated, contravenes basic principles of fairness and the Administrative Procedure Act.* Several comments focus on the Chief Counsel's responsibilities under the rules of practice; most recommend specifically that the Chief Counsel not participate in advising the decisionmaker. Should the Chief Counsel continue to advise the decisionmaker, ATA, ALPA and one private attorney object to any role played by the Chief Counsel in the enforcement process, at any stage of a case.

Under § 13.203, the separation of functions is triggered by the issuance of a notice of proposed civil penalty. Thus, in theory, as ATA fears, the Chief Counsel "could advise the decisionmaker in a case that he caused to be filed!" ATA recommends that the so-called "temporal clause" of § 13.203 be removed.

As the agency explained in its disposition of comments following issuance of the final rule, the temporal clause is patterned after the separation of functions provision in Departmental regulations governing hearings cases brought under 14 CFR chapter 2, parts 200–399. "In both sets of rules, the separation of functions is effected only after an enforcement case is initiated." 54 FR at 11915; March 22, 1989. Under DOT rules, the separation "applies after

the initiation of a hearing or enforcement case;" 14 CFR 300.4; a case is "initiated" upon the filing of a complaint.

The current rule also is consistent with the Administrative Procedure Act.

> Under the Act, the same individual may "accuse," in the sense of deciding that proceedings should be instituted, and may also judge. This is true whether the individual is a head of an agency or a subordinate.

K. Davis, *Administrative Law Text* 242 (1959). "The Act does not and probably should not forbid the combination with judging of instituting proceedings[.]" *Id.* at 244. Asimow, *When the Curtain Falls: Separation of Functions in Federal Administrative Agencies*, 81 Colum.L.Rev. 759, 766–768, 770–772 (1981).

The agency appreciates the concern that the Chief Counsel is permitted under the current rules of practice to be involved in some capacity with a case before a notice of proposed civil penalty is issued, and thereafter to advise the decisionmaker in that case. Although this has not happened in the agency's administration of this program, and the Chief Counsel has stated that he would recuse himself from advising the decisionmaker in any case in which he participated before the notice was issued, the agency is amending further § 13.203(b) by removing the last sentence to alleviate the commenters' concern.

Thus amended, the rule will not preclude the participation of the Chief Counsel in exercising prosecutorial discretion before the initiation of a particular enforcement case that ultimately is initiated under the civil penalty authority. In some situations, a matter may be referred to the Office of Chief Counsel with a recommended sanction of certificate action, or a civil penalty in excess of $50,000. In certain significant cases, the matter may be referred specifically to the Chief Counsel for his review and approval to initiate. In such cases, it does no violence to the separation of functions provided under the rules or required by the Administrative Procedure Act to allow the Chief Counsel to exercise prosecutorial discretion in determining the appropriate type and amount of sanction. Should the Chief Counsel determine that a lower civil penalty is more appropriate than one in excess of $50,000 or a certificate action, and thereafter a notice of proposed civil penalty is issued, the Chief Counsel will recuse himself from advising the decisionmaker in that case or a factually-related case, as required by § 13.203(b) and the Administrative Procedure Act.

A more fundamental objection is that the Chief Counsel cannot provide "dispassionate counsel" to the decisionmaker because of the Chief Counsel's primary role in setting and carrying out enforcement policy. NBAA states:

> The FAA Chief Counsel is the chief legal officer of the agency. His advice is not only sought as a predicate to any enforcement program; it is a legal prerequisite to such an agency action. The Chief Counsel routinely participates in the Administrator's highest councils and through his voicing of legal and policy opinions contributes significantly to the agency's enforcement policy and priorities.

The agency's response to the objection to the Administrator's involvement in creating enforcement policy applies also to the objection to the Chief Counsel's involvement. Fair adjudication is not compromised by previous involvement in policymaking by the decisionmaker or those who advise the decisionmaker. The fundamental distinction between fact and policy is captured by the Administrative Procedure Act's provision on separation of functions, which is addressed to a case or a "factually-related case." (Similar is the prohibition on administrative law judges from "consulting a person or party on a *fact* in issue, unless on notice * * *.") 5 U.S.C. 554(d)(1). Professor Asimow states:

> In my view, the [Administrative Procedure Act's] language is dispositive; by itself, an institutional tie to an adversary does not make one an adversary * * *. Inclusion of the words "in a case" limits the statute to those persons with personal involvement in the particular case under adjudication or one that is factually related.

81 Colum.L.Rev. at 774. Professor Fallon notes that an earlier ATA proposal "appears to go beyond the [Administrative Procedure Act] by forbidding the Chief Counsel to perform any investigative or prosecutorial functions, or to supervise employees engaged in such functions, at any stage in any case." Fallon Report at 44 n.234 (March 1990).

Removing the Chief Counsel from advising the decisionmaker would deprive the Administrator of the counsel of the senior legal official of the agency, to the potential detriment of sound, fair, and consistent decisionmaking. Resort by agency heads to senior advisors, such as an agency's senior legal official, is entirely appropriate and should be encouraged. It was contemplated by the drafters of the Administrative Procedure Act. The 1947 *Attorney General's Manual on the Administrative Procedure Act*, at 56–57, generally considered to be the best contemporaneous construction of the Act, stated why this is so:

> The expertise of an administrative agency is not limited to the heads of the agency; it includes also the staff of specialists through whom and with whose assistance most of the agency's functions are carried on. The issues in adjudicatory cases, while frequently less complex and with narrower policy implications than are often involved in rule making, present in many cases difficult questions of law and policy * * *. In determining such issues, agency heads have consulted with their principal advisors and specialists. Indeed, it is clearly in the public interest that they continue to do so.

The *Attorney General's Manual* uses an agency's general counsel as an example of this advice-giving, noting its permissibility so long as the counsel's office staff is organized so that individuals engaged in investigative or prosecuting functions are not also involved in advising the decisionmaker. *Id.* at 57–58. Asimow, 81 Colum.L.Rev. at 765. As the agency has explained previously, the Office of Chief Counsel is so organized. 54 FR 1335; January 13, 1989 and 54 FR 46196; November 1, 1989.

As part of its comment on this issue, ATA states:

> * * * [I]ndividual cases should be left to the decisionmaker and truly independent advisors. If legal advice is needed, the agency should assign an attorney, who otherwise would not be involved in any aspect of investigation or prosecution to be the decisionmaker's attorney advisor.

ATA, in a footnote, states that the position of "attorney advisor" would resemble that of the attorney in the Office of the General Counsel who advises the Deputy Assistant Secretary for Policy and International Affairs in the Department's carrier selection proceedings for international route authority.

Although referenced by ATA, the Department's separation of functions in such proceedings does not provide support for ATA's recommendation. In international route cases, members of the General Counsel's Office participate in three capacities. During the hearing stage of such a proceeding, a member of the staff of the Assistant General Counsel for Aviation Enforcement and Proceedings, acting as "public counsel," presents a position to the administrative law judge. Following the administrative law judge's recommended decision, the Assistant General Counsel for International Law assigns a staff member to assist the senior career official (usually the Deputy Assistant Secretary for Policy and International Affairs) in reviewing the recommended

decision. The action taken by the senior career official is subject to additional review by the Assistant Secretary for Policy and International Affairs (or, in some cases, the Secretary). The Assistant General Counsel for International Law assigns a different staff attorney to advise this decisionmaker. This separation of functions is similar to the separation at the FAA for civil penalty cases.

At all stages of the process, the Department carefully maintains a proper separation of functions. Attorneys acting in their respective roles in the process do not communicate with one another, orally or in writing, with respect to the case. Nor is the separation of functions compromised by common supervision of the attorneys' work. For example, the Assistant General Counsel for International Law does not review the work performed on a case by the staff attorney assigned to advise the senior career official.

The third objection to the Chief Counsel's responsibilities, expressed specifically by NBAA and AOPA, is that his general supervision of all attorneys in the Office of Chief Counsel, including agency attorneys who prosecute civil penalty actions, as well as the attorneys who advise the decisionmaker, may tend to intimidate those attorneys from the proper performance of their duties. AOPA cites *Columbia Research Corp.* v. *Schaffer*, 256 F.2d 677 (2d Cir. 1958), in support of that proposition.

First, concerning the Chief Counsel's supervision of prosecutors, the Chief Counsel does not directly supervise agency attorneys engaged in the prosecution of cases in the program, nor their supervisors. The Deputy Chief Counsel is their ultimate supervisor; even this official, however, is not their first, and often not their second level supervisor. To the extent the Chief Counsel may take into account the handling of a prosecution under the program in evaluating the performance of an attorney, this consideration in no way interferes with the judging function, the independence of an administrative law judge, or the burden of proof placed on the prosecution by the rules of practice. It is difficult to envision any adverse effect on the fair adjudication of a case resulting from such supervision.

The separation of functions reviewed by the court of appeals in *Columbia Research* is different than the FAA's separation. In that case, the court disapproved of a separation whereby an Assistant General Counsel prosecutes and the General Counsel decides. Under the FAA rules of practice, the decisionmaker ordinarily is the Administrator, an official whose supervision of agency staff attorneys in an agency of 50,000 employees is diffuse to such a degree that the danger of intimidation, if any, is remote. In *Columbia Research*, the final decisionmaker was the General Counsel. In any event, the court's discussion of the adequacy of the separation of functions is better described as dictum, not an "alternate holding," as AOPA believes, 256 F.2d at 680 ("[W]e * * * reserve any final decision as to that * * *."). Indeed, the court's decision was later withdrawn on rehearing because of a superseding Supreme Court decision on a different issue, and thus does not constitute binding precedent. 256 F.2d at 680–681.

Moreover, the reasoning in *Columbia Research* has been described as "unsound." Asimow, 81 Colum.L.Rev. at 774. "[I]t is difficult to see how the purely formal commingling involved in *Columbia Research* is objectionable." *Id.* at 775. Professor Asimow's view that a stricter separation is appropriate in penalty proceedings, at 792, is not required by law, as AOPA appears to recognize in its criticism of the NPRM as "merely duplicat[ing] the requirements of the [Administrative Procedure Act]." Professor Asimow notes, "In the event that strict separation * * * is considered too confining, the existing [Administrative Procedure Act] provisions clearly permit a less rigorous system." 81 Colum.L.Rev. at 775 n.161.

Second, concerning the Chief Counsel's supervision of advisors to the decisionmaker, NBAA fears that the Chief Counsel's "pervasive, yet hidden, power [to approve promotions, performance reviews, assignments, etc.] consciously, or even more powerfully unconsciously, may influence any FAA attorney in her or his advice to the Administrator on an appeal." It is difficult to understand the basis for this concern. Assuming the Chief Counsel advises the decisionmaker, there is nothing wrong with his supervision of other attorneys who also perform that function. "Judging should be separated from functions that are incompatible with judging; that is what is meant by separation of functions." K. Davis, 3 *Administrative Law Treatise* 340 (2d ed. 1980). Because the Chief Counsel and the staff attorney would both be functioning as advisors to the decisionmaker, and both would play no role in the investigation or prosecution of the case or of a factually-related case, there is no combination of functions; there is only one function.

d. *The view that the Assistant Chief Counsel for Litigation's role is inconsistent with principles of fairness and the Administrative Procedure Act.* The objections here are that the Assistant Chief Counsel for Litigation (1) is "dependent on the degree to which the Chief Counsel and the Administrator view his performance" (NBAA), (2) has an "institutional" or "built-in" bias (NBAA, FAA in oral comments at the public meeting, and a private attorney), (3) is responsible for "keeping abreast of enforcement decisions," and "must maintain an active interest in * * * enforcement proceedings and decisions concerning th[e FAR,]" (a private attorney) and finally, (4) solely by reason of his status as an FAA lawyer, should not act as an adjudicator at all (a private attorney).

The first objection has been discussed earlier: because all officials in the chain of command are involved in adjudication, there is no combination of functions, much less an improper one. But NBAA's statement that,

> It would take a very brave [Assistant Chief Counsel for Litigation] to tell the Administrator or the Chief Counsel that a Demonstration Program case should be dismissed because the interpretation of the [Federal Aviation Regulations], upon which the Complaint was based (and the initial [Administrator's] enforcement priority), was faulty[.]

unjustifiably questions the professionalism of the Office of the Chief Counsel and the Office of the Assistant Chief Counsel for Litigation. Frank, candid, and independent advice to agency heads is required of all senior legal officials in the government. The regular exercise of such advice is not generally considered a badge of courage.

The agency has previously responded at length to the second objection, in the preamble to the interim final rule implementing EAJA (54 FR 46196–46198; November 1, 1989), and that discussion will not be repeated here. It is unclear whether the commenters' third objection is independent of their second objection. If it is, it runs counter to the public policy, discussed earlier, that favors the agency head's consultation with informed staff members, including lawyers, who have not otherwise been involved in the investigation or prosecution of the case.

The fourth objection concerns the ability of lawyers to act as adjudicators. Lawyers generally are considered well equipped to perform as adjudicators and, therefore, would appear to be qualified to advise or serve the decisionmaker. This objection may stem from a misunderstanding by some commenters as to the identity of the decisionmaker. The rules of practice have been explicit from the start that the

Administrator is the decisionmaker. The Administrator's reliance on lawyers for advice in making and issuing decisions is logical, given the nature of the issues presented for decision in civil penalty cases, and is common practice in the Federal government. That lawyers provide such assistance does not render them "decisionmakers" any more than it transforms judicial law clerks into Federal judges.

The limited delegation from the Administrator to the Chief Counsel and the Assistant Chief Counsel for Litigation does not change that reality. That delegation, by memorandum dated January 29, 1990, was made pursuant to 49 U.S.C. 322(b) and § 13.202, and is published concurrently with this notice, but in a separate part of the **Federal Register**. It is similar to delegations in other agencies and is designed to obviate the agency head's review and consideration of minor, procedural, or unopposed matters.

A few commenters (NACA, ALPA, AOPA, Eastern Airlines at the public meeting) recommend that in place of the Chief Counsel and attorneys in the Office of Chief Counsel, the Administrator should create a panel of advisors wholly independent of that office. While some agencies in the Federal government have created an office of advisors to the decisionmaker entirely separate from the legal office of the agency, such degree of separation is not required by the Administrative Procedure Act. It may well be counter-productive, in that the Administrator would be deprived of the counsel of his senior legal enforcement official. Interestingly, one commenter who recommends a panel of advisors would include the Assistant Chief Counsel for Litigation as a panelist.

NATA and American Airlines (at the public meeting) recommend that any panel of advisors include persons from outside government. NATA recommends, in addition to the Assistant Chief Counsel for Litigation, "one operations/regulatory expert, one independent counsel specializing in aviation law from outside the FAA, and one industry representative on a rotating basis." Apart from the notion that adjudicatory deliberations have been historically considered to be governmental functions, including an industry representative would inherently constitute a conflict of interest. The Administrator's decisions would be subject to challenge from any respondent who is a competitor of the "independent counsel's" or industry representative's employer.

3. Effect of admissions

Some commenters objected that a sentence in § 13.220(l)(3), regarding the use of admissions by the FAA, gave the agency an "advantage" without a corresponding benefit to a respondent. The relevant sentence stated:

> Any matter admitted or deemed admitted [pursuant to a written request for admission] under this section that results in a finding of violation may be used by the Administrator in a subsequent enforcement proceeding.

The FAA proposed to delete this section from the rules of practice. ATA agrees with the FAA that the easiest way to address the commenters' concern with this provision is simply to delete it from the rules. A majority of the commenters, including NACA, ALPA, AOPA, AOCI and AAAE, agree with the proposal. Despite the commenters' support for the proposed deletion, the reasons for that support vary. Some state that deleting this sentence will lead to the development of an evidentiary rule in the context of specific cases. Others believe that deleting this sentence will enable the administrative law judges, in their discretion, to permit use of admissions where they are relevant or necessary to avoid an unfair result. Insofar as the FAA is eliminating its use of respondent's prior admissions in future enforcement actions, the FAA believes that deleting the second sentence of § 13.220(l)(3) addresses the concern of most commenters because it eliminates a possible asymmetrical use of admissions in civil penalty actions.

While supporting the proposed deletion, ALPA suggests that the rule should further state that statements made in the course of informal procedures under § 13.16(f) may not be used as evidence in a civil penalty action. The FAA already has so limited itself in FAA Order 2150.3A, Compliance and Enforcement Program (hereinafter "Order 2150.3A). Paragraph 1207(a)(4) states:

> The informal conference should not be used as a means to gather additional evidence or admissions to prove the charges in the enforcement action. However, any additional information obtained may be used for impeachment purposes if the alleged violator changes his story with regard to a material fact in subsequent proceedings.

This paragraph of Order 2150.3A limits any subsequent use of information learned at an informal conference to "material" facts that may be used, if found relevant and material by an administrative law judge, solely for impeachment of testimony given under oath. Admissions by a respondent at an informal conference may not be used to sustain the agency's burden of proving at the hearing the allegations in its complaint. In light of this existing limitation on the agency, the FAA is not adopting this suggestion in this rulemaking.

Moreover, § 13.220(l)(3) deals only with formal admissions made during the course of discovery proceedings under the rules. It is possible, in theory, that a party could submit a request for admission of statements or matters developed during informal procedures. However, the administrative law judge has the discretion under the existing rules to determine whether such statements are relevant or material to issues in the action and, thus, whether such statements should or must be excluded under the rules of practice. As a matter of discovery practice in these civil administrative proceedings, the FAA does not believe that adding such a provision is necessary.

4. Opinion Testimony, Hearsay Testimony, and FAA Employee Testimony

Previous commenters objected, although for different reasons and from different perspectives, to both sentences in § 13.227. The commenters generally emphasized two objections: (1) The scope of factual testimony by FAA employees and (2) expert or opinion testimony of FAA employees.

a. Factual Testimony of FAA Employees

As to the scope of an FAA employee's factual testimony, the commenters objected to a sentence in § 13.227 that stated:

> An employee of the agency may testify in a proceeding governed by this subpart only as to facts, within the employee's personal knowledge, giving rise to the incident or violation.

The commenters argued that this sentence implicitly limited admission of relevant factual testimony by an FAA employee. In the NPRM, the FAA acknowledged that the sentence, when read standing alone, facially suggested inadmissibility of hearsay testimony by an FAA employee, otherwise admissible under the rules. The FAA also noted, however, that this sentence was never intended to, and would not in context, result in wholesale exclusion of any factual testimony of an FAA employee.

To address the commenters' previous concerns regarding this section, the FAA proposed in the NPRM to delete the entire sentence. Thus, FAA employees could testify as to any fact relevant and material to a disputed issue, and hearsay testimony by agency employees would be admissible. Adj.Com.Rec. at 5 (March 8, 1990). There was broad

support for the agency's proposal. ATA, NACA, AOCI and AAAE, and ALPA agree with the FAA's proposal, in essence stating that respondents should be able to elicit relevant factual testimony (including hearsay) from all sources (including FAA employees). Therefore, in light of the general support for the agency's proposal, the FAA is deleting the second sentence of § 13.227 as proposed.

Related to this issue, two private attorneys and Rocky Mountain Helicopters object to the admissibility and use of hearsay testimony, either as a general matter or particularly when given by an FAA employee, because such testimony is "not admissible" in Federal courts. Although hearsay is deemed inadmissible in Federal court under Rule 802 of the Federal Rules of Evidence, Rule 803 contains 24 distinct exceptions to Rule 802 under which hearsay testimony is admitted routinely in Federal court proceedings. And, while the Federal courts have chosen to tailor the admissibility and use of such evidence in their proceedings, the Federal courts also have stated that hearsay generally is admissible and widely accepted in civil administrative proceedings. *Veg-Mix, Inc.* v. *U.S. Dept. of Agriculture*, 832 F.2d 601, 606 (D.C. Cir. 1987)("* * * [I]f hearsay evidence meets the standards of the Administrative Procedure Act by being relevant, material, and unrepetitious * * *agencies are entitled to weigh it according to its 'truthfulness, reasonableness, and credibility' " (citations omitted)); *Evosevich* v. *Consolidation Coal Co.*, 789 F.2d 1021 (3d Cir. 1986), citing *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971); *Johnson* v. *United States*, 628 F.2d 187, 190 (D.C. Cir. 1980).

The NTSB has recognized the admissibility and use of hearsay evidence in its proceedings. *Administrator* v. *Irish, NTSB Order EA-3080 at 7 (March 14, 1990); Administrator* v. *Budar*, 3 NTSB 1913, 1914 (1979); *Administrator* v. *Ortner*, 2 NTSB 396, 397 n.5 (1973); *Administrator* v. *Trier*, 2 NTSB 379, 380 (1973) ("It is axiomatic that hearsay evidence is admissible in administrative proceedings, in contradistinction to practice in law courts. The issue with respect to hearsay concerns the weight to be attached to it in each case, rather than to its admissibility").

In light of the broad admissibility of this evidence in administrative proceedings and the discretion vested in the administrative law judge to determine the weight accorded hearsay evidence, the FAA is not revising the rules of practice to restrict the admissibility and use of relevant and material evidence, including hearsay. Notably, the majority of the commenters agree with the FAA that hearsay testimony should be admitted, particularly as it applies to the admissibility of relevant and material factual testimony given by FAA employees in civil penalty actions. Although hearsay is admissible under the rules of practice, hearsay evidence (admissible under § 13.222(c)) must meet the admissibility criteria in § 13.222(b) applicable to all evidence in these proceedings.

Because NBAA seems to object to any asymmetry in the evidentiary rules of practice, the FAA presumes that the revisions address NBAA's concern regarding this section. Deleting this sentence results in a single rule applicable to both parties that governs the admissibility and use of relevant and material factual testimony, whether offered by the FAA or a respondent.

b. Expert or Opinion Testimony of FAA Employees

With regard to expert or opinion testimony by FAA employees, some previous commenters also objected to the first sentence of § 13.227, which stated, in pertinent part:

> An employee of the agency may not testify as an expert or opinion witness, for any party other than the agency, in any proceeding governed by this subpart.

As noted in the NPRM, this limitation on agency employee expert or opinion testimony merely reflects an identical limitation in Departmental rules issued by the Office of the Secretary (OST) of the Department of Transportation, governing all employees of the Department. 49 CFR 9.5(a). The FAA reviewed both the recommendation of the Committee on Adjudication and Professor Fallon's report and in the NPRM discussed the policy basis for the agency's limitation. The agency also explained its concern about deleting this sentence, noting its belief that keeping this provision in the rules better serves the public interest, avoiding the real potential for confusion regarding "official" and "unofficial" testimony by persons employed by the agency. Accordingly, the NPRM proposed to retain the limitation. A number of commenters object.

NBAA, in support of its position, cites the possible need of a private party to introduce into evidence a prior statement by an FAA employee of an opinion on the requirements of the Federal Aviation Regulations, on which statement the private party had relied. While agreeing generally with the proposed change, AOPA's support is conditioned on a two-fold caveat that prompts AOPA to recommend that the provision be deleted. Like NBAA, AOPA is concerned that (1) the rule could prevent a respondent from eliciting what could be considered expert or opinion testimony from an employee called by the agency and (2) there may be circumstances (reviewed and resolved on a case-by-case basis by an adjudicator) to warrant a respondent calling an FAA employee as an expert or allowing opinion or expert testimony of an FAA fact witness. At the public meeting, a private attorney speaking on behalf of EAA and the NTSB Bar Association and ATA echoed this need to call or cross-examine FAA expert or opinion witnesses.

ALPA states that the agency's concerns about FAA employees are "unpersuasive" and also urges the FAA to delete § 13.227. ALPA believes that only rarely would a respondent call an FAA employee and, on those rare occasions, it would be obvious that the employee is testifying "as an individual" and, thus, no confusion would arise. Moreover, ALPA contends that if the FAA "is truly concerned about any 'confusion' on this issue," the agency can include a statement that it is not bound by the unofficial testimony of an FAA employee called by a respondent.

The FAA disagrees with the statement by several commenters that there is no reason for this limitation. Several commenters acknowledge some validity in the FAA's position. AOPA agrees that the FAA should be able to restrict the use of its employees as experts for others. In AOPA's words, "This is a familiar restriction found in other Federal agencies to prevent the diversion of agency personnel from their assigned duties." NBAA recognizes that the "entire FAA ought not to be subjected to subpoenas to testify" in these cases but argues that witnesses with regulatory oversight of the respondent or relevant sections of the regulations should be compelled to testify.

ATA suggests that the simple solution is for the FAA to delete this section, positing that if the FAA's fear for its employees is justified, it is equally justified for respondents. ATA, NBAA, and NACA further urge the FAA to prompt OST to change the Departmental rule on expert and opinion testimony of employees. ATA and NACA suggest the FAA petition the Department for an exemption to the existing employee testimony regulation. ATA states that "DOT already has provided such an

exemption for enforcement proceedings brought by other government agencies." ATA cites 49 CFR 9.5(a), which pertains to certain U.S. Coast Guard proceedings brought against military personnel and requires that such military personnel have the same opportunity as the government to obtain witnesses. As ATA notes, this exemption is required by the Uniform Code of Military Justice (10 U.S.C. 846). The Department, therefore, was statutorily required to provide the narrow exemption that now exists. However, the exemption does not apply to civil penalty actions taken by the U.S. Coast Guard against private individuals or entities for regulatory violations. It applies only to actions taken by the Coast Guard against Coast Guard personnel (and therefore technically DOT employees) in court martial proceedings and before discharge boards. This limited exemption required by law does not provide a basis for a change in the Departmental rules or the rules of practice as recommended by ATA and NACA.

ALPA contends that § 9.5 of the Department's rules is not a barrier to FAA employee opinion or expert testimony on behalf of a respondent in civil penalty actions. ALPA reads that section to create a distinction between testimony that is "*compelled* by subpoena and not offered voluntarily by the witness," believing § 9.5(a) to deal only with "*voluntary* testimony by agency employees." ALPA reaches this conclusion by comparing § 9.5 with § 9.13 of the Department's rules. The FAA does not so read the regulations in 49 CFR part 9. Section 9.13 applies only to legal proceedings *between private litigants;* § 9.5 applies only to proceedings in which the United States is involved, such as civil penalty actions. The interests of the government in both types of proceedings are strikingly similar, as expressed in § 9.7 (the general rule regarding DOT employee testimony in private litigation). Moreover, § 9.5 is the only section that deals with employee testimony in proceedings in which the government is involved and that section does not differentiate between testimony compelled by subpoena or given voluntarily, unlike other sections of part 9. See § 9.9 and § 9.11. Thus, § 9.5, on its face, applies whether the employee's testimony is compelled or is given voluntarily in proceedings in which the United States or the Department are involved, either directly or indirectly.

The FAA continues to believe that the rule in question should not be deleted. It accurately reflects a Departmental regulation that is outside the scope of this rulemaking and embodies a limitation recognized as wholly proper. The NTSB's decision in *Administrator* v. *Sims and McGhee,* 3 NTSB 672 (1977) is a case in point, cited by a private aviation attorney who commented on the NPRM. In that case, the NTSB upheld the exclusion of an FAA employee from testifying as an expert or opinion witness on behalf of pilots in an enforcement proceeding. The NTSB stated:

> The Board has no reason to question the validity of regulations such as 49 CFR 9, which are within the authority of the issuing agency (DOT, in this instance) and the effect of which have generally been honored by the courts.

3 NTSB at 674–675 and n.13 (citing *Farrell* v. *Piedmont Aviation, Inc.,* 50 F.R.D. 385 (W.D.N.C. 1969), and *Craig* v. *Eastern Air Lines,* 40 F.R.D. 508 (E.D.N.Y., 1966), "wherein the courts refused to allow discovery of the opinion and conclusions of FAA employees"). The Board continued:

> The apparent and, in our view, legitimate purpose of the regulation is to avert the conflict of interest inherent in a situation where a government employee is, in effect, serving two masters.

3 NTSB at 675 n.12. Beyond the general objection noted above, the commenters previously posed, and some continue to pose, specific objections to keeping this section in the rules of practice. The commenters argue that this sentence apparently limits cross-examination of an FAA employee's expert or opinion testimony. The commenters also argue that it creates an apparent disparity between the government and private parties because the rule does not similarly address the expert testimony of employees of private parties.

(1) *Cross-examination of an FAA expert or opinion witness.* Most commenters express general support for the FAA's effort to revise § 13.227 but some still express concerns regarding a party's ability to cross-examine an FAA expert or opinion witness. ATA believes that the rule still may prevent or restrict full and complete cross-examination of, or discovery directed to, an agency employee. To cure this perceived defect, ATA suggests that the rule include a sentence regarding the scope of cross-examination as it relates to direct or factual testimony. Two private attorneys also claim that the rule "prohibits" cross-examination of an FAA expert. Certainly, that sentence did not and does not reach that far.

On the other hand, ALPA does not read the rule as "imposing *any* limit on cross-examination of a witness called by the FAA; rather, the rule is concerned only with the scope of the testimony that can be offered by an FAA employee called by the respondent." ALPA urges that any changes to the rule should make it clear that there is no limit on the normal scope of cross-examination, including the posing of opinion questions to an FAA witness in some circumstances.

After close review of the continued objections by commenters regarding effective cross-examination and the arguments presented in defense of their positions, the FAA is keeping this sentence but narrowing its scope even further. The FAA is revising that sentence by inserting the italicized language so the section reads as follows:

> An employee of the agency may not *be called* as an expert or opinion witness for any party other than the agency in any proceeding governed by this subpart.

This change is intended to address concerns expressed by ATA and AOPA that this sentence, if unchanged, would continue to chill a respondent's cross-examination of an FAA employee who has been called by the agency as an expert or opinion witness. The FAA declines to adopt ATA's suggestion to insert additional language in the rule regarding the scope of cross-examination. The FAA believes that the administrative law judges have the discretion to determine what is necessary and permissible for full and complete cross-examination during discovery and any hearing. As amended, the FAA believes that § 13.227 clarifies that a respondent is able to engage in permissible cross-examination of the agency's expert or opinion witnesses. The FAA also believes that the revision addresses the recommendation of the Committee on Adjudication. Adj.Com.Rec. at 5 (March 8, 1990).

(2) *Disparity between government and private party expert or opinion witnesses.* The most common objection to the remaining sentence in § 13.227 is that the rule unfairly omits addressing employees of private parties, leaving the inference that no similar limitation applies to their testimony and the FAA, therefore, is free to call them as its expert witnesses. This objection is expressed by ATA, NBAA, NACA, Rocky Mountain Helicopters, NATA, and one private attorney. NATA recommends that the rule either should restrict both parties' use of experts or opinion witnesses or should reflect that any party may use the testimony of any party's expert. Although, as noted in the NPRM, it is not the FAA's practice to

use expert or opinion testimony of employees of an opposing party, these commenters urge either that the limitation in the rule be eliminated or that the rule be modified to apply equally to both parties to a proceeding.

The FAA is satisfied that the rule, as amended, and its purpose are sufficiently clear to preclude a construction that would either (1) exclude a private party's otherwise admissible evidence of an opinion previously given by an FAA employee outside of the adjudicatory proceeding or (2) prevent or limit otherwise proper cross-examination of opinions given by an FAA employee on direct examination as a witness for the agency. The first example does not involve an employee's testimony for a non-FAA party. As to the second, we know of no instance in which an administrative law judge has relied on either the FAA's rule or its Departmental counterpart to limit the scope of otherwise proper cross-examination of an employee's testimonial opinions. The FAA is confident that an administrative law judge will rule properly in such situations and will do so without reference to the limitation in § 13.227.

Notwithstanding the agency's belief that the limitation in the rule, as amended, is necessary and proper, it is equally clear that, to a significant segment of the aviation community, it appears to be one-sided in that it does not similarly limit FAA's use of an opposing party's employees as expert or opinion witnesses. While the FAA does not consider such a limitation to be necessary to achieve that result, it considers the evenhanded appearance of the rules to be important.

In addressing this concern, the FAA does not want to restrict the ability of a respondent to call experts or opinion witnesses to testify on the respondent's behalf or to somehow limit the testimony of an expert or opinion witness who appears for a respondent. Thus, the FAA instead is revising the title of § 13.227 and also inserting a limitation on the agency's ability to call experts employed by a party in a civil penalty action. The FAA is adding a sentence to § 13.227 that reads as follows:

> An employee of a respondent may not be called by an agency attorney as an expert or opinion witness for the agency in any proceeding governed by this subpart to which the respondent is party.

The FAA believes that adding this provision responds to the primary concern of commenters who continue to object to § 13.227 because it still appears asymmetrical. Revised § 13.227 now addresses only an FAA employee's obligation to appear as an expert or opinion witness and the agency's ability to choose experts or opinion witnesses. Because both sentences now speak only to "calling" an expert or opinion witness, and not in terms of "testifying," this section should not restrict an FAA employee's factual testimony or a party's ability to cross-examine an opposing expert or opinion witness.

In its comments to the NPRM, NACA states that the FAA should delete the entire section and "opinion testimony should be permitted" so as not to violate a "fundamental right of fairness." NACA did not further explain how that sentence, as it existed or as proposed, "prohibits" opinion testimony in civil penalty actions. Section 13.227 does not ban the use of experts or opinion witnesses, either on its face or implicitly, and a majority of the commenters do not view that sentence as prohibiting opinion testimony. The FAA believes that the revisions to § 13.227 in this document make it abundantly clear that expert or opinion testimony, offered by either party, is permitted by the rules of practice.

Rocky Mountain Helicopters states that the "Federal Rules of Civil Procedure clearly contemplate the use of opposing expert witnesses * * *." and believes that the FAA's rule impedes a respondent's ability to present his or her case and to confront and cross-examine witnesses. The FAA, however, does not believe that the rule could be read to prohibit the use of opposing experts in these proceedings or cross-examination of an FAA expert. In light of the FAA's revision of § 13.227, the FAA has addressed these concerns.

5. Written Arguments

Some previous commenters stated that § 13.231 of the rules of practice prevented a respondent from submitting written briefs in support of motions made during a hearing or posthearing briefs. While the agency noted its preference for oral argument and decisions in relatively simple or straightforward cases, previous commenters indicated a strong preference for written submissions, arguing that the FAA's rule adversely affected their ability to present their case to an administrative law judge.

To address these concerns, the FAA proposed to leave the decision to submit written briefs in the hands of the parties or the administrative law judge, if the law judge determined that written submissions are "necessary or required for resolution of the issues or the case." Most commenters express some opinion about the proposal; however, their suggestions for additional changes vary and, in some cases, are inconsistent. Some commenters continue to believe that the agency is attempting to restrict the ability to file written briefs and urge further changes to the rule.

NATA has no specific comment on the proposal but believes that the rules before the proposal were too limiting. AOCI and AAAE advocate further expansion of the rule to give the administrative law judge the authority to "require" written arguments, or allow the parties to submit written arguments if they agree, where written arguments "would be of value" or "would be helpful" to resolve the issues or the case.

While noting that the proposal is a significant improvement, ALPA believes that the parties should have the "right" to file written briefs if they agree to do so and the administrative law judge should not have "veto power" over that decision. (ALPA suggests that the proposed rule be modified so that the parties could submit briefs even if the administrative law judge determines that they are not necessary or required. The rule, as proposed, would have given the parties that ability, in essence, to override the law judge's decision.) If the parties cannot agree, ALPA suggests that the decision be left to the administrative law judge, based on a determination that briefs are required or necessary.

AOPA urges that matters involving written arguments should be left to the administrative law judge's discretion, presumably unfettered, to be determined on a case-by-case basis, subject to review on appeal for abuse of discretion. NBAA urges the FAA to clarify that the administrative law judge has the discretion to request written briefs. While the concurrence of both parties is preferable in NBAA's opinion, NBAA believes that the administrative law judge should decide whether "additional" submissions would benefit development of the record and one party's objection should not bar submission of written arguments.

ATA continues to object to any presumption in the rules against written argument and any requirement that respondents "give up" oral argument in order to submit a written argument. ATA suggests that respondents (and presumably the agency although ATA did not so state) should be allowed to file written briefs whenever the administrative law judge finds that doing so would be "reasonable."

These continuing objections to this section are not a universally held sentiment, however. The Committee on

Adjudication of the Administrative Conference recommends that the rules "*permit* the filing of posthearing briefs whenever, in the [administrative law judge's] view, the interests of justice so require." Adj.Com.Rec. at 5 (March 8, 1990) (emphasis added). NACA concurs with the Committee's recommendation, noting that the administrative law judges should be vested with the authority to control their dockets regarding the filing of posthearing briefs.

Only the Tobacco Institute focuses directly on the agency's concern that respondents who choose to represent themselves or appear without counsel in these actions may benefit from the preference for oral argument and oral decisions in relatively simple or straightforward civil penalty cases. The Tobacco Institute states that respondents in civil penalty proceedings should not be "burdened by unnecessary formalities—notably written submissions—where their cases do not involve complex disputes or extensive research." The Tobacco Institute also states that all parties should have the opportunity to offer written arguments if the parties desire or the administrative law judge believes it will advance resolution of the case. The Tobacco Institute states that the FAA's proposed changes recognize those interests. Also, so long as the procedures are not amended to require written arguments, the Tobacco Institute endorses the FAA's proposal.

In the NPRM, the agency asked commenters to discuss the costs, impacts, and benefits of requiring parties to submit written arguments in civil penalty cases. Only NBAA comments on this issue. Without significant elaboration, NBAA asserts that the benefits of submitting written arguments "far outweigh the costs" and the cost to the respondent, over which he or she has "significant control," is reasonable. NBAA dismisses any cost to the FAA as "probably not a significant variable within the agency's overall budget * * *."

Contrary to the assertions of several commenters, section 557(c) of the Administrative Procedure Act does not confer on the parties a "right" to file written argument before an initial decision is issued by an adjudicator. That section speaks only to a "reasonable opportunity" to submit for the adjudicator's consideration proposed findings and conclusions, exceptions to decisions, and supporting reasons before an initial decision is issued. Because section 557(c) does not mandate written arguments during a hearing or at the close of hearing, the FAA will not require their submission in its rules.

Instead, the FAA is leaving the decision entirely in the hands of the administrative law judge. The FAA is amending § 13.231 to provide that the administrative law judge may request written briefs during a hearing or after a hearing when it is reasonable to do so. In addition, the FAA is deleting the phrase in the proposed rule that would allow the parties to submit written briefs pursuant to agreement of the parties despite an administrative law judge's determination that such written arguments are not required or necessary. The FAA also is amending § 13.231(c) to delete the phrase "instead of final oral argument," thus allowing a party to provide final oral argument and written posthearing briefs if the administrative law judge determines that both opportunities should be provided in a particular case.

NBAA believes that it is highly unlikely that an administrative law judge would ever "have to compel submission" of a written argument. This assertion may be true for sophisticated or represented parties who, in NBAA's opinion, would readily recognize that the administrative law judge's suggestion to submit a written brief indicates that the "person deciding their case wants some additional guidance." The agency is sensitive, however, to the potential effect of such a "suggestion" to respondents who are not familiar with an adjudicatory process or who are not represented by counsel in these proceedings. Precisely because NBAA opines that "as a matter of practical reality failure to respond to the trier's request [for written argument] is foolish," the issue should be highlighted here. To the extent that those parties who do not believe, or are not aware, that posthearing briefs would aid the administrative law judge in resolving their case, the FAA is confident that an administrative law judge also will recognize the issue and will not draw any adverse inference solely from a party's failure to submit a written argument.

6. Modification of Civil Penalty by an Administrative Law Judge

Previous commenters objected to a sentence in § 13.232(a) that required an administrative law judge to support in an initial decision a reduction of the civil penalty sought by the agency for an alleged violation. Despite the provision in the rules squarely placing the burden of proof on the agency, this sentence was criticized as improperly shifting the burden of justifying a civil penalty from the agency attorney to the administrative law judge. The agency noted that this requirement was not unique to the FAA, and that the sentence in § 13.232(a) was patterned after decisions by the NTSB. Indeed, the NTSB requires its administrative law judges to show a "clear and compelling" basis for reduction of a proposed sanction in certificate actions, a much higher standard than that contained in § 13.232(a). *Muzquiz* v. *NTSB*, 2 NTSB 1474 (1975).

According to NBAA, the *Muzquiz* doctrine provides a reasonable standard to govern an administrative law judge's exercise of the power to review the proposed penalty developed by the agency. In NBAA's words, "Nothing should be added in Part 13." Several commenters criticize the *Muzquiz* decision, and implicitly the agency's reliance on that decision, arguing that the NTSB should overrule its 1975 decision. whether the NTSB ultimately overrules *Muzquiz* is not relevant here in light of the agency's proposed revision to § 13.232(a).

The agency proposed several amendments to the rules of practice to address the commenters' concerns. ATA supports the proposals in the NPRM, stating that the proposals are "useful improvements" to the rules of practice. AOCI and AAAE also support the proposals as drafted, noting the additional support for these proposals in Professor Fallon's report.

To the extent that the commenters claim that additional burdens had been placed on the administrative law judge by the previous rule, the FAA addressed those concerns in the proposed amendments. First, the FAA proposed to delete the sentence in § 13.232(a) regarding explanation of any reduction in the amount of civil penalty. ALPA supports the proposal to delete this sentence from § 13.232(a). AOPA also concurs in the proposed deletion of this sentence, stating that the matter then will rest "where it best should be," with the administrative law judge and the Administrator on appeal.

Although it was raised as a comment on the issue of modification of a proposed civil penalty, the Tobacco Institute suggests that the FAA provide criteria or "standards placed on the public record" to guide the agency's and the administrative law judges' decisions on penalty levels. As noted by the Tobacco Institute, the FAA addressed that suggestion in its disposition of comments submitted on the final rule and will not repeat that discussion here. 54 FR at 11918–11919; March 22, 1989. The FAA believes that the revised rule addresses the Tobacco Institute's desire

to preserve the discretion of the administrative law judge "to levy a sanction appropriate to facts that emerge at a hearing." Not all commenters agree with the Tobacco Institute, however. For example, NBAA states that "The persons charged with the day-to-day administration of these cases have to be allowed * * * to exercise their best judgment as to what sanction is appropriate."

Second, the FAA proposed, conforming with the recommendations by Professor Fallon and the Committee on Adjudication, to modify the second sentence in § 13.232(a) to require an administrative law judge to include in an initial decision a discussion of the "amount of any civil penalty found appropriate by the administrative law judge."

Although other commenters seem to disagree, ALPA claims that "no one" is suggesting that an administrative law judge should not explain a reduction of a proposed civil penalty. ALPA advocates an additional requirement to explain a "refusal" to reduce a proposed penalty where such reduction is sought by the respondent. In ALPA's words, the administrative law judge should explain "any decision" regarding a proposed penalty if that is an issue in the case. The Tobacco Institute states that the "better approach" is evidenced by the proposed amendment to apply the same requirement to decisions that modify or affirm the agency's proposed penalty. The agency's proposed amendment to § 13.232(a) contemplates precisely what ALPA and the Tobacco Institute suggest ought to be done in each case. To the extent that ALPA objects to the use of the terms "affirm, modify, or reverse" as they refer to an initial decision on proposed civil penalties by an administrative law judge, the FAA agrees with ALPA's concern and is modifying that sentence, as well as other sections of the rules that contained those terms, as discussed previously.

AOPA objects to adding the proposed language to § 13.232(a), believing it to be an attempt to insert the same restriction in different language in a different place in the rule. Nevertheless, AOPA admits that the interpretation of this sentence, presumably by the administrative law judge and the Administrator on appeal in the context of a particular case, will determine whether this is an attempt to restrict the administrative law judge in favor of the agency. The FAA is confident that an administrative or judicial adjudicator would not read beyond the plain language of the rule to limit or expand that language, particularly in light of the history and discussion surrounding this provision.

The proposed changes merely mirror what already is required of an administrative law judge pursuant to the Administrative Procedure Act. Pursuant to section 557(c), an administrative law judge must include a statement of "findings and conclusions, *and the reasons or basis therefor,* on all material issues of fact, law, or discretion presented on the record * * *." (Emphasis added.) As AOPA has so aptly noted, the agency's first proposed change will preserve the administrative law judge's discretion regarding sanction, as it currently is set forth in the Administrative Procedure Act. Thus, a discussion of any sanction found appropriate by the administrative law judge in a particular case should be discussed in the decision so as to comply with the Administrative Procedure Act. Moreover, the agency stated in the NPRM, and repeats here, that a detailed or elaborate articulation may not be necessary to satisfy the requirement in section 557(c). The adjudicators in these actions, on a case-by-case basis, can determine how best to fulfill their obligations under section 557(c) of the Administrative Procedure Act by providing whatever level of discussion they deem appropriate.

In light of the significant support in the comments for the agency's proposal, the agency is adopting several of the proposed changes to § 13.232(a). The agency is deleting the fourth sentence in § 13.232(a), eliminating any specific requirement for an administrative law judge to explain a reduction in a civil penalty proposed in the agency's complaint. Adj.Com.Rec. at 5 (March 8, 1990). Also, after analysis of the comments and review of the recommendation by the Committee on Adjudication and Professor Fallon, the FAA is inserting the phrase "the amount of any civil penalty found appropriate by the administrative law judge" in the second sentence of § 13.232(a).

7. Compromise of penalties

The FAA solicited comment on the agency's policy against civil penalty compromises that result in no formal finding of violation. In the NPRM, the FAA asked a series of detailed questions to aid its understanding of the commenters' positions on the existing compromise policy and assist in the formulation of possible changes to that policy. The agency announced publicly, both in the NPRM and at the public meeting, "somewhat of a retreat" in the way it had construed the statute, which had contributed to its policy of insisting on a finding of violation in all cases in which payment was received. The agency noted that the FAA could proceed to a final rule and need not await a "legislative correction" to the statute if the FAA concluded, as a matter of policy, that compromises without findings are an appropriate resolution of some cases. The Adjudication Committee of the Administrative Conference had recommended just such a review and reconsideration of the statute and legislative history pending legislative clarification. Adj.Com.Rec. at 4 (March 8, 1990).

Nearly every commenter expresses an opinion on the issue of compromising civil penalty actions without a finding of violation. Some commenters criticize the agency even for having solicited comment on the issue. Despite these commenters' protestations, the comments have been useful to the agency's review and development of an appropriate compromise policy.

a. Policy Change Versus Rule Amendment.

AOCI and AAAE believe that the rules of practice "must reflect the ability to compromise the proposed penalty without the admission of a violation * * *." Nevertheless, AOCI and AAAE state that the regulations should not circumscribe the types of cases that could be compromised to promote administrative efficiency and the interests of justice. Instead, the agency should determine, on a case-by-case basis, whether and when it is appropriate to compromise a civil penalty case. AOCI and AAAE suggest that § 13.16 be amended to show that a compromise agreement is permitted if it "is *not contrary to* the public interest." In the NPRM, the FAA had proposed language that compromise would be permitted if "such an agreement is in the public interest." AOCI and AAAE believe that their language would give the FAA greater flexibility yet ensure that the public interest is not adversely affected.

NATA states that the rules of practice should be amended to permit the FAA to consider a history of prior violations "only" when a future complaint is the result of a "repeated alleged violation of the same rule." (It is not clear whether NATA considers a "history of prior violations" to include only violations resulting from adjudication or alleged violations that may be reflected in a compromise agreement.) APA advocates a return to "the settlement practice prior to the adoption" of the program and believes that the rules should be amended to reflect that payment of a

civil penalty "prior to an administrative hearing" is not an admission of the allegations or a formal finding of violation.

AOPA views the issue as a matter of policy but does suggest that criteria could be established and articulated in Order 2150.3A. AOPA urges the FAA to amend its policy so that it is within the discretion of the agency in a particular case to settle a civil penalty "with or without a finding of violation." As to criteria to distinguish cases that would be appropriate for compromise, AOPA suggests that a "finding should be required in the more egregious cases and for repeat offenders and where the agency, in its prosecutorial discretion, finds individual circumstances where the public interest requires a finding." AOPA does not further define "egregious cases" or cases where the "public interest requires" a finding, but suggests that distinctions articulated in Order 2150.3A between administrative action and legal enforcement action would be helpful. (The FAA notes, however, that the distinctions in Order 2150.3A currently guide the discretion vested in FAA inspectors to distinguish cases that are not appropriate for legal enforcement action, not cases where that determination has been made.)

On the other hand, some commenters consider this issue solely a matter of policy. RAA urges the FAA to adopt a policy of compromises without issuing an order that contains a finding of violation. RAA states that the FAA could refuse to compromise if, in the belief of the FAA attorney, an alleged violator views the payment of civil penalties as a "cost of doing business." RAA believes a compromise policy would benefit the FAA by eliminating cases that are "legally unfounded, poorly substantiated, or politically motivated * * * without gross embarrassment to the agency." (Where those factors are relevant, however, they are considered more appropriate to a decision declining to prosecute the action in the first instance.) NBAA regards the issue of compromise as a matter of development and use of "local judgment" and "careful, thoughtful actions" by those persons familiar with the specific case. NBAA believes that a finding of violation "has not historically been found to be a legally mandated predicate to the compromise of civil penalty cases * * *" and urges the FAA to eliminate any distinction in compromise policy between civil penalty cases that exceed $50,000 and those that fall below that amount.

NACA believes that a "flexible approach to settlement" should be followed by the FAA. NACA suggests that the agency refuse to compromise in cases that show a "lack of compliance disposition on the part of the violator or the matter is so egregious that the violator should certainly have known in advance he was violating" the regulations. ATA vigorously supports a flexible compromise policy and believes the FAA should retain the discretion to "decline settlements with, or insist on substantial settlement amounts from, recidivist respondents."

ALPA believes it is neither "necessary or desirable" to articulate or codify a comprehensive set of criteria to select cases in which compromise would be acceptable or appropriate. Instead, the agency should exercise its discretion but could compromise where a violation is minor or unintentional, where problems of proof exist in the case, or where the respondent has an "excellent" record of compliance. While Rocky Mountain Helicopters supports the agency's willingness to compromise civil penalty cases, it states that the rules of practice should govern only procedural aspects of the enforcement process and should not limit either the prosecutor or the adjudicator. This opinion leads Rocky Mountain Helicopters to conclude that if the "prosecutor insists upon a finding of violation, clearly that fits within the prosecutor's discretion."

b. Use of Compromised Civil Penalties

An issue of primary concern to most commenters is any future use of a compromise agreement by the agency or the admissibility of a compromise agreement in future litigation. Most commenters recognize the propriety of the agency's consideration of a prior compromise agreement, although the commenters do not necessarily agree on the extent of the agency's consideration of such agreements.

AOCI and AAAE "recognize the FAA's enforcement interest in using a respondent's regulatory history" to determine appropriate action in future cases. Thus, AOCI and AAAE believe that the FAA should have the ability to consider past compromises in deciding whether to initiate or to compromise future enforcement actions. ALPA believes it is appropriate for the agency to refuse to compromise an action without insisting on a finding of violation where there has been a previous compromise with the same respondent for a similar violation. Nevertheless, ALPA states that compromise agreements should not be "available for use in subsequent cases before the FAA, DOT, NTSB, or elsewhere."

NBAA suggests that the FAA turn to "history" for guidance regarding the use of civil penalty compromises. NBAA notes that "There are no easy answers other than the judicious administration of the program * * *" and discourages establishment of rules that would inhibit careful analysis of a particular case. NBAA comments that an "enforcement folder full of compromise agreements usually results" in a significantly higher penalty on the next case; however, an administrative law judge would scrutinize the facts "in a previous single compromised case" before using a document that does not "admit guilt as a basis for a severe subsequent penalty." It seems from these comments that NBAA would not object to the agency's use of previous, similar compromised civil penalty actions to analyze a case and determine an appropriate sanction or the propriety of compromise for a similar violation.

While not requesting expunction of records related to compromises, RAA suggests that records of compromises should not reflect an admission of guilt. Thus, the FAA would have the option of considering an alleged violator's compliance history in subsequent proceedings. In AOPA's view, only "findings" should be made a matter of record to be considered in the case of future alleged violations. AOPA also advocates expunction of certain enforcement and incident information from an airman's record after an appropriate time. In this light, AOPA disagrees with the current practice of including compromised civil penalties as a matter of record and considering them to decide appropriate action for future violations. On the issue of accountability, AOPA states that if an alleged violation is so serious, it should be a matter of record for consideration in a future enforcement action. However, cases that are not "so serious," could be compromised and should not be included as a matter of record or used to determine future enforcement action. AOPA suggests that criteria should be established and reflected in Order 2150.3A to define these cases.

NATA is concerned about the use of a compromise agreement in a future, unrelated case and suggests that a finding of a prior, unrelated violation is irrelevant unless it is used to show "overall lack of qualification" that justifies certificate action under section 609 of the Federal Aviation Act. One private attorney suggests that the agency "should not be allowed to consider * * * any previous violation history in subsequent civil penalty

actions." This commenter also states that payment of a fine should not be construed as an "admission of guilt" in subsequent civil penalty actions.

With regard to the agency's concern about the "deterrent effect" of a compromise and the public interest in accountability, APA simplifies the choice by suggesting that the FAA initiate certificate action against a violator instead of a civil penalty action for violations of safety regulations. APA claims that the agency's concerns on these issues lack substance in light of the dichotomy that exists for civil penalty actions over $50,000 and those that are at or below that amount. Although this disparity exists, it is the result of a jurisdictional limit in the enabling legislation.

c. Compromise System

As to the mechanics of compromising a civil penalty action, RAA and ALPA suggest that compromise should be available at any stage in the proceedings. Also, ALPA advocates issuance of a document entitled "settlement agreement" that contains an "agreed summary" of the alleged violations, a statement that the agency will accept a specified civil penalty as full settlement, and a statement that the respondent agrees to pay the civil penalty without admitting the alleged violations.

ATA offers a suggested system for compromise: (1) Criteria contained in Order 2150.3A to assist in determination of an appropriate sanction should be used to guide the agency's discretion; (2) regional attorneys should be trained to apply the criteria consistently and be vested with the authority to compromise; (3) FAA headquarters personnel should monitor the amounts and types of compromise to ensure reasonable consistency; (4) respondents should be able to "address concerns" about the compromise of individual cases to FAA headquarters to promote consistency; (5) a record of past compromises could be used by the FAA to guide all aspects of prosecutorial discretion but should not be admissible in enforcement "trials" for any purpose. ATA disagrees with DOT's practice of construing settlements as "findings" and urges the FAA not to adopt a similar practice.

Upon consideration of all the comments made on this issue, the FAA has determined to change its general policy on compromises to permit settlements without admissions or formal findings of guilt and to amend the rules to reflect this change.

It may be helpful to a discussion of the compromise issue to first distinguish between an "admission" of violation and a "finding" of violation. Neither the existing rules nor agency policy requires persons agreeing to pay a civil penalty to "admit" the violations alleged in a notice of proposed, or order assessing, civil penalty. However, a failure to contest a proposed civil penalty results in the issuance of an order assessing civil penalty. Under the Administrative Procedure Act, an "order" is a final agency disposition formulated by the process of adjudication. 5 U.S.C. 551. Therefore, an order ordinarily represents an agency's "findings" in a matter.

As discussed in the NPRM, the main public interests in making such findings in enforcement cases is to establish accountability and a violation history admissible in evidence in the event of future enforcement actions against the same person. It can be inferred from the public comments, on the other hand, that there is a substantial willingness to pay civil penalties without contest if no finding of violation is made. Settlement of cases without costly adjudication can, if otherwise appropriate, also serve the public interest. The FAA concludes that these competing public interests in adjudication and in settlement, by their nature, can best be evaluated on a case-by-case basis in the sound exercise of prosecutorial discretion, a proposition urged by several commenters.

This change in agency policy to permit the exercise of such discretion does not require a change to the rules of procedure in civil penalty cases. However, § 13.16(p) and definition of "order assessing civil penalty" are being amended in order to assure full awareness of the change, to allow for documentation of "no finding" compromises in orders assessing civil penalty, and to assure that orders in such cases may not be used by the agency as evidence of a prior violation in civil penalty or certificate action proceedings.

The amendment only permits such a compromise settlement. It does not require it or specify conditions for its acceptability. The FAA is persuaded by the comments that some case-by-case flexibility is needed here and agrees that prosecutorial discretion should not be circumscribed by regulation. Contemporaneously with the issuance of these amendments, FAA attorneys have been advised that they are authorized to enter into civil penalty compromise settlements with no findings where they determine such settlement to be consistent with the public interest. In making such determinations, they will consider violation history as well as any other relevant factors. For example, public policy considerations would generally favor settlements without findings for inadvertent first-time violations, and disfavor such settlements where the violations were deliberate or were repetitive of, or substantially related to, violations previously adjudicated or settled, with or without a finding. In addition, the agency may, from time to time, issue policy guidance on this issue, where the agency determines that the public interest is served by insisting on findings in a certain category or type of case. But again, no inflexible criteria are being established at this time. The FAA intends to closely monitor case dispositions to evaluate continuously the need for any national policy guidance in this area.

8. Conforming Amendments and Editorial Changes

In the NPRM, the FAA proposed several conforming amendments or editorial changes to ensure that the proposed changes to the specific rules of practice raised in the NPRM were implemented effectively and efficiently. The commenters generally do not address those conforming and technical amendments, although several commenters suggest alternative solutions that the agency reviewed and adopts in certain cases.

No commenter objects to the FAA's proposed revision of the authority citation for part 13 and § 13.16(a)(1) to reflect accurately the agency's statutory authority in certain matters. To the extent that the proposed changes to the authority citation are neither addressed nor opposed by the commenters, the agency is adopting the amendments as proposed. Thus, the authority citation and the initiation procedures will reflect the agency's statutory authority in two cases: (1) The obligations and abilities of the FAA under the Federal Aviation Administration Drug Enforcement Assistance Act of 1988 (Pub. L. 100–690) and (2) the statutory maximum civil penalty of $10,000 applicable to any person who boards or attempts to board an aircraft in air transportation or intrastate air transportation with a concealed deadly or dangerous weapon on or about his or her person that would be accessible in flight. The FAA also is amending § 13.15(a)(1) so that it will be consistent with its counterpart in § 13.16(a)(1).

Related to the issue of statutory authority, the Tobacco Institute comments that § 13.15(a)(2) and § 13.16(a)(2) do not accurately reflect the provisions of section 404(d) of the Federal Aviation Act. The Tobacco

Institute states that "[t]o the extent that the rules of practice purport to allow the FAA to assess penalties greater than $1000 for violations of the Act's smoking ban, they exceed FAA's statutory authority." The Tobacco Institute recommends that the FAA revise § 13.15(a)(2) and § 13.16(a)(2) to clarify that the maximum civil penalty for a violation of section 404(d)(1) (the "smoking ban") is *$1000* and the maximum civil penalty for a violation of section 404(d)(2) (the prohibition against tampering with a lavatory smoke alarm) is *$2000.* The FAA agrees with the Tobacco Institute that a revision will clarify those sections to accurately reflect the agency's statutory authority and, thus, is revising § 13.15(a)(2) and § 13.16(a)(2) to state that the maximum civil penalty for an alleged violation of that section is specified in the Federal Aviation Act.

So that the EAJA regulations promulgated by the agency conform to the changes adopted herein to the rules of practice, the FAA is amending § 14.05(e) of part 14. That section states the "Fees may be awarded only for work performed after the issuance of *an Order of Civil Penalty.*" The FAA is substituting the word "complaint" for the italicized phrase to ensure that the EAJA regulations use the same terminology as is used in the rules of practice to which they refer.

AOCI and AAAE note two typographical errors in two of the agency's proposed revisions. In § 13.218(f)(1), AOCI and AAAE believe that the phrase "10 days *of* service" should read "10 days *after* service * * *" Although the word "of" appeared in the original sentence as promulgated in August 1988, the FAA is adopting the suggested revision so the sentence in that section will conform to other sections that contain the same phrase. AOCI and AAAE also identify an error in § 13.218(f)(2)(ii) in which the proposed language states "terminates the proceedings *with* a hearing * * *" AOCI and AAAE correctly note that the italicized word should be "without" and the agency is adopting the recommendation to change that section.

9. Application of the Amendments to Pending and Concluded Civil Penalty Actions

In the summary preceding the preamble to the NPRM, the FAA indicated its willingness to consider applying changes to the rules of practice to pending civil penalty actions, "where appropriate." 55 FR 7980; March 6, 1990. During the public meeting, the agency solicited comments on whether and to what extent any changes to the rules should be applied to cases already initiated, including cases that have been resolved. Representatives of ATA, American Airlines, and Alaska Airlines spoke in response to this suggestion. Meeting Transcript at 21–22, 26, 39–40, 50–53, 66 (March 12, 1990).

Written comments were submitted by ATA, NACA, and American Airlines. ATA suggests several options to deal with cases currently in some phase of the administrative civil penalty process. Although first raised in ATA's discussion of changing the designation "order of civil penalty" to "complaint," ATA asserts that the following mechanism should be applied to all civil penalty actions under the program for all changes adopted by the FAA in this final rule.

ATA recommends the following mechanism: (1) The FAA should file amended complaints in all pending cases that have not reached trial; (2) the FAA should reopen all cases in which a respondent did not request a hearing after receiving an order of civil penalty so that the respondent has another opportunity to request a hearing; and, (3) in any case in which a trial has occurred, the case should be remanded for a new trial. ATA asserts that its proposed "remedy" would not impose substantial burdens because so few cases have been tried.

NACA suggests that the change from "order of civil penalty" to "complaint" should "embrace all of the cases that have been handled under the final rule since its adoption." Without discussing the benefits or burdens of the suggestion, NACA states that the respondent should be offered the choice to reopen a civil penalty case. At the public meeting, the representative of American Airlines recognized "the burden on the system that would happen if all cases had to be reopened." In its written comments, American Airlines recommends that the rules changes should apply to all cases in which a complaint has been filed but the case has not been litigated. American does not recommend the re-opening of all litigated or resolved cases, however. American suggests that litigated cases

> should be retried only if by applying the new rules the result could be different. Each litigant * * * should be given the opportunity to request a new hearing under the new procedures if the litigant can show that the result could be affected by evidence that was excluded under the old rules. If the litigant cannot meet its burden, then no new hearing need be granted.

American adds that any change in the agency's policy concerning the compromise of cases must apply to all pending cases.

Although the effective date of the final rule is stayed until publication of a final rule on the NPRM issued today, the FAA intends to apply all rule changes, and its change in policy with respect to compromises, prospectively to all pending cases, no matter where a case is in the process. For example, all pending cases already initiated by a notice of proposed civil penalty but which have not proceeded to an order of civil penalty (complaint), will receive the full effect of these rule changes. That means that such cases may be resolved by the payment of a civil penalty and without a formal finding of violation, under some circumstances in the discretion of the agency. That also means that should the case proceed, the agency will issue a complaint in that case, instead of an order of civil penalty. Similarly, all cases in which hearings have not yet been held will be adjudicated before an administrative law judge, and the Administrator on an appeal, if necessary, under the rules announced in this document.

The agency will not seek to amend previously-issued orders of civil penalty in pending cases simply to redenominate them as complaints. First, orders of civil penalty have been issued in over 665 cases as of the end of March 1990. In these cases, a hearing has been held, scheduled, or will be scheduled. Whatever confusion that may have been experienced by a respondent upon receipt of an order of civil penalty will have diminished at the hearing, if not sooner. The administrative burden on the agency would be substantial, without a corresponding benefit to respondents in those cases.

The agency agrees with American's suggestion in concept. The Administrator will entertain requests to remand cases pending before the Administrator on appeal from an initial decision, where the respondent demonstrates that the change in the rules of practice adopted herein would likely have affected the administrative law judge's initial decision. Similarly, the Administrator will entertain requests for reconsideration of any decision and order issued by him, on the basis that the change in the rules of practice would likely have affected the outcome of the case. Respondent must provide a particularized showing, citing the rule change (or changes) and its relevance to the findings and conclusions reached by the administrative law judge or the Administrator.

Except as indicated above, the agency does not intend to re-open cases already closed through an order assessing civil

penalty, whether or not a case was resolved before hearing or after hearing. As of March 31, 1990, over 1,800 cases had already been resolved by the issuance of an order assessing civil penalty.

The agency's change in compromise policy announced in this document, which permits a compromise without a finding of violation, will be applicable to any pending case, wherever in the process. This policy change will apply also to all cases that have been resolved by issuance of an order assessing civil penalty but in which the 60-day period for appeal or payment of the civil penalty has not yet expired. Although the agency will not entertain requests to re-open closed cases for the purpose of considering a compromise without a finding, the agency will consider, on a case-by-case basis, whether and how to use a previously-issued order assessing civil penalty in any future case.

10. Comments Beyond the Scope of the NPRM

Many of the commenters discuss general issues regarding the agency's compliance and enforcement program or policy matters in substantive regulatory areas, or note objections to other rules of practice and procedures not discussed in the NPRM. The agency is bound by the scope of its previous notice and certain policy matters clearly are outside the purview of rulemaking. The FAA is including a discussion of issues raised by the commenters in this rulemaking that are beyond the scope of this rulemaking in the NPRM published concurrently in today's **Federal Register**. Other issues that are beyond the scope of the notice issued in February 1990, because they are matters of policy or comments on the enforcement program generally, are discussed below.

a. Termination of or Opposition to the Program

Several commenters oppose the program as a general matter and advocate termination of the program by the agency or by Congress. Some commenters oppose the program as it stands now and urge the FAA to "go back and start over." Related to this issue is the desire of a few commenters for the agency to begin anew and issue an NPRM that subjects the entire rule issued in August 1988 to notice and comment. As stated previously, the FAA has republished the initiation procedures in § 13.16 and the rules of practice in subpart G of part 13 for comment by interested persons.

Three commenters (AOCI and AAAE, Rocky Mountain Helicopters) also express their belief that the program may not have been needed or necessary, although not all commenters agree. ALPA and NBAA concur in the need for an administrative procedure for these cases. Indeed, NBAA states that "the past system of waiting interminably for resolution of these cases in federal district court was unacceptable."

Several commenters either state or infer that the rules of practice "will terminate" if the FAA's civil penalty authority is not extended by Congress on or before April 30, 1990. Although stayed temporarily pursuant to the court's order, the rules of practice will survive and apply to cases where Congress has provided the FAA with separate authority to assess civil penalties administratively. As part of the Federal Aviation Administration Drug Enforcement Assistance Act of 1988 (Pub. L. 100-690), Congress included administrative civil penalty authority in the case of aircraft registration and recordation violations related to drug trafficking. This civil penalty assessment authority is identical to the authority under the "Demonstration Program," except that it is permanent. 49 U.S.C. 1471(a)(3). In addition, civil penalty assessments under the Hazardous Materials Transportation Act (49 U.S.C. 1809), like those under the Drug Enforcement Assistance Act, would continue to be subject to the same rules of practice at issue, even should the authority under section 905 of the Federal Aviation Act sunset on April 30, 1990. Letter from Gregory S. Walden, Chief Counsel, to Chairman Oberstar at 1-2 (November 11, 1989).

b. Transfer to the NTSB

At the Subcommittee hearing in November 1989, the FAA agreed to consider the issue of which forum should adjudicate the FAA's civil penalty actions. Many commenters who previously expressed no opinion on the subject now have joined the debate in favor of transferring adjudicatory jurisdiction over civil penalty actions to the NTSB. Many commenters express support for vesting adjudication of civil penalty cases in the NTSB.

Many commenters state their desire for the FAA to transfer authority to adjudicate civil penalties to the NTSB. Some commenters suggest that the FAA "assist" in transferring its authority under the statute to the NTSB. Several commenters also go so far as to suggest that it is within the FAA's power to transfer adjudication of civil penalties to the NTSB. It obviously is not, as other commenters recognize. AOPA remarks that it "may be argued that [transfer to the NTSB] will require legislation and coordination with the NTSB." ALPA states that the issue "would have to be addressed in legislation" and APA repeats that it would require "congressional vesting of adjudicatory power to the NTSB in civil penalty cases." NBAA and AOPA criticize the FAA for failing to invite comment in the NPRM on the transfer of civil penalty adjudicatory functions to the NTSB. However, in one commenter's words, the issue is "outside the scope of the present rulemaking." It is beyond the agency's authority to transfer its adjudicatory functions by rulemaking or any other administrative mechanism. Simply stated, the FAA cannot expand unilaterally the NTSB's statutory jurisdiction to review or adjudicate FAA enforcement actions. Thus, it matters little whether this issue was raised by the agency in its NPRM. Congress, not the FAA or the NTSB, ultimately must resolve the debate.

c. Ability of the FAA Decisionmaker to Raise New Issues on Appeal

NACA, American Airlines, and one private attorney, object to the current language of § 13.233(j)(1), which permits the FAA decisionmaker to raise any issue, *sua sponte*, that is required for proper disposition of the proceedings. Other commenters, including AOPA and the California Aviation Council, raised this issue previously in comments to the final rule issued in August 1988. Although the rule provides that the FAA decisionmaker will give the parties a reasonable opportunity to submit *arguments* on a new issue before making any decision on appeal, these commenters object to the fact that the rule does not allow the respondent an opportunity to submit *evidence* and develop the record with respect to the "new" issue raised by the decisionmaker on appeal. In addition, NACA asserts that the rule violates section 554(b)(3) of the Administrative Procedure Act, which requires that persons entitled to notice of an agency hearing shall be timely informed of the matters of fact and law asserted.

For a few commenters, this perception persists although § 13.233(j)(1) was neither intended nor has it been used to allow the Administrator to consider matters outside the record developed before the administrative law judge. Section 556(e) and section 557(b) of the Administrative Procedure Act restrain a decisionmaker, both at the hearing and appellate level, from considering matters outside the record. This provision provided the Administrator with the latitude only to consider issues, developed during an administrative

proceeding and contained in the record, that may not have been raised or relied upon by the parties in their appellate arguments, but which could be dispositive of the appeal before the decisionmaker. As such, the rule applied equally to respondents and the agency and did not operate, either explicitly or implicitly, to allow the Administrator to "rectify mistakes and oversights" by agency attorneys at the hearing, as one commenter has asserted.

The FAA believes that the rules of practice, as currently written, adequately protect the parties. The Administrator, as the FAA decisionmaker, already has the authority to remand a case "for any proceedings that the FAA decisionmaker determines may be necessary" pursuant to § 13.233(j). The agency is confident that the Administrator will exercise this authority in all appropriate cases, including those rare occasions where a "new" issue raised on appeal requires consideration of additional evidence or testimony.

However, in order to remove any doubt on this point and to assuage the concerns of these commenters, the agency is adding new language to § 13.233(j)(1), which makes clear that if an issue raised on the FAA decisionmaker's own initiative requires consideration of additional evidence or testimony, the FAA decisionmaker will remand the case to the administrative law judge for further proceedings and an initial decision related to that issue. This change will ensure that the parties are given an opportunity to develop a full evidentiary record on all such issues.

A remand for further evidence or testimony normally will not be required where the "new" issue raised is purely a legal one, or where the issue was sufficiently addressed at the hearing below but was not covered in the briefs on appeal, and § 13.233(j)(1) now so states. In such cases, the notice requirement of the Administrative Procedure Act will be met by providing the parties with an opportunity to submit written arguments to the Administrator. Of course, the Administrator's determination as to whether a remand is required under the revised rule would be subject to judicial review in a U.S. court of appeals if the agency's final decision is appealed.

d. Equal Access to Justice Act

Two commenters continue to complain that the civil penalty program and the rules of practice are inadequate because they fail to address the applicability of EAJA to the agency's civil penalty cases. As part of a comparison of the FAA and NTSB rules, one commenter notes that EAJA regulations are "conspicuously absent in the current civil penalty rules." The commenter believes that this "omission" reflects that the civil penalty rules "are still heavily one-sided in favor of the FAA and replete with provisions unfavorable to any unfortunate respondent subject to them."

The FAA issued an NPRM, requesting comment on proposed EAJA regulations, on July 10, 1989. 54 FR 29978; July 17, 1989. Four comments were received on the NPRM and considered by the agency before promulgation of an interim final rule. The FAA issued an interim final rule implementing EAJA regulations on October 27, 1989. 54 FR 46196; November 1, 1989. The interim final rule is effective until such time as the Department-wide EAJA regulations are updated and incorporate the civil penalty adjudications before the agency. The agency's EAJA regulations are contained in Part 14 of the Federal Aviation Regulations.

e. Comments on Substantive Areas of Regulation and the Agency's Compliance and Enforcement Program

Several entities and individuals used the opportunity for comment on the NPRM to espouse positions on issues of interest to them. Most of these issues, although superficially related to the rules of practice, clearly are beyond the scope of this rulemaking.

For example, NATA recommends several modifications to "enhance the compliance process" and promote an operator's understanding of the agency's compliance and enforcement program. NATA and the joint comments of AOCI and AAAE both express concern about how airport operator security violations are handled by the FAA, and specifically address the issue of an airport operator's potential liability for violations committed by tenants at the airport. At the public meeting, Alaska Airlines and NBAA discussed the current "environment" and "perspectives" of certain members of the aviation community with respect to a compliance and enforcement program. Both commenters stress the desire for emphasis on "voluntary compliance" with the FAA's safety regulations in any enforcement program. Last, ATA states that the civil penalty program will not work "until the agency creates sensible enforcement priorities." ATA suggests that the FAA adopt a leadership role in developing a consensus on the "appropriate uses" of the civil penalty program. Like Alaska Airlines, ATA objects to the agency's policy regarding FAA tests conducted to determine an air carrier's detection of simulated weapons at carrier screening checkpoints and any enforcement actions that arise from a carrier's failure to detect a simulated weapon.

Many of these comments express concerns that should be raised in other agency rulemaking actions. Some comments express concern about broad substantive areas that are more appropriately addressed by the agency in the normal course as a matter of policy than rulemaking. There are more appropriate and more efficient avenues for consideration of these issues than the FAA's NPRM on the rules of practice in civil penalty proceedings. Because these issues are beyond the scope of the NPRM, both technically and practically, they cannot and should not be addressed in this rulemaking, which is intended only to make specific changes to procedural rules of practice.

f. Comments on Sections of the Rules not Raised in the NPRM

A few commenters object to other sections of the rules that were not raised in the NPRM issued in February 1990. Although several of those objections have merit, they are beyond the scope of this rulemaking. Nevertheless, the agency is requesting comment on those issues in the NPRM published in a separate part of today's **Federal Register**. As such, the FAA is not amending the rules of practice as suggested by the commenters because other interested persons did not have an opportunity to review the relevant sections and any proposed revisions or discussion submitted by the commenters. While the FAA is not including a specific proposal on several of these issues in the NPRM, the agency is soliciting comment on the issues from interested parties to expedite the rulemaking.

Regulatory Evaluation

The FAA has determined that this final rule is not a major rule under the criteria of Executive Order 12291; thus, the FAA is not required to prepare a Regulatory Impact Analysis under either the Executive Order or the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979).

In nonmajor rulemaking actions, the DOT Regulatory Policies and Procedures require the FAA to prepare a regulatory evaluation, analyzing the economic consequences of proposed regulations and quantifying, to the extent practicable, the estimated costs and anticipated benefits and impacts of regulations. The FAA believes that the

changes to the rules of practice adopted in this document, aimed primarily at the appearance of fairness, do not in any economic terms significantly alter the basic process by which civil penalties not exceeding $50,000 are adjudicated within the agency. Rather, these changes address only those sections of the rules of practice that have been the subject of criticism and specific comment by the aviation industry. For example, the amended sections of the rules of practice change the designation of a document filed in civil penalty actions, expand certain sections of the rules to reflect existing statutes or regulations, eliminate provisions perceived by some to favor the agency, and expand the discretion of an administrative law judge in several areas.

The FAA did not identify, and the commenters did not provide, any specific economic consequences that can be attributed to the procedural changes adopted in this final rule. The FAA anticipates that the changes adopted herein will not result in any costs to respondents or the agency. However, adoption of the changes in the final rules could generate cost-relieving benefits to the agency and respondents, although to what extent has not been determined. If there are any costs or benefits associated with the changes to specific sections of the rules, the FAA expects their value, if any, to be minimal under the criteria of applicable Executive Orders, statutes, or regulations. Since there are no costs expected to accrue from this rule and only minimal benefits expected, the FAA is not required to prepare a full regulatory evaluation of the changes adopted in this final rulemaking document.

Nevertheless, the agency reviewed the amendments adopted herein to determine if there were any economic consequences attributable to adopting the proposals in the NPRM. The FAA specifically requested that the commenters discuss any economic consequences so that the FAA could prepare, if necessary, a full regulatory evaluation of the changes to the rules of practice or the agency's policies. With the exception of NBAA's limited comment on the issue of submission of written arguments, the commenters did not submit for the agency's review any data regarding potential costs or expected benefits and impacts of any changes or proposals in the NPRM or suggestions made by the commenters.

The commenters did not discuss any significant economic impact, positive or negative, on small entities, as those terms are defined in the Regulatory Flexibility Act of 1980, that would arise by adopting the proposals in the NPRM. Commenters also failed to note any expected impact on trade opportunities for U.S. firms operating outside the United States or foreign firms operating within the United States. As anticipated in the NPRM, the FAA believes that neither small entities nor trade opportunities for businesses will be affected by amendment of the rules of practice as discussed herein. The commenters did not identify or discuss any Federalism issues that may be adversely affected if the proposals were adopted. It was the FAA's preliminary opinion in the NPRM and current opinion in this final rule that the changes adopted by the FAA do not have sufficient Federalism implications to warrant preparation of a Federalism Assessment under the criteria of Executive Order 12612.

Conclusion

The FAA has determined that the final rule is not a major regulation under the criteria of Executive Order 12291 and, thus, this rulemaking action does not warrant preparation of a Regulatory Impact Analysis. The FAA also certifies that the changes adopted in this final rule will not have a significant economic impact, positive or negative, on a substantial number of small entities. Because neither the FAA nor the commenters have identified any specific economic consequences associated with the changes, and the agency expects little or no cost or benefit to accrue from the changes, preparation of a full regulatory evaluation is not required. Because of the interest expressed by the public on the rules of practice, the FAA has determined that this final rule is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979).

List of Subjects

14 CFR Part 13

Enforcement procedures, Investigations, Penalties.

14 CFR Part 14

Equal access to justice, Lawyers.

The Amendments

Accordingly, the FAA amends part 13 and part 14 of the Federal Aviation Regulations (14 CFR parts 13, 14) as follows:

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

1. The authority citation for part 13 is revised to read as follows:

Authority: 49 U.S.C. App. 1354 (a) and (c), 1374(d), 1401–1406, 1421–1428, 1471, 1475, 1481, 1482 (a), (b), and (c), and 1484–1489, 1523 (Federal Aviation Act of 1958) (as amended, 49 U.S.C. App. 1471(a)(3) (Federal Aviation Administration Drug Enforcement Assistance Act of 1988); 49 U.S.C. App. 1475 (Airport and Airway Safety and Capacity Expansion Act of 1987); 49 U.S.C. App. 1655(c) (Department of Transportation Act, as revised, 49 U.S.C. 106(g)); 49 U.S.C. 1727 and 1730 (Airport and Airway Development Act of 1970); 49 U.S.C. 1808, 1809, and 1810 (Hazardous Materials Transportation Act); 49 U.S.C. 2218 and 2219 (Airport and Airway Improvement Act of 1982); 49 U.S.C. 2201 (as amended, 49 U.S.C. App. 2218, Airport and Airway Safety and Capacity Expansion Act of 1987)); 18 U.S.C. 6002 and 6004 (Organized Crime Control Act of 1970); 49 CFR 1.47 (f), (k), and (q) (Regulations of the Office of the Secretary of Transportation).

2. Section 13.15 (a)(1) and (a)(2) are revised to read as follows:

§ 13.15 Civil penalties: Federal Aviation Act of 1958, as amended, involving an amount in controversy in excess of $50,000; an in rem action; seizure of aircraft; or injunctive relief.

(a) * * *

(1) Any person who violates any provision of Title III, V, VI, or XII of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than the amount specified in the Act for each violation in accordance with section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*).

(2) Any person who violates section 404(d) of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than the amount specified in the Act for each violation in accordance with section 404(d) or section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1374, 1471, *et seq.*).

* * * * *

3. Section 13.16 is amended by revising paragraphs (a)(1), (a)(2), (c), (e)(3), (g)(3), (h), (l), (m), and (p) to read as follows:

§ 13.16 Civil Penalties: Federal Aviation Act of 1958, involving an amount in controversy not exceeding $50,000; Hazardous Materials Transportation Act.

(a) * * *

(1) Any person who violates any provision of Title III, V, VI, or XII of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than the amount specified in the Act for each violation in accordance with section 901

of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*).

(2) Any person who violates section 404(d) of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than the amount specified in the Act for each violation in accordance with section 404(d) or section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1374, 1471, *et seq.*).

* * * * *

(c) The authority of the Administrator, under sections 901 and 905 of the Federal Aviation Act of 1958, as amended, and section 110 of the Hazardous Materials Transportation Act, to initiate and assess civil penalties for a violation of those Acts, or a rule, regulation, or order issued thereunder, is delegated to the Deputy Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for a region or center. The authority of the Administrator to refer cases to the Attorney General of the United States, or the delegate of the Attorney General, for the collection of assessed civil penalties, is delegated to the Chief Counsel, the Deputy Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for a region or center.

* * * * *

(e) * * *

(3) The person shall request a hearing, pursuant to paragraph (i) of this section, in which case a complaint shall be issued and shall be filed with the hearing docket clerk.

* * * * *

(g) * * *

(3) The person shall request a hearing, pursuant to paragraph (i) of this section, in which case a complaint shall be issued and shall be filed with the hearing docket clerk.

(h) *Complaint.* A complaint shall be issued if the person charged with a violation requests a hearing in accordance with paragraph (e)(3) or (g)(3) of this section.

* * * * *

(l) *Hearing.* If the person charged with a violation requests a hearing pursuant to paragraph (e)(3) or paragraph (g)(3) of this section, a complaint shall be issued and shall be filed with the hearing docket clerk. The procedural rules in subpart G of this part apply to the hearing and any appeal. At the close of the hearing, the administrative law judge shall issue, either orally on the record or in writing, an initial decision, including the reasons for the decision, that contains findings or conclusions on the allegations contained, and the civil penalty sought, in the complaint. The initial decision issued by the administrative law judge shall become an order assessing civil penalty if a party does not appeal the administrative law judge's initial decision to the FAA decisionmaker.

(m) *Appeal.* Either party may appeal the administrative law judge's initial decision to the FAA decisionmaker pursuant to the procedures in subpart G of this part. If a party files a notice of appeal pursuant to § 13.233 of subpart G, the effectiveness of the initial decision is stayed until a final decision and order of the Administrator has been entered on the record. The FAA decisionmaker shall review the record and issue a final decision and order of the Administrator that affirms, modifies, or reverses the initial decision. The FAA decisionmaker shall not assess a civil penalty in an amount greater than the amount stated in the complaint.

* * * * *

(p) *Compromise.* The Administrator may compromise any civil penalty, assessed in accordance with sections 901 and 905 of the Federal Aviation Act of 1958, as amended, involving an amount in controversy not exceeding $50,000, or any civil penalty assessed in accordance with section 901 of the Federal Aviation Act of 1958, as amended, and section 110 of the Hazardous Materials Transportation Act, at any time prior to referring the order assessing civil penalty to the United States Attorney for collection. A civil penalty compromise may include an agreement that the agency makes no finding of a violation, in which case the order assessing civil penalty shall be entitled "order assessing civil penalty/settlement without finding of violation." The order shall expressly provide that the agency makes no finding of a violation and the compromise agreement is not admissible as evidence of a prior violation in any subsequent civil penalty proceeding or certificate action proceeding.

4. Section 13.201 is amended by revising paragraphs (a)(1) and (a)(2) to read as follows:

§ 13.201 Applicability.

(a) * * *

(1) A civil penalty action in which a complaint has been issued for an amount not exceeding $50,000 for a violation arising under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), or a rule, regulation, or order issued thereunder.

(2) A civil penalty action in which a complaint has been issued for a violation arising under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*) and the Hazardous Materials Transportation Act (49 U.S.C. 1801, *et seq.*), or a rule, regulation, or order issued thereunder.

* * * * *

5. Section 13.202 is amended by removing the definition "Order of Civil Penalty" and by revising the definitions of "Agency attorney," "Complaint," "Order assessing civil penalty," "Party," and "Respondent" to read as follows:

§ 13.202 Definitions.

* * * * *

Agency attorney means the Deputy Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Assistant Chief Counsel for a region or center, or an attorney on the staff of the Assistant Chief Counsel for Regulations and Enforcement or the Assistant Chief Counsel for a region or center who prosecutes a civil penalty action. An agency attorney shall not include the Chief Counsel, the Assistant Chief Counsel for Litigation, or any attorney on the staff of the Assistant Chief Counsel for Litigation who advises the FAA decisionmaker regarding an initial decision or any appeal to the FAA decisionmaker or who is supervised in that action by a person who provides such advice in a civil penalty action.

* * * * *

Complaint means a document issued by an agency attorney alleging a violation of the Federal Aviation Act of 1958, as amended, or a rule, regulation, or order issued thereunder, or the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder, which has been filed with the hearing docket after a hearing has been requested pursuant to § 13.16(e)(3) or § 13.16(g)(3) of this part.

* * * * *

Order assessing civil penalty means an order issued by an agency attorney, or an initial decision issued by an administrative law judge that is not appealed to the FAA decisionmaker, that directs a person to pay a civil penalty.

Party means the agency attorney, or the respondent named in a complaint.

* * * * *

Respondent means a person to whom a civil penalty is directed and who has received a complaint.

6. Section 13.203 is revised to read as follows:

§ 13.203 Separation of functions.

(a) Civil penalty proceedings, including hearings, shall be prosecuted by an agency attorney.

(b) An FAA employee engaged in the performance of investigative or prosecutorial functions in a civil penalty action shall not, in that case or a factually-related case, participate or give advice in a decision by the administrative law judge or by the FAA decisionmaker on appeal, except as counsel or a witness in the public proceedings.

(c) The Chief Counsel, the Assistant Chief Counsel for Litigation, or attorneys on the staff of the Assistant Chief Counsel for Litigation will advise the FAA decisionmaker regarding an initial decision or any appeal of that civil penalty action to the FAA decisionmaker.

7. Section 13.208 is amended by revising paragraph (a) to read as follows:

§ 13.208 Complaint.

(a) The agency attorney shall serve the original complaint on the person requesting the hearing.

* * * * *

8. Section 13.209 is amended by revising paragraphs (a), (d), and (f) to read as follows:

§ 13.209 Answer.

(a) *Writing required.* A person who receives a complaint shall file a written answer to the complaint, or a motion pursuant to § 13.218(f) (1) through (4) of this subpart, not later than 30 days after service of the complaint. The answer may be in the form of a letter but must be dated and signed by the person responding to the complaint. An answer may be typewritten or may be legibly handwritten.

* * * * *

(d) *Specific denial of allegations required.* A person filing an answer shall admit, deny, or state that the person is without sufficient knowledge or information to admit or deny each allegation in each numbered paragraph of the complaint. A general denial of the complaint is deemed a failure to file an answer. Any statement or allegation contained in the complaint that is not specifically denied in the answer is deemed an admission of the truth of that allegation.

* * * * *

(f) *Failure to file answer.* A person's failure to file an answer without good cause is deemed an admission of the truth of each allegation contained in the complaint and an order assessing civil penalty shall be issued.

9. Section 13.218 is amended by revising paragraph (f)(1), the introductory text of paragraph (f)(2) and paragraphs (f)(2)(ii) and (f)(3) to read as follows:

§ 13.218 Motions.

* * * * *

(f) * * *

(1) *Motion to dismiss for insufficiency.* A party may file a motion to dismiss the complaint for insufficiency instead of an answer. If the administrative law judge denies the motion to dismiss the complaint for insufficiency, the party who received the complaint shall file an answer not later than 10 days after service of the administrative law judge's denial of the motion. A motion to dismiss the complaint for insufficiency must show that the complaint fails to state a violation of the Federal Aviation Act of 1958, as amended, or a rule, regulation, or order issued thereunder, or a violation of the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder.

(2) *Motion to dismiss.* A party may file a motion to dismiss a complaint instead of an answer, specifying the grounds for dismissal.

* * * * *

(ii) If the administrative law judge grants a motion to dismiss and terminates the proceedings without a hearing, the agency attorney may file an appeal pursuant to § 13.233 of this subpart. If the administrative law judge grants a motion to dismiss in part, the agency attorney may appeal the administrative law judge's decision to dismiss part of the complaint under the provisions of § 13.219(c) of this subpart. If required by the decision on appeal, the respondent shall file an answer with the administrative law judge and shall serve a copy of the answer on each party not later than 10 days after service of the decision on appeal.

(3) *Motion for more definite statement.* A party may file a motion for more definite statement of any pleading which requires a response under this subpart. A party shall set forth, in detail, the indefinite or uncertain allegations contained in a complaint or response to any pleading and shall submit the details that the party believes would make the allegation or response definite and certain.

(i) *Complaint.* A party may file a motion requesting a more definite statement of the allegations contained in the complaint instead of an answer. If the administrative law judge grants the motion, and the agency attorney does not supply a more definite statement not later than 15 days after service of the order granting the motion, the administrative law judge shall strike the allegations in the complaint to which the motion is directed. If the administrative law judge denies the motion, the respondent shall file an answer with the administrative law judge and shall serve a copy of the answer on each party not later than 10 days after service of the order of denial.

(ii) *Answer.* A party may file a motion requesting a more definite statement if an answer fails to clearly respond to the allegations in the complaint. If the administrative law judge grants the motion, the respondent shall supply a more definite statement not later than 15 days after service of the ruling on the motion. If the respondent fails to supply a more definite statement, the administrative law judge shall strike those statements in the answer to which the motion is directed. A party's failure to supply a more definite statement is deemed a failure to answer and the unanswered allegations in the complaint are deemed admitted.

* * * * *

10. Section 13.219 is amended by revising paragraph (c)(4) to read as follows:

§ 13.219 Interlocutory appeals.

* * * * *

(c) * * *

(4) A ruling by the administrative law judge granting, in part, a respondent's motion to dismiss a complaint pursuant to § 13.218(f)(2)(ii).

* * * * *

11. Section 13.220 is amended by revising paragraph (l)(3) to read as follows:

§ 13.220 Discovery.

* * * * *

(l) * * *

(3) *Effect of admission.* Any matter admitted or deemed admitted under this section is conclusively established for the purpose of the hearing and appeal.

* * * * *

12. Section 13.227 is revised to read as follows:

§ 13.227 Expert or opinion witnesses.

An employee of the agency may not be called as an expert or opinion witness, for any party other than the agency, in any proceeding governed by this subpart. An employee of a respondent may not be called by an agency attorney as an expert or opinion witness for the agency in any proceeding governed by this subpart to which the respondent is a party.

13. Section 13.231 is revised to read as follows:

§ 13.231 Argument before the administrative law judge.

(a) *Arguments during the hearing.* During the hearing, the administrative law judge shall give the parties a reasonable opportunity to present arguments on the record supporting or opposing motions, objections, and rulings if the parties request an opportunity for argument. The administrative law judge may request written arguments during the hearing if the administrative law judge finds that submission of written arguments would be reasonable.

(b) *Final oral argument.* At the conclusion of the hearing and before the administrative law judge issues an initial decision in the proceedings, the parties are entitled to submit oral proposed findings of fact and conclusions of law, exceptions to rulings of the administrative law judge, and supporting arguments for the findings, conclusions, or exceptions. At the conclusion of the hearing, a party may waive final oral argument.

(c) *Posthearing briefs.* The administrative law judge may request written posthearing briefs before the administrative law judge issues an initial decision in the proceedings if the administrative law judge finds that submission of written arguments would be reasonable. If a party files a written posthearing brief, the party shall include proposed findings of fact and conclusions of law, exceptions to rulings of the administrative law judge, and supporting arguments for the findings, conclusions, or exceptions. The administrative law judge shall give the parties a reasonable opportunity, not more than 30 days after receipt of the transcript, to prepare and submit the briefs.

14. Section 13.232 is revised to read as follows:

§ 13.232 Initial decision.

(a) *Contents.* The administrative law judge shall issue an initial decision at the conclusion of the hearing. In each oral or written decision, the administrative law judge shall include findings of fact and conclusions of law, and the grounds supporting those findings and conclusions, upon all material issues of fact, the credibility of witnesses, the applicable law, any exercise of the administrative law judge's discretion, the amount of any civil penalty found appropriate by the administrative law judge, and a discussion of the basis for any order issued in the proceedings. The administrative law judge is not required to provide a written explanation for rulings on objections, procedural motions, and other matters not directly relevant to the substance of the initial decision. If the administrative law judge refers to any previous unreported or unpublished initial decision, the administrative law judge shall make copies of that initial decision available to all parties and the FAA decisionmaker.

(b) *Oral decision.* Except as provided in paragraph (c) of this section, at the conclusion of the hearing, the administrative law judge shall issue the initial decision and order orally on the record.

(c) *Written decision.* The administrative law judge may issue a written initial decision not later than 30 days after the conclusion of the hearing or submission of the last posthearing brief if the administrative law judge finds that issuing a written initial decision is reasonable. The administrative law judge shall serve a copy of any written initial decision an each party.

(d) *Order assessing civil penalty.* The initial decision issued by the administrative law judge shall become an order assessing civil penalty if the administrative law judge finds that an alleged violation occurred and determines that a civil penalty, in an amount found appropriate by the administrative law judge, is warranted.

15. Section 13.233 is amended by revising paragraph (j)(1) to read as follows:

§ 13.233 Appeal from initial decision.

* * * * *

(j) * * *

(1) The FAA decisionmaker may raise any issue, on the FAA decisionmaker's own initiative, that is required for proper disposition of the proceedings. The FAA decisionmaker will give the parties a reasonable opportunity to submit arguments on the new issues before making a decision on appeal. If an issue raised by the FAA decisionmaker requires the consideration of additional testimony or evidence, the FAA decisionmaker will remand the case to the administrative law judge for further proceedings and an initial decision related to that issue. If an issue raised by the FAA decisionmaker is solely an issue of law or the issue was addressed at the hearing but was not raised by a party in the briefs on appeal, a remand of the case to the administrative law judge for further proceedings is not required but may be provided in the discretion of the FAA decisionmaker.

* * * * *

PART 14—RULES IMPLEMENTING THE EQUAL ACCESS TO JUSTICE ACT OF 1980

16. The authority citation for part 14 is revised to read as follows:

Authority: 5 U.S.C. 504 (Equal Access to Justice Act); 49 U.S.C. App. 1354(a) and (c) (Department of Transportation Act, as revised, 49 U.S.C. 106(g)).

17. Section 14.05 is amended by revising paragraph (e) to read as follows:

§ 14.05 Allowance fees and expenses.

* * * * *

(e) Fees may be awarded only for work performed after the issuance of a complaint.

Issued in Washington, DC, on April 17, 1990.

James B. Busey,

Administrator.

[FR Doc. 90-9174 Filed 04-17-90; 12:23 pm]

BILLING CODE 4910-13-M

NPRM 90-13

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 13

[Docket No. 25690; Notice No. 90-13]

Rules of Practice for FAA Civil Penalty Actions

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice invites public comment on the rules of practice regarding the FAA's civil penalty authority in actions not exceeding $50,000 for a violation of the Federal Aviation Act of 1958, or any rule, regulation, or order issued thereunder, and in actions regardless of amount for a violation of the Hazardous Materials Transportation Act, or any rule, regulation or order issued thereunder. In accordance with a decision of the U.S. Court of Appeals for the District of Columbia Circuit, on April 13, 1990, the FAA is publishing the initiation procedures and the rules of practice in their entirety for public comment by interested persons.

DATES: Written comments on the notice of proposed rulemaking must be received on or before May 21, 1990

ADDRESSES: Written comments, in triplicate, on this notice may be mailed or delivered to the Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-10), Room 915G, Docket No. 25690, 800 Independence Avenue SW., Washington, DC 20591. Comments submitted on the notice must be marked "Docket No. 25690." Comments may be inspected in the Rules Docket (room 915G) between 8:30 a.m. and 5 p.m. on weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Denise Daniels Ross, Special Counsel to the Chief Counsel (AGC-3), Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-3773.

SUPPLEMENTARY INFORMATION

Comments Invited

This notice of proposed rulemaking (NPRM) is issued to solicit broad public participation in rulemaking proceedings on specific areas of the rules of practice in civil penalty proceedings. Interested persons are invited to participate in this rulemaking proceeding by submitting such written data, views, or arguments as they may desire. Comments must identify the regulatory docket number or notice number of this document and must be submitted in triplicate to the address listed above. All comments received on or before the closing date for comments will be considered before taking further rulemaking action. Persons wishing the FAA to acknowledge receipt of their comments must submit with their comments a preaddressed postcard on which the following statement is made: "Comments to Docket No. 25690." The postcard will be date and time stamped and returned to the commenter. All comments submitted in response to this notice will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with FAA personnel involved in this rulemaking will be filed in the docket.

Availability of the NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attention: Public Information Center (APA-430), 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-3484. Communications must identify the notice number of this NPRM. Persons interested in being placed on the mailing list for future NPRMs also should request a copy of Advisory Circular No. 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

Background

On August 31, 1988, by final rule, the FAA promulgated rules of practice (53 FR 34646; Sept. 7, 1988) for civil penalty actions conducted under a statutory amendment (Pub. L. 00-223; Dec. 30, 1987) to the Federal Aviation Act of 1958, as amended. That amendment empowers the Administrator to assess civil penalties, not to exceed $50,000, for violations of the Federal Aviation Act and the FAA's safety regulations promulgated thereunder. Under this authority, a civil penalty may be assessed only after notice and an opportunity for a hearing on the record. In the final rule, the FAA invited interested persons to comment on the rules of practice.

On March 17, 1989, the FAA issued a detailed disposition of the 20 comments submitted on the rules of practice, responding to the commenters' objections to specific provisions of the rules of practice. 54 FR 11914; March 22, 1989. In the disposition of comments, the agency explained the purpose of the rules of practice and discussed its expectations of the manner in which cases would proceed under those rules.

The Air Transport Association of America (ATA) filed a petition for review in the United States Court of Appeals for the District of Columbia (No. 89-1195), challenging the agency's promulgation of the final rule and the rules of practice for civil penalty actions. Several persons in their individual capacity, the Aircraft Owners and Pilots Association (AOPA), the National Air Carrier Association (NACA), the Air Line Pilots Association (ALPA), and America West intervened in support of ATA's petition for review.

On April 13, 1990, the court of appeals issued its decision in *Air Transport Association* v. *Department of Transportation*. In a 2-1 decision, the court agreed with the petitioner that the FAA was obliged by section 553 of the Administrative Procedure Act to provide notice and comment before the rules of practice in civil penalty actions were promulgated. The court held that the *procedural* challenge to promulgation of the rules of practice in August 1988 was ripe for review and granted the petition for review on that ground. The court expressed no opinion on the ripeness or the merits of the Air Transport Association's several substantive challenges to the rules of practice.

The court ordered the FAA "not to initiate further prosecutions * * * until the agency has engaged in further rulemaking in accord with section 553." Slip op. at 21. In the exercise of its "equitable remedial powers," the court stated, "[T]he FAA is free to hold *pending* cases in abeyance while it engages in further rulemaking. If and when the FAA promulgates a final rule for adjudication of administrative penalty actions, it may then resume prosecution of these cases." *Id.* at 20-21.

In accordance with the court's decision, all FAA prosecuting attorneys will hold in abeyance all civil penalty cases initiated under the rules of practice and will not initiate any notice of proposed civil penalty until further notice. They also will not proceed even with informal procedures, such as informal conferences, until further notice. Chief Administrative Law Judge Mathias, of the Office of Hearings of the Department of Transportation, has also requested the administrative law judges to postpone hearings that had been scheduled and not to schedule any future hearings until further notice. The FAA and the Office of Hearings of the Department of Transportation will make every effort to notify all persons whose cases are pending of the court's

decision, whether or not a hearing has been held, scheduled, or not yet scheduled.

Because all proceedings under the rules of practice have been suspended as a result of the court's decision, the agency intends to move expeditiously with this rulemaking. Therefore, the agency requests public comments within 30 days. The agency believes a 30-day comment period is reasonable, given the familiarity of the aviation community with the current (and proposed) rules of practice, and the several previous opportunities the public has had to comment on these rules. The agency also believes that good cause exists to make any rules of practice, as may be adopted or amended following public comment, immediately effective upon publication of a final rule, and so intends at this time. The court's decision permits the FAA to "resume prosecution of [pending] cases" upon promulgation of a final rule, slip op. at 21, and the agency believes that immediate implementation of rules of practice on publication of a final rule in the **Federal Register** will serve the interests all parties share in fairness and expedition. The FAA intends to republish the entire initiation procedures and any rules of practice adopted in a final rule because the FAA distributes the **Federal Register** document to those charged with an alleged violation.

Discussion

In its opinion, the court stated that "Insofar as the FAA's pending notice of proposed rulemaking [issued on February 28, 1990 (55 FR 7980; March 6, 1990)] seeks public comment on the individual Rules that the agency intends to amend, the agency may rely on the outcome of that rulemaking as a partial fulfillment of this mandate." Slip op. at 20. Concurrently with the issuance of this NPRM, the FAA has published in a separate part of today's **Federal Register** a final rule, adopting changes to specific rules of practice. The rules of practice, published herein for comment, include the changes adopted pursuant to that final rule. In light of the court's decision, the FAA has suspended the effective date of the changes to the rules of practice contained in the final rule, pending further notification in the **Federal Register.**

Several commenters to the NPRM issued in February 1990, in addition to addressing the issues raised in the notice, also express opinions on other sections of the rules of practice that are outside the scope of that notice. Generally, the FAA is not including specific proposals here or adopting additional suggested changes to other rules of practice because other interested persons did not have an opportunity to review the relevant sections and any proposed revisions or discussion submitted by the commenters. Nevertheless, these comments indicate concern with other sections of the rules that heretofore may not have been raised by previous commenters. In this NPRM, the FAA has presented those concerns and solicits comment on those issues as well as on any other issues presented by the rules of practice proposed in this document.

1. *Limitations period.* Six commenters (ALPA, Experimental Aircraft Association (EAA), ATA, Allied Pilots Association (APA), NACA, and one private attorney) want the FAA to adopt a time limit within which the agency would be required to initiate a notice of proposed civil penalty after an alleged violation of the Federal Aviation Regulations has occurred. EAA suggests that the FAA "modify" section 901 of the Federal Aviation Act (49 U.S.C. App. 1471) to incorporate a time limit. Of course, the agency does not have the authority unilaterally to modify any statute.

NACA, ALPA, EAA, and APA note the NTSB's stale complaint rule (49 CFR 821.33), which requires the FAA to initiate a certificate action against an airman within six months of the alleged violation. A certificate action brought against an airman more than six months after the alleged violation may be dismissed by the NTSB unless the FAA can demonstrate good cause for the delay, or unless the airman's qualifications to hold an airman certificate are at issue.

APA suggests that the FAA simply adopt the NTSB rule, while other commenters suggest that the FAA adopt a 6-month time limit with regard to the initiation of all enforcement actions. These commenters assert that an enforcement action initiated more than six months after an alleged violation is unfair, primarily because the "ability to preserve evidence is seriously compromised" after more than six months.

This suggestion was initially made in comments to the rules of practice promulgated in August 1988. In its disposition of those comments, the agency noted that, in the absence of any specific limitations period in the Federal Aviation Act or the Hazardous Materials Transportation Act, 28 U.S.C. 2462 provides a 5-year period. 54 FR 11919; March 22, 1989. That section provides in pertinent part:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued[.]

At the time, the agency declined to adopt a shorter time period by regulation, concluding that such a regulation "is not necessary to carry out its enforcement responsibilities." 54 FR at 11919–11920.

The FAA recognizes that there may be some merit to a provision that would require the agency to bring a civil penalty within a period shorter than five years. One of the main purposes of the administrative assessment of civil penalties is to avoid the lengthy process that can result when the FAA refers a case to a U.S. Attorney. The FAA has always stated that such a process, which often takes years to be resolved, serves neither the public interest nor the interests of the respondent. The interests of both aviation safety and those regulated by the FAA are best served when action taken by the FAA is expeditious.

Expeditious initiation of a case, however, often is hampered by the agency's limited resources and competing priorities. Given this reality, the agency must strike a balance between the public's interest in having the FAA prosecute violations of its safety regulations, and a respondent's interest in fair and expeditious adjudication of an action. There are many important safety considerations and policy issues that must be explored before the FAA would issue a regulation that mandates a time limit for agency initiation of enforcement actions. Indeed, NACA and ATA state that the FAA should issue an NPRM on the subject.

Notwithstanding the general 5-year limitation period set by Congress, nothing currently prevents a respondent who believes it has been prejudiced by the agency's delay in initiating the case from asserting such prejudice as a defense in an administrative hearing. The agency believes it is within the province and authority of an administrative law judge under section 555(b) of the Administrative Procedure Act to dismiss an action if the respondent demonstrates actual prejudice as a result of the agency's unreasonable delay in initiating enforcement action. That section provides, "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." In applying section 555(b), the

courts have applied a standard of undue delay by the government and prejudice to the respondent. *See, e.g., EEOC* v. *Exchange Security Bank,* 529 F.2d 1214 (5th Cir. 1976); *Chromcraft Corp.* v. *EEOC,* 465 F.2d 745 (5th Cir. 1972); *EEOC* v. *Bell Helicopter,* 426 F. Supp. 785, 792 (N.D. Tex. 1976). Consequently, if a respondent were unable adequately to defend against the FAA's allegations because documents are inadvertently destroyed or witnesses become unavailable due to the agency's delay in initiating a case, the respondent could petition the administrative law judge to dismiss the action, or a portion thereof, on the basis of such prejudice.

While the agency is not prepared at this time to propose specifically a shorter limitations period than that provided by statute, the agency is soliciting comment on this issue from interested parties to allow it to amend the rules of practice in response to comment in this rulemaking. Commenters are asked to state the comparative benefits of a specific time period provision versus a provision that would codify the undue delay and prejudice standard used by administrative agencies and courts pursuant to the Administrative Procedure Act. If a specific time period is supported, commenters should address how the specific time period recommended fits the purpose of a limitations period and offer examples, if any, where the initiation of a case outside of the recommended period resulted in prejudice to a respondent in a civil penalty action, before the FAA or any other agency. Commenters should discuss whether receipt of a letter of investigation within a relatively brief time period would obviate a period of limitations in which a notice of civil penalty must be issued. The commenters should also address the critical date from which the period would run (i.e., the date of alleged violation, the date of discovery of the alleged violation, or some other date), and the critical event which must be taken within the time period (i.e., issuance of notice of proposed civil penalty, letter of investigation). Finally, commenters should discuss whether there would be any circumstances whereby the agency's failure to bring an action within the time specified would be excused.

2. *Verification of pleadings.* A private attorney objects to § 13.220(k)(1) that provides, in pertinent part:

> A party shall answer each interrogatory separately and completely in writing and under oath. A party's attorney may sign the response to the interrogatories if the attorney has verification of authority to sign from the party.

This commenter states that it is common practice in NTSB proceedings for FAA attorneys to sign pleadings on behalf of the agency without an accompanying verification of authorization. The commenter states that, under this section of the FAA's rules, a respondent is required to respond to interrogatories under oath but the agency is not. The commenter suggests that the agency amend § 13.220(k)(1) so that neither party is required to verify its interrogatory responses or both parties are required to so verify. While the rule appears on its face to address both parties to an action, the agency requests comment on this suggestion so that any asymmetry in the rule could be corrected.

3. *Service of documents.* ATA suggests a revision to the rules of practice and the initiation procedures to provide guidance on the appropriate person to accept service of documents on behalf of a respondent. ATA's concern arises from the corporate structure of its members who may not have designated one person or several persons to accept service of documents. ATA suggests that the FAA add a section to the rules of practice or amend § 13.16 to specify that the agency will serve a notice of proposed civil penalty on the person who responded to a letter of investigation or on the president or other designated officer of a company at its principal business address. Subsequent documents could be served on the person who responds to the notice or the attorney of record. ATA states that it makes sense to direct documents in "a manner reasonably calculated to put the company on notice of the formal initiation of a civil penalty." Because of the agency's structure, the FAA understands ATA's concern for guidance on service of documents to large organizations with nationwide operations. ATA suggests that a Departmental rule in economic proceedings (14 CFR 302.8(c)) provides a good model. The FAA requests comment on ATA's suggestion.

4. *Prehearing procedures.* American Airlines suggests revision of the FAA's prehearing procedures in civil penalty cases involving an amount not exceeding $50,000. American believes that the enabling legislation neither contemplated nor justified revision of the prehearing procedures, particularly in light of the differences in those procedures in cases involving civil penalties exceeding $50,000 and those procedures involving civil penalties at or below that amount. American objects specifically to the time limits contained in § 13.16 and proposes changes to the process.

American suggests the following criteria applicable to all civil penalty actions: (1) Specify a time in the rules by which a person must respond to a notice of proposed civil penalty; (2) specify that a person is able to compromise the civil penalty proposed in a notice without a finding of violation; (3) eliminate forfeiture of a right to a hearing even if a respondent does not meet the deadline for responding to a notice; (4) specify that an action will be referred to a U.S. Attorney or a complaint will be filed with the Hearing Docket clerk if an action is not compromised during the prehearing procedures; (5) restrict default judgments or default admissions of liability until after a complaint is filed either in district court or with an administrative law judge. American believes that the FAA and respondents will benefit from "a return to the original prehearing posture" of compromise. The FAA solicits comment on American's suggestion.

Regulatory Evaluation

The FAA has determined that this notice of proposed rulemaking is not a major rule under the criteria of Executive Order 12291; thus, the FAA is not required to prepare a draft Regulatory Impact Analysis under either the Executive Order or the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979).

In nonmajor rulemaking actions, the DOT Regulatory Policies and Procedures require the FAA to prepare a draft regulatory evaluation, analyzing the economic consequences of proposed regulations and quantifying, to the extent practicable, the estimated costs and anticipated benefits and impacts of proposed regulations. This notice invites comment on the agency's rules of practice in civil penalty actions.

Preliminarily, the FAA has not identified any specific economic consequences that would be attributed to the procedural rules. Moreover, the FAA does not anticipate that the proposed rules would result in any significant costs or substantial benefits to respondents or the agency. If there are any costs or benefits associated with the rules of practice, the FAA expects that any economic consequences or impacts would be minimal under the criteria of applicable Executive Orders, statutes, or regulations. If that expectation is accurate, the FAA would not be required to prepare a full regulatory

evaluation of the rules adopted in any final rulemaking document.

Nevertheless, the agency will analyze the economic consequences, if any, of the proposed rules of practice. So that the FAA may prepare, if necessary, a full regulatory evaluation of the rules of practice, commenters are encouraged to submit for the agency's review any data regarding potential costs or expected benefits and impacts of any proposed rule or proposals made by the commenters.

Commenters should discuss any significant economic impact, positive or negative, on small entities, as those terms are defined in the Regulatory Flexibility Act of 1980, that may arise from adopting the rules of practice in this notice. Commenters also should note any expected impact on trade opportunities for U.S. firms operating outside the United States or foreign firms operating within the United States. At this point, the FAA believes that neither small entities nor trade opportunities for businesses would be affected if the proposed rules were adopted. It is the FAA's preliminary opinion that the proposals in this NPRM do not have sufficient Federalism implications to warrant preparation of a Federalism Assessment under the criteria of Executive Order 12612. Commenters should identify and discuss any Federalism issues that may be adversely affected if the proposals are adopted.

Conclusion

The FAA has determined that the NPRM is not a major regulation under the criteria of Executive Order 12291 and, thus, this action does not warrant preparation of a draft Regulatory Impact Analysis. The FAA also expects that the proposals in this NPRM, if adopted, would not have a significant economic impact, positive or negative, on a substantial number of small entities. Because the FAA has been unable to identify any economic consequences associated with the proposals in this NPRM, the agency has not prepared a full draft regulatory evaluation for this rulemaking. The FAA anticipates that there would be little or no economic cost or benefit associated with adoption of these proposals; thus, preparation of a full regulatory evaluation would not be required if the proposed changes are adopted. Because of the interest expressed by the public on the rules of practice, the FAA has determined that this notice of proposed rulemaking is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979).

List of Subjects in 14 CFR Part 13

Enforcement procedures, Investigations, Penalties.

The Proposed Amendments

Accordingly, the FAA amends part 13 of the Federal Aviation Regulations (14 CFR part 13) as follows:

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

1. The authority citation for part 3 continues: to read as follows:

Authority: 49 U.S.C. App. 1354 (a) and (c), 1374(d), 1401–1406, 1421–1428, 1471, 1475, 1481, 1482 (a), (b), and (c), and 1484–1489, 1523 (Federal Aviation Act of 1958) (as amended, 49 U.S.C. App. 1471(a)(3) (Federal Aviation Administration Drug Enforcement Assistance Act of 1988); 49 U.S.C. App. 1475 (Airport and Airway Safety and Capacity Expansion Act of 1987); 49 U.S.C. App. 1655(c) (Department of Transportation Act, as revised, 49 U.S.C. 106(g)); 49 U.S.C. 1727 and 1730 (Airport and Airway Development Act of 1970); 49 U.S.C. 1808, 1809, and 1810 (Hazardous Materials Transportation Act); 49 U.S.C. 2218 and 2219 (Airport and Airway Improvement Act of 1982); 49 U.S.C. 2201 (as amended, 49 U.S.C. App. 2218, Airport and Airway Safety and Capacity Expansion Act of 1987)); 18 U.S.C. 6002 and 6004 (Organized Crime Control Act of 1970); 49 CFR § 1.47 (f), (k), and (q) (Regulations of the Office of the Secretary of Transportation).

2. Section 13.16 is revised to read as follows:

§ 13.16 Civil Penalties: Federal Aviation Act of 1958, involving an amount in controversy not exceeding $50,000; Hazardous Materials Transportation Act.

(a) The following penalties apply to persons who violate the Federal Aviation Act of 1958, as amended, and the Hazardous Materials Transportation Act:

(1) Any person who violates any provision of title III, V, VI, or XII of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than the amount specified in the Act for each violation in accordance with section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*).

(2) Any person who violates section 404(d) of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than the amount specified in the Act for each violation in accordance with section 404(d) or section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1374, 1471, *et seq.*).

(3) Any person who operates aircraft for the carriage of persons or property for compensation or hire (other than an airman serving in the capacity of an airman) is subject to a civil penalty of not more than $10,000 for each violation of Title III, VI, or XII of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order issued thereunder, occurring after December 30, 1987, in accordance with section 901 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*).

(4) Any person who knowingly commits an act in violation of the Hazardous Materials Transportation Act, or any rule, regulation, or order issued thereunder, is subject to a civil penalty of not more than $10,000 for each violation in accordance with section 901 of the Federal Aviation Act of 1958, as amended, and section 110 of the Hazardous Materials Transportation Act (49 U.S.C. 1471 and 1809, *et seq.*). An order assessing civil penalty for a violation under the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder, will be issued only after consideration of—

(i) The nature and circumstances of the violation;

(ii) The extent and gravity of the violation;

(iii) The person's degree of culpability;

(iv) The person's history of prior violations;

(v) The person's ability to pay the civil penalty;

(vi) The effect on the person's ability to continue in business; and

(vii) Such other matters as justice may require.

(b) An order assessing civil penalty may be issued for a violation described in paragraphs (a)(1), (a)(2), (a)(3), and (a)(4) of this section after notice and opportunity for a hearing.

(c) The authority of the Administrator, under sections 901 and 905 of the Federal Aviation Act of 1958, as amended, and section 110 of the Hazardous Materials Transportation Act, to initiate and assess civil penalties for a violation of those Acts, or a rule, regulation, or order issued thereunder, is delegated to the Deputy Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for a region or center. The authority of the Administrator to refer cases to the Attorney General of the United States, or the delegate of the Attorney General, for the collection of assessed civil penalties, is delegated to the Chief Counsel, the Deputy Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for a region or center.

(d) *Notice of proposed civil penalty* A civil penalty action is initiated by

sending a notice of proposed civil penalty to the person charged with a violation of the Federal Aviation Act of 1958, as amended, the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder. The notice of proposed civil penalty contains a statement of the charges and the amount of the proposed civil penalty.

(e) *Procedures following receipt of notice of proposed civil penalty.* Not later than 30 days after receipt of the notice of proposed civil penalty, the person charged with a violation shall do one of the following:

(1) The person shall submit the amount of the proposed civil penalty in which case an order assessing civil penalty shall be issued in that amount.

(2) The person shall participate in the informal procedures provided in paragraph (f) of this section.

(3) The person shall request a hearing, pursuant to paragraph (i) of this section, in which case a complaint shall be issued and shall be filed with the hearing docket clerk.

(f) *Informal procedures.* Not later than 30 days after receipt of the notice of proposed civil penalty, the person charged with a violation, who wants to participate in informal procedures, shall do one of the following:

(1) The person shall submit any information, including documents and witness statements, in writing, to the agency attorney, demonstrating that a violation of the regulations did not occur or that the penalty or the amount of the penalty is not warranted by the circumstances.

(2) The person shall submit a written request to the agency attorney to reduce the proposed civil penalty and shall submit, in writing, the reasons and documents supporting the reduction of the proposed civil penalty, including records indicating a financial inability to pay or records showing that payment of the proposed civil penalty would prevent the person from continuing in business.

(3) The person shall submit a written request to the agency attorney for an informal conference to discuss the matter with the agency attorney and to submit relevant information or documents to the agency attorney.

(g) *Procedures following interim reply or informal conference.* Not later than 10 days after the person charged with a violation receives an interim reply to any submission made in accordance with paragraph (f)(1) or paragraph (f)(2) or not later than 10 days after an informal conference, the person charged with a violation shall do one of the following:

(1) The person shall submit the amount of the proposed civil penalty in which case an order assessing civil penalty shall be issued in that amount.

(2) The person shall submit additional written information to the agency attorney for consideration.

(3) The person shall request a hearing, pursuant to paragraph (i) of this section, in which case a complaint shall be issued and shall be filed with the hearing docket clerk.

(h) *Complaint.* A complaint shall be issued if the person charged with a violation requests a hearing in accordance with paragraph (e)(3) or (g)(3) of this section.

(i) *Request for a hearing.* Any person who receives a notice of proposed civil penalty may request a hearing, pursuant to paragraph (e)(3) or paragraph (g)(3) of this section, to be conducted in accordance with the procedures in subpart G of this part. A person requesting a hearing shall file a written request for a hearing with the agency attorney. The request for a hearing may be in the form of a letter but must be dated and signed by the person requesting a hearing. The request for a hearing may be typewritten or may be legibly handwritten. A person requesting a hearing shall include a suggested location for the hearing in the request for a hearing.

(j) *Order assessing civil penalty.* An order assessing civil penalty shall be issued if the person charged with a violation—

(1) Submits the amount of the proposed civil penalty in which case the order assessing civil penalty shall reflect receipt of the civil penalty;

(2) Does not respond in a timely manner to the notice of proposed civil penalty;

(3) Does not respond in a timely manner to interim replies from the agency attorney under paragraph (g) of this section; or

(4) Does not comply with any agreement reached between the parties during an informal conference.

(k) *Payment.* A person charged with a violation may pay the amount of the civil penalty proposed in the notice or stated in the order, or an amount agreed upon, by sending a certified check or money order, payable to the Federal Aviation Administration, to the agency attorney.

(l) *Hearing.* If the person charged with a violation requests a hearing pursuant to paragraph (e)(3) or paragraph (g)(3) of this section, a complaint shall be issued and shall be filed with the hearing docket clerk. The procedural rules in subpart G of this part apply to the hearing and any appeal. At the close of the hearing, the administrative law judge shall issue, either orally on the record or in writing, an initial decision, including the reasons for the decision, that contains findings or conclusions on the allegations contained, and the civil penalty sought, in the complaint. The initial decision issued by the administrative law judge shall become an order assessing civil penalty if a party does not appeal the administrative law judge's initial decision to the FAA decisionmaker.

(m) *Appeal.* Either party may appeal the administrative law judge's initial decision to the FAA decisionmaker pursuant to the procedures in subpart G of this part. If a party files a notice of appeal pursuant to § 13.233 of subpart G, the effectiveness of the initial decision is stayed until a final decision and order of the Administrator has been entered on the record. The FAA decisionmaker shall review the record and issue a final decision and order of the Administrator that affirms, modifies, or reverses the initial decision. The FAA decisionmaker shall not assess a civil penalty in an amount greater than the amount stated in the complaint.

(n) *Exhaustion of administrative remedies.* A party may appeal only a final decision and order of the Administrator to the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia pursuant to section 1006 of the Federal Aviation Act of 1958, as amended. An order or an initial decision of an administrative law judge, that has not been appealed to the FAA decisionmaker, does not constitute a final order of the Administrator for the purposes of judicial appellate review under section 1006 of the Federal Aviation Act of 1958, as amended.

(o) If a person subject to an order assessing civil penalty does not pay the assessed civil penalty within 60 days after service of the order assessing civil penalty, the Administrator may refer the order to the United States Attorney General, or the delegate of the Attorney General, to begin proceedings in a United States District Court, pursuant to the authority in section 903 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1473), or section 110 of the Hazardous Materials Transportation Act (49 U.S.C. 1809), to collect the civil penalty.

(p) *Compromise.* The Administrator may compromise any civil penalty, assessed in accordance with sections 901 and 905 of the Federal Aviation Act of 1958, as amended, involving an amount in controversy not exceeding $50,000, or any civil penalty assessed in

accordance with section 901 of the Federal Aviation Act of 1958, as amended, and section 110 of the Hazardous Materials Transportation Act, at any time prior to referring the order assessing civil penalty to the United States Attorney for collection. A civil penalty compromise may include an agreement that the agency makes no finding of a violation, in which case the order assessing civil penalty shall be entitled "order assessing civil penalty/settlement without finding of violation." The order shall expressly provide that the agency makes no finding of a violation and the compromise agreement is not admissible as evidence of a prior violation in any subsequent civil penalty proceeding or certificate action proceeding.

3. Part 13, subpart G, (§ 13.201–§ 13.235) is revised to read as follows:

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

Subpart G—Rules of Practice in FAA Civil Penalty Actions

Sec.

Subpart G—Rules of Practice in FAA Civil Penalty Actions

§ 13.201 Applicability.

(a) This subpart applies to the following actions:

(1) A civil penalty action in which a complaint has been issued for an amount not exceeding $50,000 for a violation arising under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301, *et seq.*), or a rule, regulation, or order issued thereunder.

(2) A civil penalty action in which a complaint has been issued for a violation arising under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*) and the Hazardous Materials Transportation Act (49 U.S.C. 1801, *et seq.*), or a rule, regulation, or order issued thereunder.

(b) This subpart applies only to proceedings initiated after September 7, 1988. All other cases, hearings, or other proceedings pending or in progress at the time this subpart is effective are not affected by the rules in this subpart.

(c) Notwithstanding the provisions of paragraph (a) of this section, the United States district courts shall have exclusive jurisdiction of any civil penalty action initiated by the Administrator:

(1) Which involves an amount in controversy in excess of $50,000;

(2) Which is an *in rem* action or in which an *in rem* action based on the same violation has been brought;

(3) Regarding which an aircraft subject to lien has been seized by the United States; and

(4) In which a suit for injunctive relief based on the violation giving rise to the civil penalty has also been brought.

§ 13.202 Definitions.

Administrative law judge means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105.

Agency attorney means the Deputy Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, the Assistant Chief Counsel for a region or center, or an attorney on the staff of the Assistant Chief Counsel for Regulations and Enforcement or the Assistant Chief Counsel for a region or center who prosecutes a civil penalty action. An agency attorney shall not include the Chief Counsel, the Assistant Chief Counsel for Litigation, or any attorney on the staff of the Assistant Chief Counsel for Litigation who advises the FAA decisionmaker regarding an initial decision or any appeal to the FAA decisionmaker or who is supervised in that action by a person who provides such advice in a civil penalty action.

Attorney means a person licensed by a state, the District of Columbia, or a territory of the United States to practice law or appear before the courts of that state or territory.

Complaint means a document issued by an agency attorney alleging a violation of the Federal Aviation Act of 1958, as amended, or a rule, regulation, or order issued thereunder, or the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder, which has been filed with the hearing docket after a hearing has been requested pursuant to § 13.16(e)(3) or § 13.16(g)(3) of this part.

FAA decisionmaker means the Administrator of the Federal Aviation Administration, acting in the capacity of the decisionmaker on appeal, or any person to whom the Administrator has delegated the Administrator's decisionmaking authority in a civil penalty action. As used in this subpart, the FAA decisionmaker is the official authorized to issue a final decision and order of the Administrator in a civil penalty action.

Mail includes U.S. certified mail, U.S. registered mail, or use of an overnight express courier service.

Order assessing civil penalty means an order issued by an agency attorney, or an initial decision issued by an administrative law judge that is not appealed to the FAA decisionmaker, that directs a person to pay a civil penalty.

Party means the agency attorney, or the respondent named in a complaint.

Personal delivery includes hand-delivery or use of a contract or express messenger service. "Personal delivery" does not include the use of Government interoffice mail service.

Pleading means a complaint, an answer, and any amendment of these documents permitted under this subpart.

Properly addressed means a document that shows an address contained in FAA records, a residential, business, or other address submitted by a person on any document provided by this subpart, or any other address shown by other reasonable and available means.

Respondent means a person to whom a civil penalty is directed and who has received a complaint.

§ 13.203 Separation of functions.

(a) Civil penalty proceedings, including hearings, shall be prosecuted by an agency attorney.

(b) An FAA employee engaged in the performance of investigative or

prosecutorial functions in a civil penalty action shall not, in that case or a factually-related case, participate or give advice in a decision by the administrative law judge or by the FAA decisionmaker on appeal, except as counsel or a witness in the public proceedings.

(c) The Chief Counsel, the Assistant Chief Counsel for Litigation, or attorneys on the staff of the Assistant Chief Counsel for Litigation will advise the FAA decisionmaker regarding an initial decision or any appeal of that civil penalty action to the FAA decisionmaker.

§ 13.204 Appearances and rights of parties.

(a) Any party may appear and be heard in person.

(b) Any party may be accompanied, represented, or advised by an attorney or representative designated by the party and may be examined by that attorney or representative in any proceeding governed by this subpart. An attorney or representative who represents a party may file a notice of appearance in the action, in the manner provided in § 13.210 of this subpart, and shall serve a copy of the notice of appearance on each party, in the manner provided in § 13.211 of this subpart, before participating in any proceeding governed by this subpart. The attorney or representative shall include the name, address, and telephone number of the attorney or representative in the notice of appearance.

(c) Any person may request a copy of a document upon payment of reasonable costs. A person may keep an original document, data, or evidence, with the consent of the administrative law judge, by substituting a legible copy of the document for the record.

§ 13.205 Administrative law judges.

(a) *Powers of an administrative law judge.* In accordance with the rules of this subpart, an administrative law judge may:

(1) Give notice of, and hold, prehearing conferences and hearings;

(2) Administer oaths and affirmations;

(3) Issue subpoenas authorized by law and issue notices of deposition requested by the parties;

(4) Rule on offers of proof;

(5) Receive relevant and material evidence;

(6) Regulate the course of the hearing in accordance with the rules of this subpart;

(7) Hold conferences to settle or to simplify the issues by consent of the parties;

(8) Dispose of procedural motions and requests; and

(9) Make findings of fact and conclusions of law, and issue an initial decision.

(b) *Limitations on the power of the administrative law judge.* The administrative law judge shall not issue an order of contempt, award costs to any party, or impose any sanction not specified in this subpart. If the administrative law judge imposes any sanction not specified in this subpart, a party may file an interlocutory appeal of right with the FAA decisionmaker pursuant to § 13.219(c)(4) of this subpart. This section does not preclude an administrative law judge from issuing an order that bars a person from a specific proceeding based on a finding of obstreperous or disruptive behavior in that specific proceeding.

(c) *Disqualification.* The administrative law judge may disqualify himself or herself at any time. A party may file a motion, pursuant to § 13.218(f)(6), requesting that an administrative law judge be disqualified from the proceedings.

§ 13.206 Intervention.

(a) Any person who has a statutory right to participate in the proceedings shall be allowed to intervene in the proceedings by the administrative law judge.

(b) In all other cases, the administrative law judge shall not allow any person to intervene in any proceeding governed by this subpart.

§ 13.207 Certification of documents.

(a) *Signature required.* The attorney of record, the party, or the party's representative shall sign each document tendered for filing with the hearing docket clerk, the administrative law judge, the FAA decisionmaker on appeal, or served on each party.

(b) *Effect of signing a document.* By signing a document, the attorney of record, the party, or the party's representative certifies that the attorney or party has read the document and, based on reasonable inquiry and to the best of the attorney's or party's knowledge, information, and belief, the document is:

(1) Consistent with these rules;

(2) Warranted by existing law or that a good faith argument exists for extension, modification, or reversal of existing law; and

(3) Not unreasonable or unduly burdensome or expensive, not made to harass any person, not made to cause unnecessary delay, not made to cause needless increase in the cost of the proceedings, or for any other improper purpose.

(c) *Sanctions.* If the attorney of record, the party, or the party's representative signs a document in violation of this section, the administrative law judge or the FAA decisionmaker shall:

(1) Strike the pleading signed in violation of this section;

(2) Strike the request for discovery or the discovery response signed in violation of this section and preclude further discovery by the party;

(3) Deny the motion or request signed in violation of this section;

(4) Exclude the document signed in violation of this section from the record;

(5) Dismiss the interlocutory appeal and preclude further appeal on that issue by the party who filed the appeal until an initial decision has been entered on the record; or

(6) Dismiss the appeal of the administrative law judge's initial decision to the FAA decisionmaker.

§ 13.208 Complaint.

(a) The agency attorney shall serve the original complaint on the person requesting the hearing.

(b) The agency attorney shall file the complaint, attaching a copy of the request for a hearing, and shall suggest a location for the hearing, with the hearing docket clerk not later than 20 days after receipt of a person's request for hearing.

(c) If the agency attorney and the person requesting the hearing do not agree on the location for the hearing, the hearing docket clerk shall assign a hearing location near the place where the incident occurred.

§ 13.209 Answer.

(a) *Writing required.* A person who receives a complaint shall file a written answer to the complaint, or a motion pursuant to § 13.218(f)(1–4) of this subpart, not later than 30 days after service of the complaint. The answer may be in the form of a letter but must be dated and signed by the person responding to the complaint. An answer may be typewritten or may be legibly handwritten.

(b) *Filing and address.* A person filing an answer shall personally deliver or mail the answer for filing with the hearing docket clerk to the Hearing Docket, Federal Aviation Administration, 800 Independence Avenue SW., Room 924A, Washington, DC 20591, Attention: Hearing Docket Clerk.

(c) *Contents.* A person filing an answer shall include a brief statement of the relief requested by the person in the answer. The person shall include

specifically any affirmative defense in the answer that the person intends to assert at the hearing.

(d) *Specific denial of allegations required.* A person filing an answer shall admit, deny, or state that the person is without sufficient knowledge or information to admit or deny each allegation in each numbered paragraph of the complaint. A general denial of the complaint is deemed a failure to file an answer. Any statement or allegation contained in the complaint that is not specifically denied in the answer is deemed an admission of the truth of that allegation.

(e) *Service.* A person filing an answer shall comply with the service requirements of § 13.211 of this subpart.

(f) *Failure to file answer.* A person's failure to file an answer without good cause is deemed an admission of the truth of each allegation contained in the complaint and an order assessing civil penalty shall be issued.

§ 13.210 Filing of documents.

(a) *Address and method of filing.* A person tendering a document for filing shall personally deliver or mail the signed original and one copy of each document to the Hearing Docket, Federal Aviation Administration, 800 Independence Avenue SW., Room 924A, Washington, DC 20591, Attention: Hearing Docket Clerk. After an administrative law judge has been assigned to the proceedings, a person shall personally deliver or mail the signed original of each document to the hearing docket clerk and shall serve a copy of each document on each party and the administrative law judge.

(b) *Date of filing.* A document shall be considered to be filed on the date of personal delivery; or if mailed, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark.

(c) *Form.* Each document shall be typewritten or legibly handwritten.

(d) *Contents.* Unless otherwise specified in this subpart, each document must contain a short, plain statement of the facts on which the person's case rests and a brief statement of the action requested in the document.

§ 13.211 Service of documents.

(a) *General.* A person shall serve a copy of any document filed with the Hearing Docket on the administrative law judge and on each party at the time of filing.

(b) *Type of service.* A person may serve documents by personal delivery or by mail.

(c) *Certificate of service.* A person may attach a certificate of service to a document tendered for filing with the hearing docket clerk. A certificate of service shall consist of a statement, dated and signed by the person filing the document, that the document was personally delivered or mailed to each party on a specific date.

(d) *Date of service.* The date of service shall be the date of personal delivery; or if mailed, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark.

(e) *Additional time after service by mail.* Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, or on a date certain after service by mail, 5 days shall be added to the prescribed period.

(f) *Service by the administrative law judge.* The administrative law judge shall serve a copy of each document including, but not limited to, notices of prehearing conferences and hearings, rulings on motions, decisions, and orders, upon each party to the proceedings by personal delivery or by mail.

(g) *Valid service.* A document that was properly addressed, was sent in accordance with this subpart, and that was returned, that was not claimed, or that was refused, is deemed to have been served in accordance with this subpart. The service shall be considered valid as of the date and the time that the document was deposited with a contract or express messenger, the document was mailed, or personal delivery of the document was refused.

(h) *Presumption of service.* There shall be a presumption of service where a party or a person, who customarily receives mail, or receives it in the ordinary course of business, at either the person's residence or the person's principal place of business, acknowledges receipt of the document.

§ 13.212 Computation of time.

(a) This section applies to any period of time prescribed or allowed by this subpart, by notice or order of the administrative law judge, or by any applicable statute.

(b) The date of an act, event, or default, after which a designated time period begins to run, is not included in a computation of time under this subpart.

(c) The last day of a time period is included in a computation of time unless it is a Saturday, Sunday, or a legal holiday. If the last day of the time period is a Saturday, Sunday, or legal holiday, the time period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

§ 13.213 Extension of time.

(a) *Oral requests.* The parties may reasonably agree to extend the time for filing a document under this subpart. If the parties agree, the administrative law judge shall grant one extension of time to each party. The party seeking the extension of time shall submit a draft order to the administrative law judge to be signed by the administrative law judge and filed with the hearing docket clerk. The administrative law judge may grant additional oral requests for an extension of time where the parties agree to the extension.

(b) *Written motion.* A party shall file a written motion for an extension of time with the administrative law judge not later than 7 days before the document is due unless good cause for the late filing is shown. A party filing a written motion for an extension of time shall serve a copy of the motion on each party. The administrative law judge may grant the extension of time if good cause for the extension is shown.

(c) *Failure to rule.* If the administrative law judge fails to rule on a written motion for an extension of time by the date the document was due, the motion for an extension of time is deemed granted for no more than 20 days after the original date the document was to be filed.

§ 13.214 Amendment of pleadings.

(a) *Filing and service.* A party shall file the amendment with the administrative law judge and shall serve a copy of the amendment on all parties to the proceeding.

(b) *Time.* A party shall file an amendment to a complaint or an answer within the following:

(1) Not later than 15 days before the scheduled date of a hearing, a party may amend a complaint or an answer without the consent of the administrative law judge.

(2) Less than 15 days before the scheduled date of a hearing, the administrative law judge may allow amendment of a complaint or an answer only for good cause shown in a motion to amend.

(c) *Responses.* The administrative law judge shall allow a reasonable time, but not more than 20 days from the date of filing, for other parties to respond if an amendment to a complaint, answer, or

other pleading has been filed with the administrative law judge.

§ 13.215 Withdrawal of complaint or request for hearing.

At any time before or during a hearing, the agency attorney may withdraw a complaint or a party may withdraw a request for a hearing without the consent of the administrative law judge. If the agency attorney withdraws the complaint or a party withdraws the request for a hearing and the answer, the administrative law judge shall dismiss the proceedings in this subpart with prejudice.

§ 13.216 Waivers.

Waivers of any rights provided by statute or regulation shall be in writing or by stipulation made at a hearing and entered into the record. The parties shall set forth the precise terms of the waiver and any conditions.

§ 13.217 Joint procedural or discovery schedule.

(a) *General.* The parties may agree to submit a schedule for filing all prehearing motions, a schedule for conducting discovery in the proceedings, or a schedule that will govern all prehearing motions and discovery in the proceedings.

(b) *Form and content of schedule.* If the parties agree to a joint procedural or discovery schedule, one of the parties shall file the joint schedule with the administrative law judge, setting forth the dates to which the parties have agreed, and shall serve a copy of the joint schedule on each party.

(1) The joint schedule may include, but need not be limited to, requests for discovery, any objections to discovery requests, responses to discovery requests to which there are no objections, submission of prehearing motions, responses to prehearing motions, exchange of exhibits to be introduced at the hearing, and a list of witnesses that may be called at the hearing.

(2) Each party shall sign the original joint schedule to be filed with the administrative law judge.

(c) *Time.* The parties may agree to submit all prehearing motions and responses and may agree to close discovery in the proceedings under the joint schedule within a reasonable time before the date of the hearing, but not later than 15 days before the hearing.

(d) *Order establishing joint schedule.* The administrative law judge shall approve the joint schedule filed by the parties. One party shall submit a draft order establishing a joint schedule to the administrative law judge to be signed by the administrative law judge and filed with the hearing docket clerk.

(e) *Disputes.* The administrative law judge shall resolve disputes regarding discovery or disputes regarding compliance with the joint schedule as soon as possible so that the parties may continue to comply with the joint schedule.

(f) *Sanctions for failure to comply with joint schedule.* If a party fails to comply with the administrative law judge's order establishing a joint schedule, the administrative law judge may direct that party to comply with a motion to discovery request or, limited to the extent of the party's failure to comply with a motion or discovery request, the administrative law judge may:

(1) Strike that portion of a party's pleadings;

(2) Preclude prehearing or discovery motions by that party;

(3) Preclude admission of that portion of a party's evidence at the hearing, or

(4) Preclude that portion of the testimony of that party's witnesses at the hearing.

§ 13.218 Motions.

(a) *General.* A party applying for an order or ruling not specifically provided in this subpart shall do so by motion. A party shall comply with the requirements of this section when filing a motion with the administrative law judge. A party shall serve a copy of each motion on each party.

(b) *Form and contents.* A party shall state the relief sought by the motion and the particular grounds supporting that relief. If a party has evidence in support of a motion, the party shall attach any supporting evidence, including affidavits, to the motion.

(c) *Filing of motions.* A motion made prior to the hearing must be in writing. Unless otherwise agreed by the parties or for good cause shown, a party shall file any prehearing motion, and shall serve a copy on each party, not later than 30 days before the hearing. Motions introduced during a hearing may be made orally on the record unless the administrative law judge directs otherwise.

(d) *Answers to motions.* Any party may file an answer, with affidavits or other evidence in support of the answer, not later than 10 days after service of a written motion on that party. When a motion is made during a hearing, the answer may be made at the hearing on the record, orally or in writing, within a reasonable time determined by the administrative law judge.

(e) *Rulings on motions.* The administrative law judge shall rule on all motions as follows:

(1) *Discovery motions.* The administrative law judge shall resolve all pending discovery motions not later than 10 days before the hearing.

(2) *Prehearing motions.* The administrative law judge shall resolve all pending prehearing motions not later than 7 days before the hearing. If the administrative law judge issues a ruling or order orally, the administrative law judge shall serve a written copy of the ruling or order, within 3 days, on each party. In all other cases, the administrative law judge shall issue rulings and orders in writing and shall serve a copy of the ruling or order on each party.

(3) *Motions made during the hearing.* The administrative law judge may issue rulings and orders on motions made during the hearing orally. Oral rulings or orders on motions must be made on the record.

(f) *Specific motions.* A party may file the following motions with the administrative law judge:

(1) *Motion to dismiss for insufficiency.* A party may file a motion to dismiss the complaint for insufficiency instead of an answer. If the administrative law judge denies the motion to dismiss the complaint for insufficiency, the party who received the complaint shall file an answer not later than 10 days after service of the administrative law judge's denial of the motion. A motion to dismiss the complaint for insufficiency must show that the complaint fails to state a violation of the Federal Aviation Act of 1958, as amended, or a rule, regulation, or order issued thereunder, or a violation of the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder.

(2) *Motion to dismiss.* A party may file a motion to dismiss a complaint instead of an answer, specifying the grounds for dismissal.

(i) If a motion to dismiss is not granted, the respondent shall file an answer with the administrative law judge and shall serve a copy of the answer on each party not later than 10 days after service of the administrative law judge's ruling or order on the motion to dismiss.

(ii) If the administrative law judge grants a motion to dismiss and terminates the proceedings without a hearing, the agency attorney may file an appeal pursuant to § 13.233 of this subpart. If the administrative law judge grants a motion to dismiss in part, the agency attorney may appeal the

administrative law judge's decision to dismiss part of the complaint under the provisions of § 13.219(c) of this subpart. If required by the decision on appeal, the respondent shall file an answer with the administrative law judge and shall serve a copy of the answer on each party not later than 10 days after service of the decision on appeal.

(3) *Motion for more definite statement.* A party may file a motion for more definite statement of any pleading which requires a response under this subpart. A party shall set forth, in detail, the indefinite or uncertain allegations contained in a complaint or response to any pleading and shall submit the details that the party believes would make the allegation or response definite and certain.

(i) *Complaint.* A party may file a motion requesting a more definite statement of the allegations contained in the complaint instead of an answer. If the administrative law judge grants the motion, and the agency attorney does not supply a more definite statement not later than 15 days after service of the order granting the motion, the administrative law judge shall strike the allegations in the complaint to which the motion is directed. If the administrative law judge denies the motion, the respondent shall file an answer with the administrative law judge and shall serve a copy of the answer on each party not later than 10 days after service of the order of denial.

(ii) *Answer.* A party may file a motion requesting a more definite statement if an answer fails to clearly respond to the allegations in the complaint. If the administrative law judge grants the motion, the respondent shall supply a more definite statement not later than 15 days after service of the ruling on the motion. If the respondent fails to supply a more definite statement, the administrative law judge shall strike those statements in the answer to which the motion is directed. A party's failure to supply a more definite statement is deemed a failure to answer and the unanswered allegations in the complaint are deemed admitted.

(4) *Motion to strike.* Any party may make a motion to strike any insufficient allegation or defense, or any redundant, immaterial, or irrelevant matter in a pleading. A party shall file a motion to strike with the administrative law judge and shall serve a copy on each party before a response is required under this subpart or, if a response is not required, not later than 10 days after service of the pleading.

(5) *Motion for decision.* A party may make a motion for decision, regarding all or any part of the proceedings, at any time before the administrative law judge has issued an initial decision in the proceedings. The administrative law judge shall grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, matters that the administrative law judge has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law. The party making the motion for decision has the burden of showing that there is no genuine issue of material fact disputed by the parties.

(6) *Motion for disqualification.* A party may file a motion for disqualification with the administrative law judge and shall serve a copy on each party. A party may file the motion at any time after the administrative law judge has been assigned to the proceedings but shall make a motion before the administrative law judge files an initial decision in the proceedings.

(i) *Motion and supporting affidavit.* A party shall state the grounds for disqualification, including, but not limited to, personal bias, pecuniary interest, or other factors showing disqualification, in the motion for disqualification. A party shall submit an affidavit with the motion for disqualification that sets forth, in detail, the matters alleged to constitute grounds for disqualification.

(ii) *Answer.* A party shall respond to the motion for disqualification not later than 5 days after service of the motion for disqualification.

(iii) *Decision on motion for disqualification.* The administrative law judge shall render a decision on the motion for disqualification not later than 15 days after the motion has been filed. If the administrative law judge finds that the motion for disqualification and supporting affidavit show a basis for disqualification, the administrative law judge shall withdraw from the proceedings immediately. If the administrative law judge finds that disqualification is not warranted, the administrative law judge shall deny the motion and state the grounds for the denial on the record. If the administrative law judge fails to rule on a party's motion for disqualification within 15 days after the motion has been filed, the motion is deemed granted.

(iv) *Appeal.* A party may appeal the administrative law judge's denial of the motion for disqualification in accordance with § 13.219 of this subpart.

§ 13.219 Interlocutory appeals.

(a) *General.* Unless otherwise provided in this subpart, a party may not appeal a ruling or decision of the administrative law judge to the FAA decisionmaker until the initial decision has been entered on the record. A decision or order of the FAA decisionmaker on the interlocutory appeal does not constitute a final order of the Administrator for the purposes of judicial appellate review under section 1006 of the Federal Aviation Act of 1958, as amended.

(b) *Interlocutory appeal for cause.* If a party files a written request for an interlocutory appeal for cause with the administrative law judge, or orally requests an interlocutory appeal for cause, the proceedings are stayed until the administrative law judge issues a decision on the request. If the administrative law judge grants the request, the proceedings are stayed until the FAA decisionmaker issues a decision on the interlocutory appeal. The administrative law judge shall grant an interlocutory appeal for cause if a party shows that delay of the appeal would be detrimental to the public interest or would result in undue prejudice to any party.

(c) *Interlocutory appeals of right.* If a party notifies the administrative law judge of an interlocutory appeal of right, the proceedings are stayed until the FAA decisionmaker issues a decision on the interlocutory appeal. A party may file an interlocutory appeal with the FAA decisionmaker, without the consent of the administrative law judge, before an initial decision has been entered in the case of:

(1) A ruling or order by the administrative law judge barring a person from the proceedings;

(2) Failure of the administrative law judge to dismiss the proceedings in accordance with § 13.215 of this subpart;

(3) A ruling or order by the administrative law judge in violation of § 13.205(b) of this subpart; and

(4) A ruling by the administrative law judge granting, in part, a respondent's motion to dismiss a complaint pursuant to § 13.218(f)(2)(ii).

(d) *Procedure.* A party shall file a notice of interlocutory appeal, with supporting documents, with the FAA decisionmaker and the hearing docket clerk, and shall serve a copy of the notice and supporting documents on each party and the administrative law judge, not later than 3 days after the administrative law judge's decision forming the basis of the appeal. A party shall file a reply brief, if any, with the FAA decisionmaker and serve a copy of the reply brief on each party, not later than 10 days after service of the appeal brief. If the FAA decisionmaker does not

issue a decision on the interlocutory appeal or does not seek additional information within 10 days of the filing of the appeal, the stay of the proceeding is dissolved. The FAA decisionmaker shall render a decision on the interlocutory appeal, on the record and as a part of the decision in the proceedings, within a reasonable time after receipt of the interlocutory appeal.

(e) The FAA decisionmaker may reject frivolous, repetitive, or dilatory appeals, and may issue an order precluding one or more parties from making further interlocutory appeals in a proceeding in which there have been frivolous, repetitive, or dilatory interlocutory appeals.

§ 13.220 Discovery.

(a) *Initiation of discovery.* Any party may initiate discovery described in this section, without the consent or approval of the administrative law judge, at any time after a complaint has been filed in the proceedings.

(b) *Methods of discovery.* The following methods of discovery are permitted under this section: depositions on oral examination or written questions of any person; written interrogatories directed to a party; requests for production of documents or tangible items to any person; and requests for admission by a party. A party is not required to file written interrogatories and responses, requests for production of documents or tangible items and responses, and requests for admission and response with the administrative law judge or the hearing docket clerk. In the event of a discovery dispute, a party shall attach a copy of these documents in support of a motion made under this section.

(c) *Service on the agency.* A party shall serve each discovery request directed to the agency or any agency employee on the agency attorney of record.

(d) *Time for response to discovery requests.* Unless otherwise directed by this subpart or agreed by the parties, a party shall respond to a request for discovery, including filing objections to a request for discovery, not later than 30 days of service of the request.

(e) *Scope of discovery.* Subject to the limits on discovery set forth in paragraph (f) of this section, a party may discover any matter that is not privileged and that is relevant to the subject matter of the proceeding. A party may discover information that relates to the claim or defense of any party including the existence, description, nature, custody, condition, and location of any document or other tangible item and the identity and location of any person having knowledge of discoverable matter. A party may discover facts known, or opinions held, by an expert who any other party expects to call to testify at the hearing. A party has no ground to object to a discovery request on the basis that the information sought would not be admissible at the hearing if the information sought during discovery is reasonably calculated to lead to the discovery of admissible evidence.

(f) *Limiting discovery.* The administrative law judge shall limit the frequency and extent of discovery permitted by this section if a party shows that:

(1) The information requested is cumulative or repetitious;

(2) The information requested can be obtained from another less burdensome and more convenient source;

(3) The party requesting the information has had ample opportunity to obtain the information through other discovery methods permitted under this section; or

(4) The method or scope of discovery requested by the party is unduly burdensome or expensive.

(g) *Confidential orders.* A party or person who has received a discovery request for information that is related to a trade secret, confidential or sensitive material, competitive or commercial information, proprietary data, or information on research and development, may file a motion for a confidential order with the administrative law judge and shall serve a copy of the motion for a confidential order on each party.

(1) The party or person making the motion must show that the confidential order is necessary to protect the information from disclosure to the public.

(2) If the administrative law judge determines that the requested material is not necessary to decide the case, the administrative law judge shall preclude any inquiry into the matter by any party.

(3) If the administrative law judge determines that the requested material may be disclosed during discovery, the administrative law judge may order that the material may be discovered and disclosed under limited conditions or may be used only under certain terms and conditions.

(4) If the administrative law judge determines that the requested material is necessary to decide the case and that a confidential order is warranted, the administrative law judge shall provide:

(i) An opportunity for review of the document by the parties off the record;

(ii) Procedures for excluding the information from the record; and

(iii) Order that the parties shall not disclose the information in any manner and the parties shall not use the information in any other proceeding.

(h) *Protective orders.* A party or a person who has received a request for discovery may file a motion for protective order with the administrative law judge and shall serve a copy of the motion for protective order on each party. The party or person making the motion must show that the protective order is necessary to protect the party or the person from annoyance, embarrassment, oppression, or undue burden or expense. As part of the protective order, the administrative law judge may:

(1) Deny the discovery request;

(2) Order that discovery be conducted only on specified terms and conditions, including a designation of the time or place for discovery or a determination of the method of discovery; or

(3) Limit the scope of discovery or preclude any inquiry into certain matters during discovery.

(i) *Duty to supplement or amend responses.* A party who has responded to a discovery request has a duty to supplement or amend the response, as soon as the information is known, as follows:

(1) A party shall supplement or amend any response to a question requesting the identity and location of any person having knowledge of discoverable matters.

(2) A party shall supplement or amend any response to a question requesting the identity of each person who will be called to testify at the hearing as an expert witness and the subject matter and substance of that witness' testimony.

(3) A party shall supplement or amend any response that was incorrect when made or any response that was correct when made but is no longer correct, accurate, or complete.

(j) *Depositions.* The following rules apply to depositions taken pursuant to this section:

(1) *Form.* A deposition shall be taken on the record and reduced to writing. The person being deposed shall sign the deposition unless the parties agree to waive the requirement of a signature.

(2) *Administration of oaths.* Within the United States, or a territory or possession subject to the jurisdiction of the United States, a party shall take a deposition before a person authorized to administer oaths by the laws of the United States or authorized by the law of the place where the examination is held. In foreign countries, a party shall take a deposition in any manner

allowed by the *Federal Rules of Civil Procedure*.

(3) *Notice of deposition.* A party shall serve a notice of deposition, stating the time and place of the deposition and the name and address of each person to be examined, on the person to be deposed, on the administrative law judge, on the hearing docket clerk, and on each party not later than 7 days before the deposition. A party may serve a notice of deposition less than 7 days before the deposition only with consent of the administrative law judge. If a subpoena *duces tecum* is to be served on the person to be examined, the party shall attach a copy of the subpoena *duces tecum* that describes the materials to be produced at the deposition to the notice of deposition.

(4) *Use of depositions.* A party may use any part or all of a deposition at a hearing authorized under this subpart only upon a showing of good cause. The deposition may be used against any party who was present or represented at the deposition or who had reasonable notice of the deposition.

(k) *Interrogatories.* A party shall not serve more than 30 interrogatories to each other party. Each subpart of an interrogatory shall be counted as a separate interrogatory.

(1) A party shall answer each interrogatory separately and completely in writing and under oath. A party's attorney may sign the response to the interrogatories if the attorney has verification of authority to sign from the party. If a party objects to an interrogatory, the party shall state the objection and the reasons for the objection.

(2) A party shall file a motion for leave to serve additional interrogatories on a party with the administrative law judge before serving additional interrogatories on a party. The administrative law judge shall grant the motion only if the party shows good cause for the party's failure to inquire about the information previously and that the information cannot reasonably be obtained using less burdensome discovery methods or be obtained from other sources.

(l) *Requests for admission.* A party may serve a written request for admission of the truth of any matter within the scope of discovery under this section or the authenticity of any document described in the request. A party shall set forth each request for admission separately. A party shall serve copies of documents referenced in the request for admission unless the documents have been provided or are reasonably available for inspection and copying.

(1) *Time.* A party's failure to respond to a request for admission, in writing and signed by the attorney or the party, not later than 30 days after service of the request, is deemed an admission of the truth of the statement or statements contained in the request for admission. The administrative law judge may determine that a failure to respond to a request for admission is not deemed an admission of the truth if a party shows that the failure was due to circumstances beyond the control of the party or the party's attorney.

(2) *Response.* A party may object to a request for admission and shall state the reasons for objection. A party may specifically deny the truth of the matter or describe the reasons why the party is unable to truthfully deny or admit the matter. If a party is unable to deny or admit the truth of the matter, the party shall show that the party has made reasonable inquiry into the matter or that the information known to, or readily obtainable by, the party is insufficient to enable the party to admit or deny the matter. A party may admit or deny any part of the request for admission. If the administrative law judge determines that a response does not comply with the requirements of this rule or that the response is insufficient, the matter is deemed admitted.

(3) *Effect of admission.* Any matter admitted or deemed admitted under this section is conclusively established for the purpose of the hearing and appeal.

(m) *Motion to compel discovery.* A party may make a motion to compel discovery if a person refuses to answer a question during a deposition, a party fails or refuses to answer an interrogatory, if a person gives an evasive or incomplete answer during a deposition or when responding to an interrogatory, or a party fails or refuses to produce documents or tangible items. During a deposition, the proponent of a question may complete the deposition or may adjourn the examination before making a motion to compel if a person refuses to answer.

(n) *Failure to comply with a discovery order or order to compel.* If a party fails to comply with a discovery order or an order to compel, the administrative law judge, limited to the extent of the party's failure to comply with the discovery order or motion to compel, may:

(1) Strike that portion of a party's pleadings;

(2) Preclude prehearing or discovery motions by that party;

(3) Preclude admission of that portion of a party's evidence at the hearing; or

(4) Preclude that portion of the testimony of that party's witnesses at the hearing.

§ 13.221 Notice of hearing.

(a) *Notice.* The administrative law judge shall give each party at least 60 days notice of the date and time of the hearing.

(b) *Date and time of the hearing.* The administrative law judge to whom the proceedings have been assigned shall set a reasonable date and time for the hearing. The administrative law judge shall consider the need for discovery and any joint procedural or discovery schedule submitted by the parties when determining the hearing date.

(c) *Location of the hearing.* After assignment of an administrative law judge to the proceedings, a party may file a motion to change the location of the hearing or the administrative law judge on his own motion may change the location of the hearing. The administrative law judge shall give due regard to where the majority of the witnesses reside or work, the convenience of the parties, and whether the location is served by a scheduled air carrier.

(d) *Earlier hearing.* With the consent of the administrative law judge, the parties may agree to hold the hearing on an earlier date than the date specified in the notice of hearing.

§ 13.222 Evidence.

(a) *General.* A party is entitled to present the party's case or defense by oral, documentary, or demonstrative evidence, to submit rebuttal evidence, and to conduct any cross-examination that may be required for a full and true disclosure of the facts.

(b) *Admissibility.* A party may introduce any oral, documentary, or demonstrative evidence in support of the party's case or defense. The administrative law judge shall admit any oral, documentary, or demonstrative evidence introduced by a party but shall exclude irrelevant, immaterial, or unduly repetitious evidence.

(c) *Hearsay evidence.* Hearsay evidence is admissible in proceedings governed by this subpart. The fact that evidence submitted by a party is hearsay goes only to the weight of the evidence and does not affect its admissibility.

§ 13.223 Standard of proof.

The administrative law judge shall issue an initial decision or shall rule in a party's favor only if the decision or ruling is supported by, and in accordance with, the reliable, probative, and substantial evidence contained in the record. In order to prevail, the party with the burden of proof shall prove the party's case or defense by a

preponderance of reliable, probative, and substantial evidence.

§ 13.224 Burden of proof.

(a) Except in the case of an affirmative defense, the burden of proof is on the agency.

(b) Except as otherwise provided by statute or rule, the proponent of a motion, request, or order has the burden of proof.

(c) A party who has asserted an affirmative defense has the burden of proving the affirmative defense.

§ 13.225 Offer of proof.

A party whose evidence has been excluded by a ruling of the administrative law judge may offer the evidence for the record on appeal.

§ 13.226 Public disclosure of evidence.

(a) The administrative law judge may order that any information contained in the record be withheld from public disclosure. Any person may object to disclosure of information in the record by filing a written motion to withhold specific information with the administrative law judge and serving a copy of the motion on each party. The party shall state the specific grounds for nondisclosure in the motion.

(b) The administrative law judge shall grant the motion to withhold information in the record if, based on the motion and any response to the motion, the administrative law judge determines that disclosure would be detrimental to aviation safety, disclosure would not be in the public interest, or that the information is not otherwise required to be made available to the public.

§ 13.227 Expert or opinion witnesses.

An employee of the agency may not be called as an expert or opinion witness, for any party other than the agency, in any proceeding governed by this subpart. An employee of a respondent may not be called by an agency attorney as an expert or opinion witness for the agency in any proceeding governed by this subpart to which the respondent is a party.

§ 13.228 Subpoenas.

(a) *Request for subpoena.* A party may obtain a subpoena to compel the attendance of a witness at a deposition or hearing or to require the production of documents or tangible items from the hearing docket clerk. The hearing docket clerk shall deliver the subpoena, signed by the hearing docket clerk or an administrative law judge but otherwise in blank, to the party. The party shall complete the subpoena, stating the title of the action and the date and time for the witness' attendance or production of documents or items. The party who obtained the subpoena shall serve the subpoena on the witness.

(b) *Motion to quash or modify the subpoena.* Any person upon whom a subpoena has been served may file a motion to quash or modify the subpoena with the administrative law judge at or before the time specified in the subpoena for compliance. The applicant shall describe, in detail, the basis for the application to quash or modify the subpoena including, but not limited to, a statement that the testimony or the documents or tangible evidence is not relevant to the proceeding, that the subpoena is not reasonably tailored to the scope of the proceeding, or that the subpoena is unreasonable and oppressive. A motion to quash or modify the subpoena will stay the effect of the subpoena pending a decision by the administrative law judge on the motion.

(c) *Enforcement of subpoena.* Upon a showing that a person has failed or refused to comply with a subpoena, a party may apply to the local Federal district court to seek judicial enforcement of the subpoena in accordance with section 1004 of the Federal Aviation Act of 1958, as amended.

§ 13.229 Witness fees.

(a) *General.* Unless otherwise authorized by the administrative law judge, the party who applies for a subpoena to compel the attendance of a witness at a deposition or hearing, or the party at whose request a witness appears at a deposition or hearing, shall pay the witness fees described in this section.

(b) *Amount.* Except for an FAA employee who appears at the direction of the agency, a witness who appears at a disposition or hearing is entitled to the same fees and mileage expenses as are paid to a witness in a court of the United States in comparable circumstances.

§ 13.230 Record.

(a) *Exclusive record.* The transcript of all testimony in the hearing, all exhibits received into evidence, and all motions, applications, requests, and rulings shall constitute the exclusive record for decision of the proceedings and the basis for the issuance of any orders in the proceeding. Any proceedings regarding the disqualification of an administrative law judge shall be included in the record.

(b) *Examination and copying of record.* Any person may examine the record at the Hearing Docket, Federal Aviation Administration, 800 Independence Avenue, SW., Room 924A, Washington, DC 20591. Any person may have a copy of the record after payment of reasonable costs to copy the record.

§ 13.231 Argument before the administrative law judge.

(a) *Arguments during the hearing.* During the hearing, the administrative law judge shall give the parties a reasonable opportunity to present arguments on the record supporting or opposing motions, objections, and rulings if the parties request an opportunity for argument. The administrative law judge may request written arguments during the hearing if the administrative law judge finds that submission of written arguments would be reasonable.

(b) *Final oral argument.* At the conclusion of the hearing and before the administrative law judge issues an initial decision in the proceedings, the parties are entitled to submit oral proposed findings of fact and conclusions of law, exceptions to rulings of the administrative law judge, and supporting arguments for the findings, conclusions, or exceptions. At the conclusion of the hearing, a party may waive final oral argument.

(c) *Posthearing briefs.* The administrative law judge may request written posthearing briefs before the administrative law judge issues an initial decision in the proceedings if the administrative law judge finds that submission of written arguments would be reasonable. If a party files a written posthearing brief, the party shall include proposed findings of fact and conclusions of law, exceptions to rulings of the administrative law judge, and supporting arguments for the findings, conclusions, or exceptions. The administrative law judge shall give the parties a reasonable opportunity, not more than 30 days after receipt of the transcript, to prepare and submit the briefs.

§ 13.232 Initial decision.

(a) *Contents.* The administrative law judge shall issue an initial decision at the conclusion of the hearing. In each oral or written decision, the administrative law judge shall include findings of fact and conclusions of law, and the grounds supporting those findings and conclusions, upon all material issues of fact, the credibility of witnesses, the applicable law, any exercise of the administrative law judge's discretion, the amount of any civil penalty found appropriate by the administrative law judge, and a discussion of the basis for any order issued in the proceedings. The

administrative law judge is not required to provide a written explanation for rulings on objections, procedural motions, and other matters not directly relevant to the substance of the initial decision. If the administrative law judge refers to any previous unreported or unpublished initial decision, the administrative law judge shall make copies of that initial decision available to all parties and the FAA decisionmaker.

(b) *Oral decision.* Except as provided in paragraph (c) of this section, at the conclusion of the hearing, the administrative law judge shall issue the initial decision and order orally on the record.

(c) *Written decision.* The administrative law judge may issue a written initial decision not later than 30 days after the conclusion of the hearing or submission of the last posthearing brief if the administrative law judge finds that issuing a written initial decision is reasonable. The administrative law judge shall serve a copy of any written initial decision on each party.

(d) *Order assessing civil penalty.* The initial decision issued by the administrative law judge shall become an order assessing civil penalty if the administrative law judge finds that an alleged violation occurred and determines that a civil penalty, in an amount found appropriate by the administrative law judge, is warrented.

§ 13.233 Appeal from initial decision.

(a) *Notice of appeal.* A party may appeal the initial decision, and any decision not previously appealed pursuant to § 13.219, by filing a notice of appeal with the FAA decisionmaker. A party shall file the notice of appeal with the Federal Aviation Administration, 800 Independence Avenue, SW., Room 924A, Washington, DC 20591, Attention: Appellate Docket Clerk. A party shall file the notice of appeal not later than 10 days after entry of the oral initial decision on the record or service of the written initial decision on the parties and shall serve a copy of the notice of appeal on each party.

(b) *Issues on appeal.* A party may appeal only the following issues:

(1) Whether each filing of fact is supported by a preponderance of reliable, probative, and substantial evidence;

(2) Whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and

(3) Whether the administrative law judge committed any prejudicial errors during the hearing that supports the appeal.

(c) *Perfecting an appeal.* Unless otherwise agreed by the parties, a party shall perfect an appeal, not later than 50 days after entry of the oral initial decision on the record or service of the written initial decision on the party, by filing an appeal brief with the FAA decisionmaker.

(1) *Extension of time by agreement of the parties.* The parties may agree to extend the time for perfecting the appeal with the consent of the FAA decisionmaker. If the FAA decisionmaker grants an extension of time to perfect the appeal, the appellate docket clerk shall serve a letter confirming the extension of time on each party.

(2) *Written motion for extension.* If the parties do not agree to an extension of time for perfecting an appeal, a party desiring an extension of time may file a written motion for an extension with the FAA decisionmaker and shall serve a copy of the motion on each party. The FAA decisionmaker may grant an extension if good cause for the extension is shown in the motion.

(d) *Appeal briefs.* A party shall file the appeal brief with the FAA decisionmaker and shall serve a copy of the appeal brief on each party.

(1) A party shall set forth, in detail, the party's specific objections to the initial decision or rulings in the appeal brief. A party also shall set forth, in detail, the basis for the appeal, the reasons supporting the appeal, and the relief requested in the appeal. If the party relies on evidence contained in the record for the appeal, the party shall specifically refer to the pertinent evidence contained in the transcript in the appeal brief.

(2) The FAA decisionmaker may dismiss an appeal, on the FAA decisionmaker's own initiative or upon motion of any other party, where a party has filed a notice of appeal but fails to perfect the appeal by timely filing an appeal brief with the FAA decisionmaker.

(e) *Reply brief.* Unless otherwise agreed by the parties, any party may file a reply brief with the FAA decisionmaker not later than 35 days after the appeal brief has been served on that party. The party filing the reply brief shall serve a copy of the reply brief on each party. If the party relies on evidence contained in the record for the reply, the party shall specifically refer to the pertinent evidence contained in the transcript in the reply brief.

(1) *Extension of time by agreement of the parties.* The parties may agree to extend the time for filing a reply brief with the consent of the FAA decisionmaker. If the FAA decisionmaker grants an extension of time to file the reply brief, the appellate docket clerk shall serve a letter confirming the extension of time on each party.

(2) *Written motion for extension.* If the parties do not agree to an extension of time for filing a reply brief, a party desiring an extension of time may file a written motion for an extension with the FAA decisionmaker and shall serve a copy of the motion on each party. The FAA decisionmaker may grant an extension if good cause for the extension is shown in the motion.

(f) *Other briefs.* The FAA decisionmaker may allow any person to submit an *amicus curiae* brief in an appeal of an initial decision. A party may not file more than one appeal brief or reply brief. A party may petition the FAA decisionmaker, in writing, for leave to file an additional brief and shall serve a copy of the petition on each party. The party may not file the additional brief with the petition. The FAA decisionmaker may grant leave to file an additional brief if the party demonstrates good cause for allowing additional argument on the appeal. The FAA decisionmaker will allow a reasonable time for the party to file the additional brief.

(g) *Number of copies.* A party shall file the original appeal brief or the original reply brief, and two copies of the brief, with the FAA decisionmaker.

(h) *Oral argument.* The FAA decisionmaker has sole discretion to permit oral argument on the appeal. On the FAA decisionmaker's own initiative or upon written motion by any party, the FAA decisionmaker may find that oral argument will contribute substantially to the development of the issues on appeal and may grant the parties an opportunity for oral argument.

(i) *Waiver of objections on appeal.* If a party fails to object to any alleged error regarding the proceedings in an appeal or a reply brief, the party waives any objection to the alleged error. The FAA decisionmaker is not required to consider any objection in an appeal brief or any argument in the reply brief if a party's objection is based on evidence contained on the record and the party does not specifically refer to the pertinent evidence from the record in the brief.

(j) *FAA decisionmaker's decision on appeal.* The FAA decisionmaker will review the briefs on appeal and the oral argument, if any, to determine if the administrative law judge committed prejudicial error in the proceedings or that the initial decision should be affirmed, modified, or reversed. The

FAA decisionmaker may affirm, modify, or reverse the initial decision, make any necessary findings, or may remand the case for any proceedings that the FAA decisionmaker determines may be necessary.

(1) The FAA decisionmaker may raise any issue, on the FAA decisionmaker's own initiative, that is required for proper disposition of the proceedings. The FAA decisionmaker will give the parties a reasonable opportunity to submit arguments on the new issues before making a decision on appeal. If an issue raised by the FAA decisionmaker requires the consideration of additional testimony or evidence, the FAA decisionmaker will remand the case to the administrative law judge for further proceedings and an initial decision related to that issue. If an issue raised by the FAA decisionmaker is solely an issue of law or the issue was addressed at the hearing but was not raised by a party in the briefs on appeal, a remand of the case to the administrative law judge for further proceedings is not required but may be provided in the discretion of the FAA decisionmaker.

(2) The FAA decisionmaker will issue the final decision and order of the Administrator on appeal in writing and will serve a copy of the decision and order on each party.

(3) A final decision and order of the Administrator after appeal is precedent in any other civil penalty action. Any issue, finding or conclusion, order, ruling, or initial decision of an administrative law judge that has not been appealed to the FAA decisionmaker is not precedent in any other civil penalty action.

§ 13.234 Petition to reconsider or modify a final decision and order of the FAA decisionmaker on appeal.

(a) *General.* Any party may petition the FAA decisionmaker to reconsider or modify a final decision and order issued by the FAA decisionmaker on appeal from an initial decision. A party shall file a petition to reconsider or modify with the FAA decisionmaker not later than 30 days after service of the FAA decisionmaker's final decision and order on appeal and shall serve a copy of the petition on each party. The FAA decisionmaker will not reconsider or modify an initial decision and order issued by an administrative law judge that has not been appealed by any party to the FAA decisionmaker.

(b) *Form and number of copies.* A party shall file a petition to reconsider or modify, in writing, with the FAA decisionmaker. The party shall file the original petition with the FAA decisionmaker and shall serve a copy of the petition on each party.

(c) *Contents.* A party shall state briefly and specifically the alleged errors in the final decision and order on appeal, the relief sought by the party, and the grounds that support the petition to reconsider or modify.

(1) If the petition is based, in whole or in part, on allegations regarding the consequences of the FAA decisionmaker's decision, the party shall describe these allegations and shall describe, and support, the basis for the allegations.

(2) If the petition is based, in whole or in part, on new material not previously raised in the proceedings, the party shall set forth the new material and include affidavits of prospective witnesses and authenticated documents that would be introduced in support of the new material. The party shall explain, in detail, why the new material was not discovered through due diligence prior to the hearing.

(d) *Repetitious and frivolous petitions.* The FAA decisionmaker will not consider repetitious or frivolous petitions. The FAA decisionmaker may summarily dismiss repetitious or frivolous petitions to reconsider or modify.

(e) *Reply petitions.* Any other party may reply to a petition to reconsider or modify, not later than 10 days after service of the petition on that party, by filing a reply with the FAA decisionmaker. A party shall serve a copy of the reply on each party.

(f) *Effect of filing petition.* Unless otherwise ordered by the FAA decisionmaker, filing of a petition pursuant to this section will not stay or delay the effective date of the FAA decisionmaker's final decision and order on appeal and shall not toll the time allowed for judicial review.

(g) *FAA decisionmaker's decision on petition.* The FAA decisionmaker has sole discretion to grant or deny a petition to reconsider or modify. The FAA decisionmaker will grant or deny a petition to reconsider modify within a reasonable time after receipt of the petition or receipt of the reply petition, if any. The FAA decisionmaker may affirm, modify, or reverse the final decision and order on appeal, or may remand the case for any proceedings that the FAA decisionmaker determines may be necessary.

§ 13.235 Judicial review of final decision and order.

A person may seek judicial review of a final decision and order of the Administrator as provided in section 1006 of the Federal Aviation Act of 1958, as amended. A party seeking judicial review of a final decision and order shall file a petition for review not later than 60 days after the final decision and order has been served on the party.

Issued in Washington, DC on April 17, 1990.

Gregory S. Walden,

Chief Counsel.

[FR Doc. 90-9173 Filed 4-17-90; 12:23 pm]

BILLING CODE 4910-13-M