

FAA R 12m 15-2

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 15****[Docket No. 25673; Amdt. No. 15-2]****Indemnification of Publishers of Aeronautical Charts and Maps****AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Final Rule.

SUMMARY: This final rule establishes procedures to indemnify a publisher of aeronautical charts or maps if the publisher is liable for tort damages as a result of defective or deficient flight procedures or airways promulgated by the FAA and accurately depicted by the publisher on a chart or map.

EFFECTIVE DATE: June 4, 1990.**FOR FURTHER INFORMATION CONTACT:**

James S. Dillman, Assistant Chief Counsel, Litigation Division, AGC-400, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. Telephone: (202) 267-3361.

SUPPLEMENTARY INFORMATION:**Background**

On December 19, 1985, Congress amended the Federal Aviation Act of 1958 (FAAct) by adding section 1118, 49 U.S.C. 1519, entitled "Aeronautical Charts and Maps." This section provides for the execution of indemnification agreements between the United States and publishers of aeronautical charts or maps. Specifically, indemnification may be available to the publisher if the publisher is liable on a claim for damages arising out of the depiction on a chart or map of any defective or deficient flight procedure or airway, if this procedure or airway was promulgated by the Federal Aviation Administration (FAA) and was accurately depicted on the chart or map. The United States will not agree to indemnification for a claim which does not arise out of a defect or deficiency in the procedure or airway.

Indemnification is available only if the defect in the chart or map is the result of information provided by the FAA which is not obviously defective or deficient so that the error should have been detected by the publisher. In addition, the flight procedure or airway in question must have been depicted as designed by the Government. A "defective or deficient" flight procedure or airway includes any defect in the design, as well as the FAA's inclusion or omission of any feature, which makes the flight procedure or airway inherently

hazardous. The determination that a flight procedure or airway is "defective or deficient" can be made only by the FAA, or by a court of competent jurisdiction.

On August 8, 1988, the FAA issued a Notice of Proposed Rulemaking (NPRM) (53 FR 31608; August 18, 1988) entitled "Indemnification of Publishers of Aeronautical Charts and Maps." The NPRM proposed regulations for public comment. The FAA received 8 written comments on the proposals contained in the NPRM.

Editorial Changes

Numerous editorial changes have been made to the proposed rules for purposes of clarification, formatting, and removal of redundancies. They include the renumbering and rearrangement of proposed sections and the placement of related provisions in the same section. For example, all exclusionary provisions have been grouped under § 15.103 and all notice requirements applicable to publishers have been placed under § 15.107. The provisions relating to settlements (§ 15.109), litigation (§ 15.111), indemnification agreements (§ 15.113), and payment (§ 15.115) have been reorganized and, where appropriate, redrafted for clarity. The FAA believes that these editorial changes, in addition to those discussed below, remove the ambiguities and redundancies cited by several commenters.

Discussion of Comments

One major theme presented by nearly all of the commenters is that the proposed regulations are too restrictive and, as such, could deny indemnification to publishers whom Congress intended to be indemnified. These commenters contend that the following aspects of the proposed procedures, among others, would frustrate the Congressional intent if implemented as proposed:

1. FAA determinations as to whether defects are "obvious;"
2. Stringent notice requirements;
3. Determinations by the FAA that the publisher did, or did not, negotiate a settlement in "good faith" or conduct a "good faith" defense;
4. Delays in executing indemnification agreements and in obtaining necessary funds; and
5. No indemnification proposed for certain costs, such as attorney fees and interest.

These comments, and others, will be discussed in greater depth below under the appropriate subject headings.

Applicability**Electronic Medium Aeronautical Data Bases**

Noting that the Notice of Proposed Rulemaking (NPRM) refers only to charts and maps, one commenter requests that the proposed applicability section be expanded to include "electronic medium" aeronautical data bases. These bases store aeronautical data on diskettes, tapes, and other electronic storage devices. The data that is stored can be identical to that contained on paper charts and maps. This commenter requests that the final rule be expanded to permit indemnification of persons designing, manufacturing, and/or marketing electronic medium aeronautical data bases and/or products capable of utilizing them. This commenter believes that these companies should not be held liable when provided erroneous data by an agency of the United States Government.

The amendment which added a new section 1118 to the FAAct provides for agreements pursuant to which the United States will indemnify publishers of aeronautical charts or maps under appropriate circumstances. Section 1118 provides, in pertinent part, that "the United States Government shall enter into agreements to indemnify any person who publishes a chart or map for use in aeronautics from any claim, or portion of a claim, which arises out of such person's depiction on such chart or map of any defective or deficient flight procedure or airway * * * ." Therefore, by the explicit terms of the statute, indemnification is limited to the publishers referenced in the new section, namely, those publishing aeronautical charts and maps.

After further reviewing section 1118 and its legislative history, the FAA cannot find any evidence as to whether Congress intended to indemnify persons that publish other than printed charts and maps. Without any clear indication of Congressional intent, the FAA turns to the Random House Dictionary of the English Language, Second Edition, Unabridged (1987) which defines the verb "to publish" as follows: "to issue (printed or otherwise reproduced textual or graphic material, computer software, etc.) for sale or distribution to the public." This definition is broad enough to encompass not only publishers of printed charts and maps, but also publishers of "electronic medium" data bases that store aeronautical data, if that data is of a type which is transmitted to, and visually displayed as a chart or map in, the cockpit of an

aircraft. The applicability section of this final rule has been expanded to cover this type of publisher of data bases.

Accurate Depiction

Another commenter believes that the phrase "for claims arising out of the publisher's accurate depiction on such chart of any defective or deficient FAA flight procedure or airway" needs to be clarified. According to this commenter, the words "accurate depiction" could be construed to require the use of the identical charting specifications and chart layouts used by the FAA. Such an interpretation of the statute would be incorrect, according to this commenter, for publishers are not required to use the FAA's chart specifications and designs. The only requirement is to produce a chart that gives the pilot an accurate pictorial presentation of the procedure described by the FAA.

To be eligible for indemnification, a publisher must, among other things, "accurately depict" or display, as applicable, the flight procedure or airway provided to it by the FAA. The FAA believes that the requirement to "accurately depict" or display FAA flight procedures and airways is unambiguous and that it cannot reasonably be interpreted to limit indemnification only to publishers who use the identical charting specifications and chart layout used by the FAA. Accordingly, the proposed language has been incorporated into this final rule and expanded to require the accurate display of flight procedures and airways by publishers of aeronautical data bases.

Exclusions

Under the proposed rules, a publisher could not be indemnified if the underlying cause of action against it arose prior to December 19, 1985 (the date of enactment of section 1118), or if the publisher is a state agency or public entity.

Underlying Cause

One commenter observes that section 1118 provides for indemnification without regard to the timing of the underlying cause which gives rise to a claim against the publisher. This commenter interprets "underlying cause," as used in proposed § 15.11, to mean the publication of defective information that leads to a claim against the publisher. As this commenter reads the statute, if the claim was filed against the publisher after December 18, 1985, irrespective of when the defective information was published, indemnification would be available.

Another commenter objects to the exclusion of claims where the underlying cause arose prior to December 19, 1985, stating that the statute does not restrict indemnification in this manner. This commenter interprets "underlying cause" to be the accident or aircraft crash that gave rise to the claim. This commenter believes that indemnification should be provided in cases wherein a judgment was rendered on or after December 19, 1985. Still another commenter comes to this same conclusion contending that the legislative history supports this position.

In the absence of specific statutory language to the contrary, Congressional statutes apply prospectively rather than retroactively. Since section 1118 does not provide for indemnification retroactively, the FAA concludes that it requires indemnification in appropriate cases based on some act or occurrence that takes place on or after December 19, 1985, the date of its enactment.

Neither the statute nor its legislative history provides any guidance concerning the act or occurrence that would trigger the right to indemnification. In the absence of a statement of Congressional intent, the FAA believes that the right to indemnification should attach at the moment (on or after December 19, 1985) when the potential need for it first arises. This would not be when an accident or incident occurs, for these events, without more, could not justify a request for indemnification. The potential need for it would first arise when a publisher first receives a demand for the payment of damages, or a civil complaint alleging that the publisher is liable for damages, arising out of its publication of a defective or deficient flight procedure or airway. Therefore, this final rule specifies that indemnification is available only if the demand or complaint is first received by the publisher on or after December 19, 1985. A request for indemnification will be considered in such case even if the underlying cause arose prior to enactment of the statute, so long as the demand or complaint for indemnification is made or filed on or after the date of enactment.

Persons Excluded

One commenter mistakenly states that "private entities" are excluded under the proposed exclusionary section (§ 15.11(b)) while "private publishers" are included under the proposed applicability section. Such an inconsistency could give rise to confusion in the view of this commenter.

Private entities would not be excluded under the proposed exclusionary

provision; however, it was proposed to exclude public entities under proposed § 15.11(b). Thus, the apparent inconsistency noted by the commenter does not exist.

Exclusion of State Agencies and Public Entities

This same commenter also objects to the exclusion of state agencies and public entities under § 15.11(b).

The FAA agrees with this commenter that the FAA Act contemplates coverage of state agencies and public entities. Section 1118 provides for the indemnification of "persons" and that term, under section 101 of the FAA Act, includes "bodies politic." The FAA believes that this term is broad enough to include state agencies and public entities. Accordingly, the exclusionary language as proposed in § 15.11, as it relates to those agencies and entities, has been deleted.

Notification Requirements

This proposed section provides, among other things, that the publisher must notify the Chief Counsel of the FAA of its first receipt of a complaint in which it appears that indemnification may be appropriate. Under the proposed section, the notice must be received by the Chief Counsel within 30 days of the publisher's receipt of the complaint.

Correction

Paragraph (a) of proposed § 15.13 makes reference to the time limits set forth in that section. That paragraph erroneously referred to "the time limits described in paragraph (a) or (b) of § 15.13." In fact, the time limits are set forth in paragraphs (b) and (c) rather than in paragraphs (a) and (b). This error is corrected in the final rule.

Use of the Word "Appropriate"

Commenting on the provision requiring notice when indemnification "may be appropriate," one commenter states, in essence, that use of the word "appropriate" implies that the FAA may be granting itself authority to reject a proper request for indemnification.

In response to this comment, the FAA has revised proposed § 15.13(a) by deleting the word "appropriate" and substituting therefor the word "required." Thus, this final rule provides that the publisher must give notice to the FAA in those cases in which it appears that indemnification under section 1118 "may be required."

Time Limits

Several commenters state that the publisher generally will not know

whether a flight procedure is defective within 30 days of receipt of a complaint. The suggestions for revising this notice requirement are varied. One commenter suggests that notice be given within 60 days of service of the complaint if the complaint, on its face, reasonably indicates that indemnification may be required. If not, the publisher should have 60 days from the date it reasonably determines that indemnification is required. In any event, according to this commenter, notice should be given within six months of receipt of the complaint. This commenter also states that, if notice were given as proposed in the NPRM, the case would not have developed sufficiently to permit the FAA to determine whether indemnification is required.

While acknowledging that a claim for indemnification must be made within a reasonable time, another commenter states that 30 days is not sufficient time to determine whether such a claim can be made. According to this commenter, 60 days is adequate time to notify the FAA of an action or occurrence, if the publisher is aware of the action or occurrence and reasonably believes that it may lead to a claim for indemnification.

The FAA agrees that 30 days from receipt of a complaint may not be sufficient time to notify the FAA that indemnification may be required. Accordingly, this final rule provides that such notice must be given within 60 days after receipt of a complaint.

The FAA, however, does not agree that any longer period of time should be allowed to permit the publisher to "reasonably determine" if indemnification may be required, or that the notice requirement should not apply unless the publisher "reasonably believes" that an action or occurrence may lead to a claim for indemnification. Such language could lead to lengthy delays in notifying the FAA. These delays would deprive the Government of an opportunity to evaluate the case or participate in it when appropriate. A lengthy delay in giving notice to the FAA also could delay settlement in cases in which a prompt settlement is appropriate. This would thereby unjustifiably increase the litigation costs of all parties. Moreover, the FAA believes that 60 days is sufficient time for reviewing the pleadings, consulting with counsel, and ascertaining whether indemnification may be required. This prompt notice to the FAA will afford the Government a reasonable opportunity to protect its legitimate interests.

Conduct of the Action

This proposed section would require, among other things, that:

(1) The publisher agree to cooperate in the defense of the action with the United States when the United States is impleaded as a third-party defendant;

(2) The publisher provide any additional information requested by the United States;

(3) The FAA notify the publisher within 60 days of receipt of the publisher's initial notice, or within 60 days of receipt of additional information, whichever is later, if it determines that the publisher's claim does not require indemnification; and

(4) The publisher provide a copy of any adverse decision to the FAA not more than 3 days after it is rendered.

Cooperation Between FAA and the Publisher

One commenter suggests that proposed § 15.14 should be redrafted to promote cooperation between the FAA and the publisher, since a failure to cooperate would be equally detrimental to both. This commenter suggests that the FAA and the publisher should agree on tactics and conduct (including discovery), legal ethics, arguments, any determination to remove to Federal court, and settlement discussions. In the opinion of this commenter, such agreements would minimize costs.

The FAA agrees that cooperation between the FAA and the publisher is essential to the conduct of a proper defense and to the achievement of a proper settlement where appropriate. Proposed § 15.14 was drafted with this cooperation in mind. However, while the FAA contemplates and supports a high degree of cooperation between the publisher and the Government, the Government must not compromise its right to make determinations on an independent basis in the public interest. For this reason, the proposal that the Government and the publisher agree on tactics and the conduct of the litigation has not been adopted.

Request for Additional Information

Several commenters object to what they perceive to be the possibility of an unlimited request for information. One of the commenters suggests that there be reasonable restrictions on the scope and subject of requests, such as limiting the requests to information reasonably necessary to enable the FAA to determine whether the elements for indemnification are present or whether the amount of a proposed settlement is reasonable.

The FAA does not intend to delay the indemnification of publishers in proper cases through the imposition of burdensome requests for information. The FAA intends to request only such additional information deemed necessary for the conduct of a proper defense. Moreover, the FAA believes that it would not be appropriate to place prior restrictions on the scope or subject of the information it may need to request, for it is impossible to determine in advance of an action what information may be deemed essential for the preparation of a proper defense. Accordingly, the provisions regarding requests for additional information have been adopted as proposed.

Denial of Requests for Indemnification

With regard to the FAA's denial of requests for indemnification, one commenter states that denials should be based only on the inability of the publisher to demonstrate one or more of the three statutory criteria. Further, this commenter states that the factual basis for each denial should be clearly described.

The FAA does not agree that indemnification is required in all cases in which the statutory criteria are met. If, for example, the publisher does not conduct a good faith defense, or if the publisher fails to respond to reasonable requests for additional information, thereby undermining the United States' efforts to prepare a proper defense, indemnification may not be required. This restriction is consistent with the legislative history of section 1118 which states that the Government may impose additional provisions to protect its legitimate financial and litigation interests. Therefore, the FAA has not adopted the proposal which would have permitted a denial of indemnification only in those cases in which the publisher could not demonstrate one or more of the statutory criteria. However, the FAA agrees that the basis for a denial should be clearly stated, and proposed § 15.14(c) has been revised accordingly.

Determinations by the FAA

This commenter also states that the FAA should determine whether indemnification is required within 60 days after receiving the publisher's notice and should notify the publisher of its determination within that period of time.

The FAA does not agree that it should be bound to determine the appropriateness of indemnification within 60 days after receiving the publisher's notice. Clearly, there will be

occasions when the FAA cannot determine whether indemnification is required under the statute until a final adverse judgment is rendered or a good faith settlement is reached. These events cannot be expected to occur always within 60 days of the notice given by the publisher. Further, in many cases, it may be entirely inappropriate for the Government to agree to indemnification and to enter into settlement agreements prior to final judgment or settlement of a case. Moreover, the statute does not address the timing of indemnification agreements. In the absence of such language, the FAA believes that the statute should be interpreted to require that such agreements be entered into within a reasonable time after it is determined that indemnification is required. For the above reasons, the FAA has not adopted the proposal to require a determination of the appropriateness of indemnification within 60 days after notice.

Notice of Adverse Decisions

On further review and consideration, the FAA concludes that 3 days may not be sufficient time for the publisher to give the FAA notice of adverse decisions, especially in cases where the decision is rendered the day before a 3-day holiday. Accordingly, this final rule provides 5 business days for notice of adverse decisions.

Settlements

This section sets forth the proposed procedures for approving proposed settlements.

Time for Approval of Settlement

Several commenters object to the provision in paragraph (a) which affords the FAA 60 days to decide whether it will approve a proposed settlement. These commenters stress the need to move expeditiously on proposed settlements, especially in the final days before a trial. One of these commenters states that the 60-day approval period would, in effect, preclude the approval of settlements within 60 days of trial, the time when many settlements are consummated. Other commenters state that the proposed approval period would unduly delay settlements thereby increasing the costs of all parties. All commenters recommend a much shorter review and approval period, especially during the hours before trial.

While 60 days may appear to be an excessive period of time for review and approval of proposed settlements by the Government, coordination within the Government reasonably can be expected to take up to 60 days in some cases. Proposed settlements must be

reviewed by various levels within the FAA and the Department of Justice before a decision is reached. The proposed rule provides for a maximum of 60 days for the FAA to consider the proposed settlement. For the above reasons, the 60-day review period has been adopted as proposed. Efforts will be made to reach a decision in less than 60 days, if possible. Additionally, any approval period, whether 60 days, 30 days, or shorter, could conflict with a trial schedule. When such conflicts occur, the parties can advise the court that a settlement has been reached subject to Government approval and can file a motion to continue the trial date to permit the Government to evaluate the settlement. Since all the litigants can be expected to support or join in the motion, it is reasonable to expect that the court would grant it.

Approval and Disapproval of Settlements

One commenter questions whether the Chief Counsel has been delegated authority to approve or reject proposed settlements. This commenter states that such approvals or rejections should be made by the FAA Administrator.

The FAA agrees that the decision whether to approve or disapprove a proposed settlement should be made by the FAA Administrator. However, in some cases, approval of a settlement by the United States Department of Justice may be required. The proposal has been revised accordingly.

In addition, a new provision has been added requiring the publisher to release the United States from further liability once a settlement is reached. This provision will prevent a publisher from executing a comprehensive settlement, then improperly requesting additional compensation from the United States.

Explanation for Rejection of Settlements

Two commenters observe that the Chief Counsel would be required under the proposal to notify the publisher if he determines that indemnification is inappropriate. One commenter states that, in fairness, the FAA should provide an explanation as to why a proposed settlement is not approved by the Government. The other commenter contends that this notice provision should be moved to another section because it does not belong in a section which addresses settlements.

The FAA agrees that the notice provided by the FAA to the publisher should at least briefly set forth why the Government has not approved the proposed settlement. This final rule, as adopted, provides for such an explanation.

On the other hand, the FAA does not agree that the notice provisions regarding approval or disapproval should be set forth in another section of the final rule. Since notice to the publisher will contain the Government's approval or rejection of the proposed settlement, and the reasons for any rejection, the FAA believes that these notice provisions belong in the section relating to settlement. Therefore, this suggestion has not been adopted.

Obvious Defects

One commenter objects to having the Chief Counsel determine that a depiction is inaccurate or contains an obvious defect. The commenter suggests that such findings will be challenged on appeal and, if overturned, could result in additional expense to the Government. This commenter also states that decisions such as these should be made by the Administrator absent a specific delegation to the Chief Counsel.

As part of the process of evaluating requests for indemnification, the FAA must determine if a depiction is inaccurate or contains an obvious defect, since such determinations are required by section 1118 before indemnification can be approved. Since these determinations involve legal issues, participation of the Chief Counsel necessarily will be required even though the decision to approve or disapprove requests for indemnification will be made by the Administrator.

The Term "Obviously Defective"

Two commenters express concern that the term "obviously defective" is unclear and could be misconstrued. They state that the term could be interpreted in such a way as to impose on the publisher a duty to verify the accuracy of information provided by the FAA. One commenter even suggests that, under the proposed rule, the publisher could be held liable to the FAA for failure to verify. One of these commenters recommends that the final rule be clarified by at least providing clear examples of "obvious defects." The other commenter suggests that the proposed rule be revised to clarify that "obvious defects" are those which are obvious "on their face" and in the context of other information provided, but not obvious based upon physical testing or inspection.

The proposed rules do not of themselves impose a duty on the publisher to verify the accuracy of information provided by the FAA. Nor do the rules themselves impose any liability on a publisher for failure to verify the accuracy of information

supplied. The publisher need only depict the flight procedure or airway as represented by the FAA.

The FAA agrees with the comment which states that "obvious defects" are those which are obvious "on their face" and in the context of other information provided. This final rule uses the term "obviously defective;" however, the rule should not be interpreted as imposing a requirement upon a publisher to verify the accuracy of information provided by the FAA through physical testing, inspection, or any other means.

"Good Faith" Determinations

Several commenters object to the provisions that would permit the FAA to reject a request for indemnification upon a finding by the Chief Counsel that the publisher has not conducted a "good faith defense" or that a proposed settlement appears not to have been negotiated in "good faith." One commenter views these standards as being too subjective. It states that the FAA should specify the acts or inactions of the publisher that constitute a lack of good faith. Other commenters state that the FAA is not in a position fairly to judge the adequacy of a defense or settlement. According to these commenters, these determinations should be made by a court or administrative law judge.

"Good faith" is defined, in pertinent part, in *Black's Law Dictionary*, (4th ed.), as follows: "an honest intention to abstain from taking any unconscientious advantage of another." This is what is meant by "good faith" in the proposed rules. The FAA believes that it is reasonable to hold a publisher to such a standard. The failure of a publisher to conduct a good faith defense or to negotiate a settlement in good faith could result in an improper shifting of liability from the publisher to the Government. This, in turn, could result in the unjustified expenditure of public funds to indemnify a publisher who was responsible for the error and the resulting accident or occurrence.

Consistent with the legislative history of section 1118, the term "good faith" was introduced into the proposed rules as a safeguard to protect the Government's legitimate financial and litigation interests. If the "good faith" requirements should be used instead as a means improperly to avoid indemnification, the publisher's recourse is to seek judicial review of the FAA's denial of indemnification. Moreover, to refer "good faith" issues initially to a court or administrative law judge, as suggested by one commenter, could lead to additional litigation costs and the lengthy administrative delays that many

commenters clearly wish to avoid. For these reasons, the final rule does not permit indemnification if a publisher does not negotiate a settlement in good faith or does not conduct a good faith defense.

Adverse Judgments

This section sets forth the proposed procedure for processing requests for indemnification after an adverse judgment is entered against a publisher. It proposed that the publisher notify the FAA of its claim for indemnification within 5 days after a judgment is rendered against the publisher or within 30 days after denial of an appeal. It also proposed that the Chief Counsel notify the publisher if its claim for indemnification does not meet the requirements of section 1118. Finally, the Administrator would determine whether the publisher had conducted a "good faith" defense.

Redundancy

One commenter suggests that, beyond the first sentence, this section is redundant and should be deleted.

Like this commenter, another commenter states that the proposed section seems to impose redundant notice requirements since, under proposed § 15.13, the publisher must notify the FAA that indemnification may be appropriate long before a judgment is rendered. This commenter states that the section affords the Chief Counsel another opportunity to evaluate the claim to determine if it meets the requirements of section 1118 of the Act.

The notice requirements set forth in proposed § 15.16 are not redundant. The initial notice given under § 15.13 is to permit the Government to participate from the beginning in actions brought against the publisher, or to prepare for other measures which it considers appropriate to protect the public interest. The post-judgment notice requirements set forth under § 15.16 are intended to ensure that the FAA has prompt notice of adverse judgments so that it can expeditiously evaluate the publisher's claim for indemnification to determine if it must be paid by the Government.

The FAA necessarily must evaluate the claim after judgment to determine whether it must indemnify the publisher. Although an initial evaluation is done after the § 15.13 notice is received by the FAA, a number of intervening events could occur after the initial evaluation to alter the FAA's initial assessment of the claim. For example, it may not be clear initially as to whether indemnification is required, and the final court judgment may decide the question. Or, it may

appear initially that indemnification may be required, but subsequent events, such as a failure to conduct a good faith defense, may alter the preliminary decision to indemnify. Accordingly, this provision has been adopted as proposed.

Ambiguity

Another commenter states that the proposed section is confusing in that the last sentence refers to a determination made by the Administrator without specifying what that determination is. Also with regard to the last sentence, still another commenter states that the phrase "a claim for indemnification with respect to the judgment" is ambiguous.

The FAA agrees that the last sentence of proposed § 15.16 is confusing in certain respects and requires revision. First, the intent of the proposed section is to reject requests for indemnification if, after a judgment is entered, it is determined that the publisher does not meet the requirements of section 1118 or did not conduct a good faith defense. Both of these decisions ultimately will be made by the FAA Administrator, and the proposed section has been revised accordingly.

In addition, the FAA agrees that the proposal requiring one to "notify the Chief Counsel of its claim for indemnification with respect to the judgment" is unclear. The notice provided must specify that: (1) There was an adverse judgment against the publisher; and (2) the publisher has a claim for indemnification arising out of that adverse judgment. The proposed section has been revised accordingly.

Payment

This proposed section specifies the source from which funds would be obtained for indemnification, what costs would and would not be indemnified, and what subrogation would be available.

Delays in Making Payment

Several commenters object to the payment scheme set forth under proposed § 15.17(a). They express concern that the publisher may have to pay the adverse judgment while awaiting approval of a special appropriation from Congress. They consider this provision inappropriate or in conflict with section 1118. One of these commenters states that payment of the claim should be made out of agency funds as soon as the judgment is final or the obligation to pay damages is certain.

The FAA agrees that funds should be obtained by a means other than a

special appropriation from Congress. Accordingly, the FAA will follow the procedures mandated for obtaining the necessary indemnification proceeds from the Judgment Fund. This fund, which is administered by the General Accounting Office, contains funds for the payment of obligations owed by the United States. By adopting this approach, which will require the approval of the Department of Justice (DOJ), the Government should be able to pay valid claims within a reasonable time after a judgment is final or the obligation to pay the claim is otherwise certain. Proposed § 15.17 has been revised to incorporate this approach for the payment of appropriate claims.

Delays in Executing Indemnification Agreements

Several commenters take issue with the provision in proposed § 15.17(a) which addresses the execution of indemnification agreements. One commenter interprets the section to mean that the agreement to indemnify would be executed only after an adverse judgment is rendered (or settlement approved). According to this commenter, the intent of section 1118 is to require execution of the agreement when the three statutory requirements are met, not only after the publisher has litigated the matter. Another commenter states that the agreement should be executed promptly after it is determined that the three criteria are met. Still another commenter states that the FAA must negotiate an agreement before an action against the publisher is initiated if the FAA's negligence has been demonstrated.

Proposed § 15.17(a) would not require delaying the execution of an indemnification agreement until a settlement is reached or a judgment rendered. On the contrary, it proposes that the FAA prepare and execute an indemnification agreement once the Chief Counsel determines that the requirements of section 1118 have been met. However, since the agreement will require payment of the publisher's claim out of the Judgment Fund, DOJ approval will be required prior to its execution by the FAA and the publisher. This final rule provides that DOJ approval is required and that the Administrator makes the determinations regarding indemnification.

Costs and Fees Not Indemnified

Several commenters object to some or all of the items excluded from indemnification under the proposal. One commenter states that special and punitive damages, attorney fees, and incidental expenses should be covered.

Another commenter states that Congress intended publishers to be indemnified for all reasonable costs, attorney fees, incidental expenses, and interest. Two other commenters state that, based on their reading of section 1118, there is no basis for excluding the costs proposed to be excluded under paragraph (b). One of these commenters contends that the exclusion of these costs is unreasonable in view of the obligations that the FAA proposes to impose on the publisher. Another commenter questions what type of attorney fees the FAA proposes to exclude.

With reference to the exclusions from coverage set forth under proposed § 15.17(b), under the Federal Tort Claims Act (FTCA) the United States is not liable for punitive or exemplary damages. In any event, the likelihood of such damages being sought or awarded in these cases is extremely remote, since any error that would give rise to Government liability would likely be innocent rather than intentional. Moreover, the FTCA also prohibits the assessment of civil and criminal fines and other litigation sanctions against the United States.

Ordinarily, the Government does not pay costs and fees associated with litigation against third parties. However, a limited exception to this policy is justified when a publisher, at the request of or with the concurrence of the Government, conducts a good faith defense against a claim or pursues an appeal in good faith. In instances such as these, where the Government has determined that an appeal is justified, it will pay the reasonable costs and fees incurred by the publisher, including the publisher's reasonable attorney fees and prejudgment interest but it will not pay attorney fees in excess of those allowed by law under the Equal Access to Justice Act (5 U.S.C. 335). The Government will not pay these costs if the publisher pursues an appeal without the Government's request or concurrence. To pay appeal costs, regardless of the merits of a case, would encourage frivolous appeals and unjustifiably increase the costs reimbursed by the Government.

Correction

Proposed § 15.17(b) provides that the FAA may direct the publisher to appeal from an adverse decision. Since the Government is without authority to direct the publisher to pursue litigation in any form, it is inappropriate to suggest that a defense or appeal can be initiated "at the direction of * * * the FAA." Therefore, this phrase has been revised to provide that the FAA may request that the publisher appeal from

an adverse decision. However, if the publisher refuses to appeal, the FAA may deny the request for indemnification.

Subrogation

One commenter questions the meaning of the last sentence of proposed § 15.17(b). The sentence provides, in pertinent part, that "[n]o payment shall be recommended unless the indemnification agreement provides that the Government shall be subrogated to all claims * * * of the publisher." This commenter appears to view subrogation as a ploy to avoid indemnification in proper circumstances.

It is entirely appropriate and essential for the Government to be subrogated to all claims of the publisher and that the publisher be required to agree to this. Once the Government agrees to indemnify, it must succeed to the publisher's rights in order to pursue reimbursement of costs in appropriate circumstances. To provide otherwise would permit the publisher to obtain a double recovery. Accordingly, payment will not be "made" (proposed § 15.17(b) used the term "recommended") unless the Government is subrogated to all the publisher's claims.

Failure to Follow Required Procedures

One commenter states that the new rules should contain language providing that publishers who fail to follow the procedures set forth in the rules will not be indemnified while those which do follow the prescribed procedures must be indemnified.

The intent of the new rules is to require indemnification in those cases in which the publisher meets all the requirements set forth in the statute and complies with the procedures in this final rule. In some instances, however, the FAA may elect to provide indemnification even though one or more procedures in this rule have not been followed, especially if the failure to comply is deemed insignificant and has not undermined the Government's interest. For this reason, the FAA considers it inappropriate to adopt this comment.

Indemnification Under Other Laws

One commenter expresses the concern that the new rules may be interpreted to mean that the publisher may not obtain indemnification under other applicable laws in instances wherein it cannot make a case for indemnification under section 1118.

This final rule reasonably cannot be interpreted to preclude a publisher from

pursuing any other available legal remedies where indemnification under section 1118 is not required.

Economic Summary

Executive Order 12291 dated February 17, 1981, directs Federal agencies to promulgate new regulations or modify existing regulations only if potential benefits to society for each regulatory change outweigh potential costs. The order also requires the preparation of a Regulatory Impact Analysis of all "major" proposals except those responding to emergency situations or other narrowly defined exigencies. A "major" proposal is one that is likely to result in an annual effect on the economy of \$100 million or more, a major increase in consumer costs, a significant adverse effect on competition or is highly controversial.

Analysis of Benefits and Costs

The FAA has estimated the benefits and costs associated with this rule. The rule implements section 1118 of the Federal Aviation Act. That section requires the United States government to indemnify a publisher of aeronautical charts or maps when the publisher incurs liability as a result of publishing a chart or map accurately depicting a defective or deficient FAA flight procedure or airway.

Each section of this rule implements the statutory mandate of section 1118. The rule also gives effect to the stated intent of Congress in that it sets forth requirements which will protect the Government's legitimate financial and litigation interests. The rule merely provides an orderly procedure for the payment of costs for which the Government would be liable in any event. The financial impact of section 1118 is a transfer of funds under appropriate conditions. For these reasons, this rule implementing the statute will not result in any additional cost to society. On the other hand, by requiring that the Government be promptly notified of its potential liability, and by requiring that the Government be promptly provided with all information needed to assess its potential liability, this rule should promote prompt and just settlements. It will thereby help to avoid costly and burdensome litigation and delays. It will in this way be beneficial to society.

For these reasons, this final rule is not considered major under E.O. 12291. Moreover, because the impact is limited merely to insignificant administrative costs, the impact is so minimal that it does not warrant a full regulatory evaluation.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. The RFA requires agencies to review rules which may have a "significant economic impact on a substantial number of small carriers."

For the reasons stated above in the cost/benefit analysis, this final rule will not have a significant economic impact, positive or negative, on a substantial number of small entities.

Since there is no cost associated with this rule, the FAA has determined that it will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Statement

This rule will have no impact on trade opportunities for U.S. firms doing business overseas or on foreign firms doing business in the United States.

Federalism Implications

The regulations adopted herein will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule will not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Conclusion

Since this rule merely provides an orderly procedure for the prompt payment of damages for which the Government otherwise would be liable, thereby helping to avoid costly litigation and delays, its impact will only be a minimal, positive one. Therefore, the FAA has determined that this amendment is not major under Executive Order 12291 and is not significant under the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 28, 1979). Since the impact of this rule involves only minor administrative costs, it is certified that under the criteria of the Regulatory Flexibility Act this amendment will not have a significant economic impact, positive or negative, on a substantial number of entities. Because of the absence of any costs attendant with this rule, the FAA has determined that the expected impact of these regulations is so minimal that they do not warrant a full regulatory evaluation.

List of Subjects in 14 CFR Part 15

Aeronautical charts, administrative claims, indemnification procedures, aircraft accident investigation information.

The Amendment

Accordingly, the FAA adopts a new subpart B to part 15 of the Federal Aviation Regulations (14 CFR part 15) as follows:

PART 15—ADMINISTRATIVE TORT CLAIMS UNDER FEDERAL TORT CLAIMS ACT

1. The authority citation for part 15 is revised to read as follows:

Authority: 49 U.S.C. 1354; 49 U.S.C. APP 1519; 5 U.S.C. 301; 28 U.S.C. 2672, 2675; 49 U.S.C. 106(g) (Revised, Pub. L. 97-449, Jan. 12, 1983).

2. 14 CFR 15.1 through 15.9 are designated as subpart A—General Procedures.

3. A new subpart B is added to read as follows:

Sec.

- 15.101 Applicability.
- 15.103 Exclusions.
- 15.105 Filing of requests for indemnification.
- 15.107 Notification requirements.
- 15.109 Settlements.
- 15.111 Conduct of litigation.
- 15.113 Indemnification agreements.
- 15.115 Payment.

Subpart B—Indemnification Under Section 1118 of the Federal Aviation Act of 1958.

§ 15.101 Applicability.

This subpart prescribes procedural requirements for the indemnification of a publisher of aeronautical charts or maps under section 1118 of the Federal Aviation Act of 1958, as amended, when the publisher incurs liability as a result of publishing—

- (a) A chart or map accurately depicting a defective or deficient flight procedure or airway that was promulgated by the FAA; or
- (b) Aeronautical data that—
 - (1) Is visually displayed in the cockpit of an aircraft; and
 - (2) When visually displayed, accurately depicts a defective or deficient flight procedure or airway promulgated by the FAA.

§ 15.103 Exclusions.

A publisher that requests indemnification under this part will not be indemnified if—

- (a) The complaint filed against the publisher, or demand for payment

against the publisher, first occurred before December 19, 1985;

(b) The publisher does not negotiate a good faith settlement;

(c) The publisher does not conduct a good faith defense;

(d) The defective or deficient flight procedure or airway—

(1) Was not promulgated by the FAA;

(2) Was not accurately depicted on the publisher's chart or map;

(3) Was not accurately displayed on a visual display in the cockpit, or

(4) Was obviously defective or deficient;

(e) The publisher does not give notice as required by § 15.107 of this part and that failure is prejudicial to the Government; or

(f) The publisher does not appeal a lower court's decision pursuant to a request by the Administrator under § 15.111(d)(2) of this part.

§ 15.105 Filing of requests for indemnification.

A request for indemnification under this part—

(a) May be filed by—

(1) A publisher described in § 15.101 of this part; or

(2) The publisher's duly authorized agent or legal representative;

(b) Shall be filed with the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; and

(c) Shall state the basis for the publisher's assertion that indemnification under this part is required.

§ 15.107 Notification requirements.

A request for indemnification will not be considered by the FAA unless the following conditions are met:

(a) The publisher must notify the Chief Counsel of the FAA, within the time limits prescribed in paragraph (b) or (c) of this section, of the publisher's first receipt of a demand for payment, or service of a complaint in any proceeding, federal or state, in which it appears that indemnification under this part may be required.

(b) For each complaint filed, or demand for payment made, on or after December 19, 1985, and before June 4, 1990, the notice required by paragraph (a) of this section must be received by the FAA on or before July 2, 1990.

(c) For each complaint filed, or demand for payment made, on or after June 4, 1990, the notice required by paragraph (a) of this section must be received by the FAA within 60 days after the day the publisher first receives

the demand for payment or service of the complaint.

(d) Within 5 days after the day a judgment is rendered against the publisher in any proceeding, or within 30 days of the denial of an appeal, whichever is later, the publisher must notify the FAA Chief Counsel that—

(1) There is an adverse judgment against the publisher; and

(2) The publisher has a claim for indemnification against the FAA arising out of that judgment.

§ 15.109 Settlements.

(a) A publisher may not settle a claim with another party, for which the publisher has sought, or intends to seek, indemnification under this part, unless—

(1) The publisher submits a copy of the proposed settlement, and a statement justifying the settlement, to the Chief Counsel of the FAA; and

(2) The Administrator and where necessary, the appropriate official of the Department of Justice, approves the proposed settlement.

(3) The publisher submits a signed release that clearly releases the United States from any further liability to the publisher and the claimant.

(b) If the Administrator does not approve the proposed settlement, the Administrator will—

(1) So notify the publisher by registered mail within 60 days of receipt of the proposed settlement; and

(2) Explain why the request for indemnification was not approved.

(c) If the Administrator approves the proposed settlement, the Administrator will so notify the publisher by registered mail within 60 days after the FAA's receipt of the proposed settlement.

(d) If the Administrator does not have sufficient information to approve or disapprove the proposed settlement, the Administrator will request, within 60 days after receipt of the proposed settlement, the additional information needed to make a determination.

§ 15.111 Conduct of litigation.

(a) If a lawsuit is filed against the publisher and the publisher has sought, or intends to seek, indemnification under this part, the publisher shall—

(1) Give notice as required by § 15.107 of this part;

(2) If requested by the United States—

(i) Implead the United States as a third-party defendant in the action; and

(ii) Arrange for the removal of the action to Federal Court;

(3) Promptly provide any additional information requested by the United States; and

(4) Cooperate with the United States in the defense of the lawsuit.

(b) If the lawsuit filed against the publisher results in a proposed settlement, the publisher shall submit that proposed settlement to the FAA for approval in accordance with § 15.109 of this part.

(c) If the lawsuit filed against the publisher results in a judgment against the publisher and the publisher has sought, or intends to seek, indemnification under this part as a result of the adverse judgment, the publisher shall—

(1) Give notice to the FAA as required by § 15.107(d) of this part;

(2) Submit a copy of the trial court's decision to the FAA Chief Counsel not more than 5 business days after the adverse judgment is rendered; and

(3) If an appeal is taken from the adverse judgment, submit a copy of the appellate decision to the FAA Chief Counsel not more than 30 days after that decision is rendered.

(d) Within 60 days after receipt of the trial court's decision, the Administrator by registered mail will—

(1) Notify the publisher that indemnification is required under this part;

(2) Request that the publisher appeal the trial court's adverse decision; or

(3) Notify the publisher that it is not entitled to indemnification under this part and briefly state the basis for the denial.

§ 15.113 Indemnification agreements.

(a) Upon a finding of the Administrator that indemnification is required under this part, and after obtaining the concurrence of the United States Department of Justice, the FAA will promptly enter into an indemnification agreement providing for the payment of the costs specified in paragraph (c) of this section.

(b) The indemnification agreement will be signed by the Chief Counsel and the publisher.

(c) The FAA will indemnify the publisher for—

(1) Compensatory damages awarded by the court against the publisher;

(2) Reasonable costs and fees, including reasonable attorney fees at a rate not to exceed that permitted under the Equal Access to Justice Act (5 U.S.C. 504), and any postjudgment interest, if the publisher conducts a good faith defense, or pursues a good faith appeal, at the request, or with the concurrence, of the FAA.

(d) Except as otherwise provided in this section, the FAA will not indemnify the publisher for—

(1) Punitive or exemplary damages;

- (2) Civil or criminal fines or any other litigation sanctions;
 - (3) Postjudgment interest;
 - (4) Costs;
 - (5) Attorney fees; or
 - (6) Other incidental expenses.
- (e) The indemnification agreement must provide that the Government will be subrogated to all claims or rights of the publisher, including third-party claims, cross-claims, and counterclaims.

§ 15.115 Payment.

After execution of the indemnification agreement, the FAA will submit the agreement to the United States Department of Justice and request payment, in accordance with the agreement, from the Judgment Fund.

James D. Busey,
Administrator.

Issued in Washington, DC, on April 26, 1990.

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