DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 13

[Docket No. 25690; Amdt. No. 13-21]

Rules of Practice for FAA Civil Penalty Actions

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: In accordance with a decision of the United States Court of Appeals for the District of Columbia, issued on April 13, 1990, the FAA published the rules of practice for civil penalty actions for comment by interested persons. This final rule adopts and republishes, with certain changes discussed herein, the initiation procedures and the rules of practice for FAA civil penalty actions (1) not exceeding $50,000 for a violation of the Federal Aviation Act of 1958, or of any rule, regulation, or order issued thereunder, and, (2) regardless of amount, for a violation of the Hazardous Materials Transportation Act, or any rule, regulation, or order issued thereunder. Adoption of the final rule is necessary so that the FAA may resume initiation, prosecution, and adjudication of civil penalty actions under its statutory authority. The final rule is intended to complete the rulemaking action issued after the court's decision.

DATES: Effective date: August 2, 1990. Effective date of the final rule issued on April 17, 1990 (55 FR 15110; April 20, 1990): August 2, 1990.

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 notices of proposed rulemaking 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; September 7, 1988) for civil penalty actions conducted under a statutory amendment (Pub. L. 100-223; December 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 a violation of the Federal Aviation Act or the FAA's safety regulations promulgated thereunder. Under this statutory authority, a civil penalty may be assessed only after notice and an opportunity for a hearing on the record. The legislation enacted in 1987, authorizing the FAA generally to assess civil penalties administratively, was limited by its terms to a 2-year period, effective through December 30, 1989. On December 15, 1989, a 4-month extension of the FAA's authority was enacted, effective through April 30, 1990. On May 4, 1990, an additional 3-month extension of the FAA's authority was enacted; the legislation states that the extension is effective as of April 30, 1990. The authority now will expire on July 31, 1990, unless Congress again acts to extend it or make it permanent.

In the final rule issued in August 1988, the FAA made the rules of practice applicable to civil penalty actions, regardless of amount, for a violation of the Hazardous Materials Transportation Act, or any rule, regulation, or order issued thereunder. In the August 1988 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.

The Air Transport Association of America filed a petition for review in the U.S. 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 petition for review filed by the Air Transport Association.

On April 13, 1990, the court of appeals issued its decision in *Air Transport Association* v. *Department of Transportation* (D.C. Cir., No. 89-1195). In a 2-1 decision, the court agreed with the petitioner and intervenors 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. On May 29, 1990, the Department of Justice filed with the U.S. Court of Appeals a petition for rehearing and a suggestion for rehearing *en banc* of the panel's decision issued on April 13, 1990. On June 20, 1990, by a vote of 5-5, the U.S. Court of Appeals denied the suggestion for rehearing *en banc*. The Department of Justice is currently considering whether to seek further review of the April 13 panel decision in the United States Supreme Court.

In its April 3 decision, 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 civil penalty cases initiated under the rules of practice have been held in abeyance and no notices of proposed civil penalty have been issued since the court's decision. Even informal procedures, such as informal conferences, have been held in abeyance. The administrative law judges in the Office of Hearings of the Department of Transportation have notified the parties in docketed cases that all proceedings are being held in abeyance pending adoption of procedural rules in accordance with the court's decision. No new hearings have been scheduled since April 13, 1990. The FAA and the Office of Hearings made every effort to notify in writing all persons whose cases were pending at the time of the court's decision, whether or not a hearing had 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. Nevertheless, in light of the court's

decision, the FAA suspended the effective date of the changes contained in a final rule issued on April 17, 1990 (55 FR 15110; April 20, 1990), pending further notification in the Federal Register. By this document, the FAA gives notice that the changes published in the April 1990 final rule, to the extent they have not been revised herein, will become effective 30 days after publication of this final rule.

Concurrently with the issuance of the April 1990 final rule, the FAA issued another NPRM, published in a separate part of the same Federal Register, in response to the court's ruling. 55 FR 15134; April 20, 1990. The rules of practice, published in their entirety for comment, included the changes adopted pursuant to the April 1990 final rule. Because all proceedings under the rules of practice were suspended as a result of the court's decision, the agency moved expeditiously to issue the NPRM following the court's decision. Given the familiarity of the aviation community with the rules of practice, and the several previous opportunities the public has had to comment on these rules, the FAA provided a 30-day comment period on the April 1990 NPRM.

On June 7, 1990, the Administrative Conference of the United States (hereinafter "Administrative Conference") met in its forty-first plenary session to consider the proposed recommendations of the Committee on Adjudication, and the report on civil money penalties for Federal aviation violations prepared by Professor Richard Fallon of Harvard Law School, a consultant to the Administrative Conference. On June 20, 1990, the Administrative Conference transmitted Recommendation 90–1 to Congress. Recommendation 90–1, which will be published in the Federal Register, recounts the history of the agency's civil penalty assessment authority and the Administrative Conference's participation in reviewing implementation of the authority and the rules of practice. The Administrative Conference adopts the Adjudication Committee's recommendation that the authority for administrative assessment of civil penalties "* * * be made a permanent feature of Federal regulation of aviation safety." The Administrative Conference also recommends that Congress remove the $50,000 statutory ceiling for civil penalty actions initiated pursuant to the assessment authority.

While continuing to recommend changes to the rules of practice to eliminate ambiguities and address misunderstandings and perceptions of unfairness in the rules, the Administrative Conference notes that the April 1990 NPRM "substantially incorporates the provisions" of the Conference's recommendations. In Recommendation 90–1, the Administrative Conference notes its "intention to study the issue of the more appropriate location for adjudicatory authority[.]" if Congress extends the assessment authority either permanently or for a substantial period. According to the Administrative Conference, there are arguments on both sides of the issue of whether the assessment authority should be retained by the agency or transferred to the National Transportation Safety Board. In the Conference's words, "The better choice between the two is not self-evident."

Effectiveness of the Final Rule

The court's decision permits the FAA to "resume prosecution of [pending] cases" upon promulgation of a final rule. Slip op. at 21. In the April 1990 NPRM, the FAA stated its intent to make the rules and any revisions immediately effective upon publication of a final rule in the Federal Register as permitted under the Administrative Procedure Act. The FAA stated that good cause would exist for immediate effectiveness of the final rule to address the interests that all parties share in fair and expeditious adjudication of civil penalty actions, considering the time that civil penalty actions would have been suspended under the court's decision. The commenters neither addressed nor objected to the agency's expressed intent.

The agency continues to believe that immediate implementation of the amended rules, thus serving the interests of respondents and the public in swift prosecution and adjudication, would constitute good cause for immediate effectiveness. However, there are other interests to consider in light of the number of issues raised by the commenters in response to the April 1990 NPRM. This final rule adopts many changes to the prehearing procedures and the rules of practice that govern civil penalty hearings. Despite the interests that may be served by immediate effectiveness of the amended rules, the agency believes that both public and private interests will be better served by allowing interested persons, particularly respondents in these actions, sufficient time to review the amended rules of practice.

Therefore, the amended rules will not become effective immediately. Instead, changes to the rules of practice contained in the April 1990 final rule, changes adopted herein, and provisions adopted without change will become effective 30 days after publication of this final rule, in accordance with section 553 of the Administrative Procedure Act. The agency believes that the 30-day period will ensure that interested persons have a sufficient opportunity to review and become familiar with the revised rules of practice.

The revised initiation procedures and amended rules of practice, of course, will apply prospectively to any case initiated after the effective date of this final rule. The revised procedures and amended rules also will apply to pending cases, no matter where in the process, as described in the April 1990 final rule. 55 FR at 15125–15126; April 20, 1990. In addition to that discussion, the following guidance is offered to ensure smooth and efficient implementation of the revised prehearing procedures and amended rules of practice to pending cases held in abeyance after the court's decision.

Under § 13.221(a), an administrative law judge must give the parties at least 60 days notice of the date, time, and location of a hearing. Thus, while the required notice of the time, place, and location of a hearing could be issued as soon as the rules become effective, the agency anticipates that hearings would not be held earlier than 60 days after the effective date (in essence, 90 days after publication of this final rule). Under § 13.221(c) as revised, the parties may agree, with the consent of the administrative law judge, to hold the hearing earlier than scheduled but sometime after the effective date of the final rule.

Also, to avoid unnecessary disputes about calculation of time and the amount of time remaining to file documents or responses, the agency believes that any time period in the rules of practice that permits or requires action by a party should begin anew as of the effective date. For example, if a party had 20 days remaining (of the 50-day period) to perfect an appeal by filing an appeal brief on the date of the court's decision (April 13, 1990), the party now will have the full 50-day period to file the appeal brief, calculated from the effective date of this final rule. The FAA will construe time periods in the rules in this manner and is confident that the administrative law judges will exercise their discretion appropriately and judiciously to ensure fairness to the parties in these proceedings. If the parties find that they would be adversely affected by unanticipated time constraints, either party may request an extension of time to file documents, either orally or in writing, under § 13.213 of the rules.

Admittedly, this somewhat unusual construction of the effectiveness of the final rule will delay prosecution and adjudication of civil penalty actions brought to address violations of safety and security regulations. Nevertheless, it is equally important to ensure that civil penalty respondents are not disadvantaged by the complex posture of this rulemaking, a possibility if the revised procedures and rules were made immediately effective. During the 30-day period before the final rule is effective, the FAA will make every effort to notify civil penalty respondents, whose cases have been held in abeyance, in writing of promulgation of the final rule and adoption of the changes to the initiation procedures and the rules of practice. As occurred when the court issued its decision on April 13, 1990, the FAA anticipates that the administrative law judges also will make every effort to notify civil penalty respondents of the status of their cases. This 30-day period also will enable other interested persons to become aware of the many changes to the initiation procedures and rules of practice adopted in this final rule. Thus, on balance, the agency believes that the public interest, and the private interests of the parties, are better served by providing this 30-day period for notice and implementation of the revised procedures and rules of practice.

To the extent that this final rule again revises sections of the rules amended in the April 1990 final rule, the initiation procedures and rules of practice in this document will govern initiation and prosecution of civil penalty cases under the general assessment authority. The revisions in the April 1990 final rule either have been incorporated in this final rule unchanged or revised again. Those sections that were revised pursuant to the February 1990 NPRM (and with which the commenters agreed, continue to agree, or make no further comment) generally have been included unchanged from the April 1990 final rule. Other sections, such as § 13.16 dealing with prehearing procedures, are significantly different from the April 1990 final rule as a result of the comments to the April 1990 NPRM. The amendments to the rules of practice adopted in the April 1990 final rule, to the extent that they are not either incorporated or adopted in this final rule, will not appear in any publication other than the **Federal Register** of April 20, 1990 (55 FR 15110–15131).

The initiation procedures and the rules of practice, as they appear in this document, ultimately will be published in the Code of Federal Regulations. This final rule will be published in the **Federal Register** and may be used by the parties in civil penalty proceedings under the general assessment authority. The FAA is republishing the revised initiation procedures of § 13.16 and the entire amended rules of practice. As a matter of course, the FAA distributes the initiation procedures and the rules of practice, as published in the **Federal Register**, with a notice of proposed civil penalty to those persons who have been charged with an alleged violation for their use in any civil penalty proceedings.

Discussion

Several commenters to the NPRM issued in February 1990, in addition to addressing the issues raised in the notice, also expressed opinions on other sections of the rules of practice that were outside the scope of that NPRM. Those comments indicated concern with other sections of the rules that heretofore may not have been raised by previous commenters. In the April 1990 NPRM, the FAA presented those concerns and solicited comment on those issues.

Twenty comments were submitted on or before May 21, 1990, the closing date for receipt of comments on the proposals in the April 1990 NPRM. The FAA considered all comments received on or before May 25, 1990, including two comments received after the close of the comment period. The FAA reviewed carefully the suggestions and recommendations of the commenters. In accordance with the recommendation of one commenter, the FAA also reviewed the comments submitted previously on the rules of practice to ensure that all comments were fairly considered.

The commenters included representatives of aviation entities regulated by the FAA, such as: Pro-Tech-Tube, Inc. (Pro-Tech); Keystone Flight Services (Keystone); the National Air Carrier Association (NACA); the Air Line Pilots Association (ALPA); the Experimental Aircraft Association (EAA); the National Business Aircraft Association (NBAA); the President of the National Transportation Safety Board Bar Association (NTSB Bar Association); the Aircraft Owners and Pilots Association (AOPA); ABX Air, Inc. (Airborne); the Air Transport Association of America (ATA); the Airport Operators Council International (AOCI) and the American Association of Airport Executives (AAAE) (joint comments); and American Airlines. Several individuals associated with regulated entities and attorneys, who submitted comments on behalf of clients or whose practice includes aviation-related enforcement actions, also submitted comments on the April 1990 NPRM.

Although generally pleased with and supportive of the changes to the rules contained in the April 1990 final rule, commenters raise several concerns about other sections of the rules of practice. Some commenters continue to raise issues previously discussed, addressed, or adopted in the April 1990 final rule; to the extent that the commenters raise new issues related to issues addressed previously, the FAA discusses those comments here. This document also discusses issues and concerns not raised previously in comments to the rules of practice and changes adopted in this rulemaking action pursuant to those comments.

Separation of Functions

Several commenters reiterate objections they have previously expressed in this rulemaking that the separation of functions provided in the rules of practice is inadequate to ensure a system of adjudication that both is fair and appears fair. These commenters criticize the separation of functions in the rules of practice, even as revised in the April 1990 final rule. Much of their criticism, however, stems from a general view that housing prosecution and adjudication functions within one agency constitutes an inherent violation of principles of fundamental fairness and due process.

In the preamble to the April 1990 final rule, the agency exhaustively responded to many of the same concerns expressed by the commenters to this notice. 55 FR 15112–15117; April 20, 1990. Although the agency has thoroughly considered the most recent set of comments on this issue, it will not repeat the extensive discussion contained in the April 1990 final rule preamble. The agency refers the public also to four previous discussions of the agency's separation of functions in addition to the preamble to the April 1990 final rule. 54 FR 1335; January 10, 1989 (notice of implementation within the Office of Chief Counsel); 54 FR 11914; March 22, 1989 (disposition of comments to August 1988 final rule); 54 FR 46196; November 1, 1989 (preamble to final rule implementing the Equal Access to Justice Act); 55 FR 7980; March 6, 1990 (notice of proposed rulemaking on the rules of practice).

In the April 1990 final rule, the agency revised its rules of practice in response to concerns expressed by the aviation community and to suggestions made by the Committee on Adjudication and Professor Fallon. Specifically, the agency amended § 13.203 to: (1) Include

the separation within the Office of Chief Counsel described in the January 1989 Federal Register notice; (2) expressly prohibit agency employees who participate in an investigation from advising any person who performs adjudicative functions in a case or a factually-similar case; and (3) preclude the Chief Counsel from advising the decisionmaker in any case in which the Chief Counsel participated before the notice of proposed civil penalty was issued (removing the so-called temporal clause). (One private attorney, who submitted the same comment separately on behalf of two airmen, mistakenly fails to note this change to the rules of practice. Another private attorney commenter ignores this revision, claiming that "nothing [has been] done" about the lack of separation within the Office of Chief Counsel.)

A few commenters (some private attorneys, EAA, and the President of the NTSB Bar Association) repeat in general or conclusory terms their view that any separation of functions is inadequate so long as both prosecutorial and adjudicative functions are performed by the same agency. The agency deems sufficient its previous response to this point in the preamble to the April 1990 final rule. 55 FR at 15113; April 20, 1990.

This general position continues to be articulated, even by some attorneys, in terms of "due process." As the agency has noted previously, this legal argument is not supported by any provision of the Constitution or statute, or any court decision. Most commenters to this notice recognize that as a matter of constitutional and statutory law, it has long been settled that in-house adjudication of civil penalties does not constitute an inherent violation of due process. (And of course, in-house adjudication is expressly contemplated by the Administrative Procedure Act.)

AOPA notes that the agency's separation of functions "arguably meets" the requirements of the Administrative Procedure Act, but urges the agency to go beyond what the law requires, which the agency has done in deleting the "temporal clause." One private attorney concedes that, "As a matter of legal theory and Aristotelian logic, the Agency would appear to be correct." ALPA states that the legality of the separation is "beside the point[,]" because of a "widespread perception * * * that the Chief Counsel and his staff are basically prosecutorial in their outlook and orientation." These commenters object to the agency's separation of functions because they believe that, regardless of whether the rule is consistent with law, the rule in fact or in appearance is unfair or biased in favor of the agency. They note that it is important that a system of adjudication be perceived as fair by those who are subject to it, not simply that it actually operate fairly, a proposition with which the FAA agrees. Most of the commenters who oppose the agency's separation of functions do not point to its unfairness *per se*, but complain of the appearance of unfairness, or the "perceptions of the appearance" of unfairness.

Some commenters believe the agency's conduct and "attitude" render inadequate any structural separation of functions within the FAA. Other commenters focus their attention on the Office of Chief Counsel, especially the role of the Chief Counsel and the Assistant Chief Counsel for Litigation, and suggest that the entire Office be removed from the role of advising the decisionmaker. These commenters recommend that a separate staff be created to advise the decisionmaker, entirely independent of the Office of Chief Counsel. For example, ATA concludes that "Appointment of independent legal advisors, separated in all respects from prosecutors, would appear more fair."

As an indication that the agency is "incapable of fairly and properly adjudicating enforcement actions against pilots in-house," one private attorney cites the FAA's conduct in three enforcement cases which were not adjudicated in-house, but by the NTSB. In each of the three cases, the agency failed to sustain its burden of proof on the merits and the pilot was awarded attorney fees under the Equal Access to Justice Act (EAJA). While the agency does not dispute the commenter's summary of these cases, it is the FAA's prosecution of these cases that is the subject of criticism. The commenter argues that because of the agency's "adversarial and unreasonable behavior" in the prosecution of these (and ostensibly other) certificate actions, it cannot be trusted fairly to adjudicate civil penalty cases.

This comment fails to appreciate that under the rules of practice, the adjudication function is performed initially by administrative law judges employed by the Office of the Secretary of the Department of Transportation. Only an appeal of an administrative law judge's decision is considered by the Administrator. Under the rule's separation requirements, prosecutors (as well as investigators) may not communicate with the adjudicators on a case in which they have participated, or on a factually-related case and, of course, neither adjudicator is subject to the control or supervision of any prosecutor. Just as the agency may be liable for attorney fees under EAJA in adversary adjudications in Federal court and before the NTSB, so the agency is subject to attorney fees under EAJA in civil penalty proceedings adjudicated within the Department of Transportation. Finally, final decisions of the decisionmaker under the rules of practice are subject to review in the U.S. Courts of Appeals. In sum, there are ample protections built into the agency's adjudicative and appeal processes to check overzealous prosecution and ensure a fair adjudication based on the facts and the law.

A few commenters, such as AOPA, refer to a contentious relationship that has developed between the agency—most notably, the Chief Counsel—and the aviation community as evidence of an apparent partiality or bias in the agency's favor that is inconsistent with fair adjudication. The agency readily acknowledges that the civil penalty assessment authority and the rules of practice implementing that authority have engendered a significant amount of controversy, and that this controversy finds the agency and a substantial portion of the aviation community on opposite sides in court and before the Congress. Nonetheless, the agency believes the civil penalty assessment authority has been administered fairly and in good faith from its inception, and fully expects to win the confidence of the aviation community, as well as the general public, as actual experience is gained under the rules.

The agency has responded to the concerns of the aviation community, making significant changes to the rules of practice earlier this year. Just as it pledged to do, it carefully considered the revisions to the rules of practice recommended by Professor Fallon and the Adjudication Committee of the Administrative Conference, and accepted all of them. Ultimately, the proof of the fairness of the FAA's civil penalty assessment authority will be reflected in the quality of the decisionmaking, both at the hearing and appellate stages. As of this time, the agency has no reason to question the evenhandedness of decisionmaking at any level of the process, and no commenter has voiced such concern in the actual operation of the assessment authority to date.

Nevertheless, as noted above, several commenters (ALPA, ATA, AOPA, EAA, two private attorneys, including one attorney who represents two airmen) urge that the Chief Counsel's office play

no role in advising the decisionmaker. ATA states that the separation of functions "would be better implemented" (AOPA calls it "a better solution") if the decisionmaker were advised by legal advisors independent of the Chief Counsel. These commenters repeat concerns expressed previously that the Chief Counsel's role in (1) the general supervision of agency attorneys, including prosecutors, and (2) making and executing enforcement policy tilts the adjudicatory process unfairly in favor of the prosecution. They also reiterate their objection to the role served by the Assistant Chief Counsel for Litigation and his staff.

The agency again has considered these comments, although they do not rise above the level of unsupported assertions, and elects not to make any further revision to the agency's separation of functions by removing the advisory function from the Chief Counsel's office, as suggested by these commenters. The agency's response is explained more fully in the preamble to the April 1990 final rule (55 FR at 15114–15117), but is summarized below.

1. Fair adjudication is not compromised by the fact that the Chief Counsel (or the Administrator) previously was involved in policymaking that guides the adjudicator's discretion. In fact, it is in the interest of sound, fair and consistent decisionmaking for the Administrator to be advised by the agency's senior legal official. Where the Chief Counsel has played no role in the investigation or prosecution of that case or a factually-related case, there is no risk that he has prejudged the facts, the credibility of witnesses, the weight of the evidence, or the application of law to a set of facts. A previously-formed opinion of law or policy, whether held by the decisionmaker or someone who advises the decisionmaker, does not reasonably call into question the integrity of the decisionmaking process. K. Davis, *Administrative Law Treatise* 371–377 (2d ed. 1980); *see Knapp* v. *Kinsey*, 232 F.2d 458, 466 (6th Cir.), *cert. denied*, 352 U.S. 892 (1956).

2. The Chief Counsel does not supervise agency attorneys in their prosecution of civil penalty cases initiated under the rules of practice, and his general management of the Office of the Chief Counsel nationwide is sufficiently attenuated that there is no real risk of the Chief Counsel's general supervision adversely affecting the prosecution of civil penalty cases under the rules of practice. Moreover, such supervision has absolutely no effect on the adjudicatory function performed by administrative law judges; they are fully capable of ensuring a fair hearing for respondents, and as noted previously, they are completely independent of the Chief Counsel, and in fact, independent of the FAA.

3. There is nothing improper about the Chief Counsel's supervision of other attorneys who also advise the Administrator. Because the Chief Counsel and these attorneys all perform the same function of advising the FAA decisionmaker, there is no combination of functions in this relationship at all.

4. The responsibility of the Assistant Chief Counsel for Litigation to defend the FAA against tort claims does not prejudice the legal advice that official provides the Administrator under the rules of practice. One private attorney, who previously served as Assistant Chief Counsel for Litigation, maintains that the basic responsibilities of this official, and the everyday performance of his duties, inevitably involve that official in enforcement matters. Whatever may have been the case when the commenter served in this position nearly ten years ago, it is not now and has not been in many years the case that the Assistant Chief Counsel is "heavily involved in any phases of enforcement." Neither the Assistant Chief Counsel for Litigation nor his staff performs any enforcement responsibilities. These are the responsibility of the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for the regions and centers. Moreover, the separation of functions provided in the rules of practice, and assiduously observed by agency personnel, ensures that prosecutors and those who advise the decisionmaker will not communicate with each other about any particular enforcement case or factually-related case.

The agency does not quarrel with the idea that the Assistant Chief Counsel for Litigation and his staff, in performing their responsibilities to defend the agency, must be knowledgeable of, and may rely on, precedential rulings in enforcement cases, and regulatory interpretations previously issued by the agency or the adjudicative tribunal in such cases. This is a far cry, however, from the implication that the merits of an enforcement action may be decided on the basis of, or materially affected by, the government's exposure to money damages in tort, as a result of advice provided to the Administrator by the Assistant Chief Counsel for Litigation.

As the agency explained in the preamble to the final rule implementing the Equal Access to Justice Act (EAJA) (54 FR at 46196–46198; November 1, 1989), there would be nothing improper in the dual roles performed by the Assistant Chief Counsel for Litigation and his staff. There is no conflict where an agency represents the government on two separate matters, even if those matters arise from the same incident, and even if the government has varying or conflicting interests. The law and ethical standards repose in the Federal government the responsibility to resolve internally any conflict of interests; sound public policy dictates that an Executive branch agency speak with one voice that harmonizes all varying or discordant notes sung by its constituent parts. The fact that agency officials may need to struggle with difficult questions of regulatory interpretation and enforcement policy, in the context of deciding a particular enforcement case, does not render the underlying decisionmaking process unfair.

Finally, ATA continues to rely on the separation of functions provided in DOT international route proceedings, and the role of an "attorney advisor" in those proceedings. ATA states that such an attorney is "independent in his function and is entirely separate from matters of advocacy." As the agency discussed in the preamble to the April 1990 final rule, the role of the attorney advisor in international route proceedings is essentially the same as the role performed by those who advise the FDA Administrator in civil penalty proceedings under the rules of practice: Although, like the DOT lawyers under the general supervision of the General Counsel, FAA lawyers are under the general supervision of the Chief Counsel, they are entirely independent and separate from an advocacy function. Among the agency legal officials who may advise the Administrator in a case on appeal, only the Chief Counsel also is responsible for enforcement policy. But as noted previously, the Chief Counsel's exercise of policymaking and policy implementation does not disable him from rendering impartial advice to the Administrator.

Limitations Period

In the April 1990 NPRM, the FAA solicited comment on whether the agency should adopt a time limit within which it would be required to initiate a notice of proposed civil penalty after an alleged violation of the Federal Aviation Regulations has occurred. Currently, violations of the Federal Aviation Act and the Hazardous Materials Transportation Act are subject to a 5-year statute of limitations by virtue of 28

U.S.C. 2462. In the NPRM, the FAA asked a series of questions to determine the appropriate length of any time limit and how it should be applied practically. 55 FR at 15135–15136; April 20, 1990. Fifteen commenters (Pro-Tech, Keystone, NACA, ALPA, NBAA, AOPA, Airborne, ATA, American Airlines, EAA, and five individuals) responded to FAA's inquiry regarding whether the rules of practice should be amended in this regard. In addition, the agency considered the comments previously filed on this issue.

Of the 15 comments that address this issue, only Pro-Tech recommends that the 5-year statute of limitations not be further limited. Pro-Tech believes that a 5-year period is necessary to prosecute violations of the Hazardous Materials Transportation Act. The remaining 14 commenters all recommend that the FAA adopt a shorter limitations period. The suggested limitations periods range from 90 days (Keystone and one individual) to one year (NACA). Nine commenters (ALPA, NBAA, AOPA, Airborne, ATA, American Airlines, and three individuals) suggest that the agency adopt a 6-month limitations period analogous to the NTSB's stale complaint rule (49 CFR 821.33).

Commenters were asked to address the critical date from which the period would run and the critical event which must be taken by the agency within the time limit. Eight commenters (Keystone, NACA, ALPA, NBAA, AOPA, Airborne, ATA, and one individual commenter) recommend that the limitations period begin to run on the date of the alleged violation. The same eight commenters recommend that the agency be required to issue a notice of proposed civil penalty, instead of a letter of investigation, within the 6-month period. Four commenters (ALPA, ATA, Airborne, and American Airlines) state that the agency's issuance of a letter of investigation is not adequate notice to the respondent that enforcement action is pending, and should not serve to avoid dismissal of an action based on the limitations period.

American Airlines suggests that the 6-month period begin to accrue on the date the FAA learns of the violation, but in no event should FAA be permitted to initiate enforcement action more than nine months from the date of the alleged violation. American also suggests that the agency be required to do more than issue a notice of proposed civil penalty to prevent the limitations period from tolling: Specifically, the agency should be required to issue a complaint within the required limitations period. In accordance with agency policy and the rules of practice, this would require the agency to issue a notice of proposed civil penalty, offer the respondent the opportunity either to have an informal conference or otherwise submit pertinent information to the agency for consideration, and evaluate such information before the complaint is issued. American bases its recommendation on an assertion that "It is not until after the informal conference has taken place that the decision to initiate legal enforcement action is made."

Commenters were also asked whether there would be any circumstances whereby the agency's failure to bring an action within the time specified would be excused. Eight of the commenters state that, like the NTSB's rule, dismissal of a complaint under the limitations period could be avoided where the FAA demonstrates good cause for delay in initiating a case (NACA, ALPA, NBAA, AOPA, Airborne, ATA, American Airlines, and one individual).

Commenters were asked to state the comparative benefits of a specific time period versus a provision that would codify the "undue delay and prejudice" standard enunciated by some courts construing the Administrative Procedure Act. Three commenters (NACA, ALPA, and ATA) state that the respondent should not shoulder the burden of demonstrating prejudice where there is delay in initiating a case. ATA suggests that such a burden would result in constant litigation about the extent of the delay and prejudice. ATA further maintains that respondents can "not be expected to solve problems of faded, although not extinct, memories and of incomplete, although not empty, documentary records." No commenters offer any example where initiation of a case outside of a particular period prejudiced a respondent's defense of a civil penalty action, as solicited in the notice.

Although beyond the scope of this rulemaking, American also recommends that, in those cases referred by the agency to a U.S. Attorney for prosecution, such referral be accomplished within a 6-month limitations period. American further states that the agency should require that those cases referred to a U.S. Attorney be filed and served within one year of the date of the alleged incident. Related to this recommendation, it must be understood that the rules of practice subject to this rulemaking apply only to: (1) Civil penalty actions not exceeding $50,000 for alleged violations of the safety and security relations; (2) civil penalty actions not exceeding $50,000 for alleged violations of registration and recordation regulations related to drug trafficking; and (3) civil penalty actions regardless of amount for alleged violations of the Hazardous Materials Transportation Act. Consequently, any time limit adopted by the agency in this rulemaking would necessarily apply only to those cases. Any time limit would not affect any civil penalty case outside the agency's general assessment authority, such as cases exceeding $50,000 that must be referred in order to institute a suit to obtain judicial assessment of a penalty, and cases referred to a U.S. Attorney to initiate a collection action. The adoption of a limitations period applicable to any case for which the agency does not have general assessment authority is outside the scope of this rulemaking. Moreover, the FAA has no control over the resources, priorities, or schedules of the various U.S. Attorneys. Consequently, the FAA is not authorized to impose a limitations period on the offices of the U.S. Attorneys, even were it within the scope of this rulemaking.

After careful consideration of the comments, the FAA is adopting a 2-year limitations period and is amending § 13.208 of the rules of practice to so reflect. Pursuant to this limitations period, the agency will be required to issue a notice of proposed civil penalty within two years from the date of the alleged violation in all cases in which it has assessment authority. The agency is placing this provision in § 13.208, the rule on complaints, so that it is clearly set forth in the rules of practice. The agency also is amending § 13.209, the rule describing answers to complaints, so that it is clear that a respondent may file a motion to dismiss based on the limitations period instead of an answer. To conserve adjudicatory resources, issues related to dismissal of a complaint should be raised and resolved by the administrative law judge early in the proceedings. For the same reason, the agency has provided an interlocutory appeal for cause, available to either party, on the administrative law judge's ruling on a motion to dismiss a complaint based in the limitations period. Also, as many commenters suggest, the FAA is adopting a "good cause" standard that, on a case-by-case basis, may excuse delayed notification of a proposed civil penalty action. The "good cause exception" in the agency's rule is based on the first provision in 49 CFR 821.33(a)(1), the NTSB's articulation of an exception to its stale complaint rule in certificate actions.

The FAA recognizes that this limitations period will not satisfy those who believe that the agency should, in all respects, follow the NTSB's stale complaint rule. NBAA stresses that any distinction between the FAA and the NTSB will result in one system being perceived as fairer than the other. The implication of this statement is that if the FAA adopts a limitations period of longer than six months, adjudication by the NTSB will be looked on more favorably by the aviation community and adjudication by the FAA will continue to meet resistance. Despite this prediction, the FAA is obligated to carry out its statutory mandate to promote aviation safety. The agency cannot adequately undertake this mandate if it is, in essence, precluded by regulation from enforcing the Federal Aviation Regulations to a significant degree. As explained more fully below, a 6-month period would do just that.

The FAA considers the NTSB's stale complaint rule to be an artificial restraint that is not reasonably required in the interest of fairness and effectively distorts FAA enforcement priorities. Currently, the FAA must give all proposed certificate actions expedited treatment in order to avoid their nearly automatic dismissal under the NTSB's stale complaint rule. This very often requires the agency to put aside other enforcement actions that may otherwise deserve precedence. The FAA is not inclined to adopt a similar regulation that would further adversely affect FAA enforcement policies and priorities. The public interest in safety would not be served by any regulation that would likely preclude the agency from initiating a significant portion of its enforcement cases.

Contrary to the claim of one individual commenter that the FAA has "virtually unlimited resources[,]" agency resources are limited. In the counsel's offices alone, many attorneys have current caseloads of 200–400 or more enforcement cases (initiated and uninitiated certificate actions and civil penalty actions). These attorneys are also called upon to represent the agency in many matters other than enforcement. ALPA maintains that if the FAA is able to initiate certificate actions within six months, it should be able to do so with all other enforcement actions. ALPA's conclusion, however, does not follow its premise. If the agency is able to initiate even half of its caseload within six months, it does not automatically follow that, without a dramatic increase in staff or changes in priorities, the other half of its caseload could be handled with similar dispatch.

ALPA also states that a limitations period serves both the public interest and a respondent's interests, and that delayed adjudication serves no interest, either public or private. Although the agency agrees with ALPA that delay is in no one's interest, in practice it is not always possible to accomplish the goal of expeditious case initiation. For some years now, the agency has not been able to meet the 6-month deadline in all cases in which a finite suspension might have been sought. The NTSB's stale complaint rule, as it essentially appears now, was promulgated in 1963 (28 FR 13298; December 7, 1963), a time when the numbr of enforcement cases was much smaller. Given the current state of the FAA's enforcement caseload and resources to prosecute these cases, in the agency's view the NTSB's 6-month limitations period is no longer realistic.

ATA and American Airlines have, in the agency's view, a more realistic view of the FAA's resources and the effect a 6-month limitations period would have on the agency. Both commenters recognize that the agency would not be able to initiate all enforcement actions within a 6-month limitations period. Nevertheless, the commenters feel that a time limit would force the agency to pursue only those cases "that truly warrant a civil penalty[,]" and, thus, "justify the expenditure of agency resources after careful consideration of enforcement priorities." To do as ATA and American suggest, however, would mean that otherwise meritorious civil penalty actions, whose prosecution is an important tool to achieve compliance with safety and security regulations, would go unprosecuted. The agency believes such a policy would be contrary to the public interest in the considered and deliberate development of an enforcement action.

The FAA does recognize, however, that compliance and enforcement objectives are enhanced when enforcement actions are initiated and adjudicated expeditiously. Toward this end, the agency sees the benefit of a realistic limitations period that considers both a respondent's need for expeditious adjudication and the agency's finite resources and competing priorities. The agency does not consider six months to be a realistic period, given the FAA's resources, for initiation of any type of enforcement action other than an emergency certificate action.

Moreover, the commenters have not shown any evidence to suggest that any respondent has actually been harmed by the initiation of a case more than six months after the date of an alleged violation. As noted above, eight of the commenters state that the 6-month limitations period could be extended or excused where the agency demonstrates good cause for any delay. The implication of this provisional extension is that a respondent would not generally be prejudiced by an enforcement action initiated more than six months from the date of the alleged violation.

The FAA realizes that the NTSB's stale complaint rule has greatly influenced the comments on this issue. It is possible that many of the commenters resort to the NTSB's rule because it may be the only limitations period with which they are familiar. In an effort to obtain some additional guidance, the agency surveyed 22 Executive branch agencies with civil penalty assessment authority to determine if initiation of actions by these agencies is subject to a limitations period, whether imposed by the agency or another entity, other than the general 5-year statutory period.

This survey appears to confirm that the NTSB's stale complaint rule is without parallel. Indeed, the agency did not find any other limitations period imposed by regulation, and found no self-imposed limit. Four of the 22 agencies are subject to a statute of limitations period of five or six years: Department of Health and Human Services (enforcement of Medicare and Medicaid amendments of 1980, 6-year statute at 42 U.S.C. 1320(a–7a)); Department of Justice (Program Fraud Civil Remedies Act, 6-year statute at 31 U.S.C. 3808(a)); Federal Maritime Commission (Shipping Act of 1984, 5-year statute at 46 U.S.C. App. 831(e)); and Customs Service (Anti-Smuggling Act, 5-year statute at 19 U.S.C. 1621).

Thirteen of the 22 agencies are not subject to any statute of limitations other than the general 5-year provision in 28 U.S.C. 2462: Department of Agriculture (enforcement of various acts); Department of Commerce (enforcement of various acts); Department of Energy (Atomic Energy Act); Department of Housing and Urban Development (Manufactured Home Standards Act and the Department of Housing and Urban Development Reform Act); Department of Transportation (Federal Aviation Act of 1958, as amended); National Highway Traffic Safety Administration (Motor Vehicle Information Cost and Savings Act and Hazardous Materials Transportation Act); U.S. Coast Guard (Coast Guard Act of 1949 and Hazardous Materials Transportation Act); Environmental Protection Agency (Toxic Substances Abuse Act); Mine Safety Health Administration (Mine Safety Act); Federal Trade Commission

(Fair Trade Act); International Trade Commission (Tariff Act); Nuclear Regulatory Commission (Atomic Energy Act); and Securities and Exchange Commission (enforcement of various acts including Securities Act of 1933, as amended, and Securities and Exchange Act of 1934). None of these 17 agencies are subject to a regulation that affects the general or specific statute of limitations to which they are subject. Further, none of these agencies has any formal, written policy mandating initiation of an enforcement action within a shorter period than the applicable statute of limitations.

Five other administrative agencies are subject to a statute of limitations that is shorter than the 5-year period provided in 28 U.S.C. 2462. None of these five agencies has adopted a regulation or internal policy that otherwise affects the statute of limitations to which they are subject. The Internal Revenue Service enforces the Internal Revenue Act and is subject to a 3-year statute of limitations, pursuant to the Internal Revenue Code (*see* 26 U.S.C. 6501, 6502). The Bureau of Alcohol, Tobacco and Firearms is subject to a 2-year statute of limitations, pursuant to the Federal Alcohol Act (*see* 27 U.S.C. 204(i) and 207). The Federal Communications Commission enforces the Communications Act and brings forfeiture actions that are subject to a more complex statute of limitations (*see* 47 U.S.C. 503). The Commission must issue a notice of apparent liability within one year of the violation charged, unless the person holds a broadcast station license. If the person holds such a license, the Commission must issue the notice either (1) within one year of the violation charged or (2) within the current term of the broadcast station license, whichever period is longer. In no case, however, may the Commission issue the notice of apparent liability to a broadcast station license holder for a violation that is alleged to have occurred more than three years before issuance of the notice.

The Federal Energy Regulatory Commission primarily enforces three statutes by the assessment of civil penalties (Natural Gas Act, Natural Gas Policy Act, and Federal Power Act). Only the Natural Gas Policy Act contains a statute of limitations as short as three years (*see* 15 U.S.C. 3414(b)(6)(D)). Civil penalty enforcement actions brought under the authority of the Natural Gas Act or the Federal Power Act are subject to the general statute of limitations contained in 28 U.S.C. 2462. The Commission has not imposed a 3-year limitation on all its enforcement actions simply because one of the authorizing statutes it enforces has such a requirement.

The Occupational Safety and Health Administration is subject to a 6-month statute of limitations by virtue of the Occupational Safety and Health Act (*see* 29 U.S.C. 658(c)). The legislative history of the Occupational Safety and Health Act indicates that the House version of the bill originally contained a requirement that a citation issued pursuant to the bill be issued within three months of the alleged violation. The Senate version of the bill contained no limitations provision. The resulting compromise was a 6-month period. Courts interpreting this statute indicate that the limitations period serves not only to protect the employer from prejudice, but also to obtain prompt corrective action in situations where the health and safety of an employee is at stake. *Todd Shipyards Corporation* v. *Secretary of Labor*, 566 F.2d 1327 (9th Cir. 1977). Congress considered violations of the Occupational Safety and Health Act to pose an immediate and direct threat to the health and safety of workers, thus mandating that violations be addressed within a very short time frame when compared with other statutes of limitations and the general 5-year provision. Of course, where immediate corrective action is required in the interest of aviation safety and legal enforcement action is necessary, the FAA generally pursues emergency certificate action, rather than a civil penalty action, for an alleged violation.

Based on the above survey, the FAA draws several conclusions. Where Congress deems that it is appropriate, it imposes a statute of limitations for the initiation of enforcement actions. As discussed above, sometimes the statute of limitations is quite short. Aside from the NTSB's rule governing the FAA in certificate actions, however, no agency surveyed has a shorter limitations period imposed by regulation or internal policy than that imposed by statute. For the FAA to adopt, by regulation, a limitations period that significantly shortens the time in which it may initiate a civil penalty action appears relatively unprecedented in administrative agencies.

In light of the practices of other Executive branch agencies, the FAA's decision to adopt a shorter limitations period by regulation is a significant concession to the concerns expressed by the commenters. The FAA considers the 2-year limitations period to balance reasonably three interests at issue here: (1) A respondent's interest in timely notice and adjudication; (2) the agency's interest in having sufficient time to initiate a case on pain of dismissal or forfeit; and (3) the public interest in promoting compliance with, and initiating enforcement action if necessary for violations of, aviation safety and security regulations. Therefore, based on the absence of an empirical basis to support an assumption of prejudice by more than a 6-month delay in case initiation and the general practice of other Executive branch agencies, the FAA concludes that adopting a 2-year limitations period is fair.

The FAA's 2-year limitations period generally will start to run from the date of the alleged violation and will be satisfied if the FAA issues a notice of proposed civil penalty within two years of that date. As in the NTSB's rule, the FAA's rule provides that agency delay in issuing a notice of proposed civil penalty may be excused, in the discretion of the administrative law judge in a particular case, for good cause shown by the FAA. The FAA is not, however, adopting the NTSB's additional exception that may excuse delay in initiating a notice where "* * * the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor." 49 CFR 821.33(a)(1). The agency believes that this exception in the NTSB's rule is appropriate in certificate action cases where the public interest may require remedial action regardless of the agency's diligence in discovery of a violation and initiation of an action. It does not appear necessary where a civil penalty action is the appropriate sanction.

The FAA is adopting a "good cause" standard to account for delays attributable to the agency's inability to issue a notice within the 2-year period because the agency was not, or could not reasonably be expected to be, aware of a possible violation. This exception is particularly critical where violations are discovered only as a result of an accident or an incident that occurred long after a violation that may have contributed to the accident or incident. The good cause exception in § 13.208(d) enables an administrative law judge, based on a review of information presented by the parties, to excuse the agency's delay in notifying a respondent of an alleged violation in light of its late discovery of the alleged violation. There are several examples of cases, possibly due to the complexity of an investigation or the difficulty of proceeding with the action, in which such a good cause showing could appropriately excuse the agency's delay in issuing a notice: (1)

Violations of flight or duty time restrictions; (2) violations of maintenance procedures or requirements; (3) complex or lengthy investigations of air carrier operations; and (4) concurrent or subsequent criminal investigations or prosecutions.

The NTSB's rule creates a "presumption of prejudice" where a notice was issued more than six months after an alleged violation. *See Administrator* v. *Parish*, 3 NTSB 3474 (1981). Despite this presumption, the NTSB has denied motions to dismiss "stale" complaints where the agency was not aware of the alleged violation and exercised reasonable diligence to notify the respondent after learning of the alleged violation. *See Administrator* v. *Zanlunghi*, 3 NTSB 3696 (1981); *Administrator* v. *Marshall*, NTSB Order No. EA–1939 (1983); *Administrator* v. *Apollo Airways*, NTSB Order No. EA–2373 (1986). *Administrator* v. *Richard, et al.*, NTSB Order No. EA–2575 (1987); *Administrator* v. *Finke*, NTSB Order No. EA–2819 (1988). Denials of these motions are particularly appropriate where a respondent fails to demonstrate specific or actual prejudice based solely on the passage of time and the amount of time that passed was not excessive or unjustifiable.

As noted above, four commenters specifically state that a letter of investigation should not be considered sufficient to avoid dismissal of an action based on the limitations period. Despite the NTSB's recognition that it is the content of the document, not the label attached to it, that should be considered in a motion to dismiss, the FAA has not adopted a letter of investigation as a benchmark for its limitations period. *See Administrator* v. *Adams*, 3 NTSB 3142 (1980), *aff'd*, *Adams* v. *NTSB*, Civil No. 81–2847 (3d Cir. 1982) and *Administrator* v. *Tracy*, NTSB Order No. EA–1761 (1982). Although not necessary for resolution of the case, the NTSB noted in *Adams* that the agency's letter of investigation adequately apprised respondent of the reasons why future action might be taken, highlighting that the letter showed: (1) The nature of the objectionable conduct; (2) the sections of the regulations that may have been violated; and (3) the sanctions that may be imposed for those violations. *Id.* at 3143.

Instead, the FAA is responding to the sentiment of the commenters, and § 13.208(d) requires the agency to issue a notice of proposed civil penalty to prevent the limitations period from tolling. Of the four, only American Airlines articulates a reason for the insufficiency of such letter, stating that the limitations period should not be satisfied until the actual decision to initiate legal enforcement action is made. Although American states that the decision to initiate enforcement action is made only after an informal conference, with the issuance of a complaint, the FAA has always considered legal enforcement action to be initiated with the issuance of a notice of proposed civil penalty. Consequently, it is a notice of proposed civil penalty that should, and will, satisfy the limitations requirement, as does a notice of proposed certificate action under the NTSB's stale complaint rule.

Although the FAA's limitations period is satisfied by issuance of a notice, a letter of investigation ordinarily informs the respondent that a particular incident is being reviewed by the FAA. Thus, well before legal enforcement action is initiated by the issuance of a notice, the respondent is usually aware of charges directed to the respondent and that there may be a need to preserve evidence regarding a particular incident. The agency believes the notice provided in a letter of investigation reduces the chance that the respondent is prejudiced by delay, especially where legal enforcement action is initiated within two years.

Two commenters (Keystone and one individual) request that the rules require that a letter of investigation be issued by the agency within 30 days of the date of the alleged violation. Letters of investigation are discussed in FAA Order 2150.3A, Compliance and Enforcement Program, paragraph 403 (hereinafter "Order 2150.3A"). The FAA believes that issuance of a letter of investigation is more properly dictated by policy, rather than regulation. Moreover, because this rulemaking addresses only initiation of a civil penalty action and procedures during any hearing—actions that may occur only after issuance of a letter of investigation—revision of the agency's policy is beyond the scope of this rulemaking. Thus, the FAA has not revised the initiation procedures or rules of practice as suggested by these two commenters.

In addition, it would not be practical for the agency to require that a complaint be issued within this limitations period, as American Airlines suggests. An agency attorney would always need to be mindful of date by which the complaint must be issued, to the detriment of the enforcement proceeding. The FAA would not have as much flexibility in scheduling informal conferences at times and locations convenient to the respondent, if doing so might jeopardize the case. Similarly, the FAA would not have as much flexibility in negotiating settlements or waiting to receive information from respondents, to the extent that such would cause delay and might result in dismissal. Respondents would not benefit from the rigidity which would result from a regulation that would encourage the agency to issue a complaint first and ask questions later.

As stated in the April 1990 NPRM, the agency believes that a respondent's demonstration of actual prejudice resulting from the agency's unreasonable or excessive delay in initiation of a civil penalty case could be asserted as a defense in an administrative hearing. 55 FR at 15135; April 20, 1990. The FAA acknowledges that one court has held that section 555 and section 706 of the Administrative Procedure Act do not provide authority for dismissing an agency action due to agency delay. *See United States* v. *Popovitch*, 820 F.2d 134, 138 (5th Cir.), *cert. denied*, 484 U.S. 976 (1987) (abrogating *EEOC* v. *Bell Helicopter*, 426 F. Supp. 785 (N.D. Tex. 1976)). There also is case law that the equitable doctrine of laches is not a defense against the United States when it acts to enforce a public right. *See United States* v. *California*, 332 U.S. 19 (1947); *United States* v. *Arrow Transportation Co.*, 658 F.2d 392, 394–95 (5th Cir.), *cert. denied*, 456 U.S. 915 (1982).

While not unmindful of this case law, considerations of due process, and a fair construction of section 555 of the Administrative Procedure Act, lead the agency to allow for a showing of actual prejudice due to agency delay as a defense in an appropriate case. Although the agency believes it would rarely occur, it is possible that a respondent would be unable adequately to defend a civil penalty action because documents or witnesses become unavailable due solely to the agency's unreasonable or excessive delay in initiating a case. In such a case, it is possible that a respondent could make such showing of actual prejudice and petition the administrative law judge to dismiss the action, or a portion thereof, on the basis of such prejudice.

Finally, the limitations period provided in § 13.208(d) applies only to those violations alleged to have occurred on or after the effective date of this final rule. The adoption of this time limit should not serve as a defense to (1) respondents who have already received a notice of proposed civil penalty for violations alleged to have occurred more than two years before issuance of the notice; or (2) those respondents who

may receive a notice in the future, unless the violation is alleged to have occurred on or after the effective date of this rule and more than two years passed before issuance of a notice of proposed civil penalty.

Service of Documents

In comments to the February 1990 NPRM, ATA suggested a revision of the rules to provide guidance on the appropriate person to accept service of documents on behalf of a respondent in a civil penalty action. FAA specifically noted ATA's suggestion and requested comment by interested persons in the April 1990 NPRM. ATA suggested that a notice of proposed civil penalty be directed to the person who may have responded to a letter of investigation or the president (or other designated officer) of a company at its principal business address. In its earlier comments, ATA referred the FAA to the DOT's rule in economic proceedings (14 CFR 302.8(c)). NBAA, AOCI, and AAAE, and American Airlines submitted comments on ATA's suggestion in their responses to the April 1990 NPRM.

Although expressly incorporating its earlier comments, ATA suggests in its recent comments that when a corporation is identified as a respondent, documents should be sent either to the corporate official authorized to receive service of process in civil litigation or the corporation's chief legal officer. After counsel enters an appearance in a civil penalty proceeding, all subsequent documents should be served on that named counsel.

Although it takes no position on whether a specific service provision is "legally necessary," NBAA voices the perception of its members that unspecified changes regarding service of documents could enhance the sense of procedural fairness of the rules of practice. NBAA did not specifically endorse or reject ATA's suggestion. AOCI and AAAE believe that ATA's suggestion for a specific service provision is well founded and support ATA's proposed modification to the rules of practice. American Airlines states that service of documents should "protect the opportunity of the corporate respondent to respond in a timely fashion." While conceptually supporting ATA's suggestion, American states that the appropriate person for receipt of service is the person responding to a letter of investigation, the corporate security director, or the corporate legal officer. After a civil penalty case has been initiated, American suggests that all documents be served on the attorney of record, or a designated company representative if there is no attorney of record.

The commenters express a legitimate concern for large entities. In light of the agency's size and structure, the FAA understands the concerns of the commenters about proper service of documents. Because the suggestions of the commenters vary so widely regarding the appropriate person to accept service, the FAA is not adopting precisely the suggestions advanced by the commenters. Nevertheless, because of the broad support for a more specific yet still flexible provision on service of documents, particularly notices in the prehearing stages, the FAA is amending several sections of the rules to address the concerns of these commenters representing large organizations.

Although ATA referred the agency to DOT's service of process provision noted above, that section may be somewhat broader than necessary and may not adequately accommodate the numerous and varied small aviation entities and individuals that may be involved in a civil penalty action under these procedures. The FAA also is concerned that a specific provision that accommodates the needs of large corporate air carriers, in practice, could adversely affect small entities and individual respondents. With regard to American's suggestion for example, not all corporate entities, particularly small air carriers, have a security officer or legal officer on staff. The FAA does not believe that it would be wise to so limit its rules if there is a possibility that such a limitation would be detrimental to individual respondents and small entities. Also, in any cases, the person who responded substantively to a letter of investigation may not always be the appropriate person to respond to a notice that initiates a civil penalty action. Thus, the FAA is not adopting the commenters' suggestion in this regard.

The FAA, however, is adding several provisions to address service of documents to help ensure timely and properly-directed notices and responses in these actions. As revised, § 13.16(d) provides that a notice of proposed civil penalty will be sent either to an individual respondent or, in the case of a corporation or company, to the president of the company. Thereafter, a corporation or company may in writing designate another person to accept service of subsequent documents in a particular civil penalty action. A second notice that may be issued in these cases (*see* revised § 13.16(e) and the following discussion on prehearing procedures) will be sent to an individual respondent, the president of a corporation or company if there was no response to the first notice or no previous written designation, or the person designated previously by the corporation or company. The agency will send notices in civil penalty actions, marked to the attention of the president, to the address listed with the agency, an address that generally is the principal business address of the corporation or company and that should be current and correct.

The FAA also is adding language to § 23.208, the section on complaint, that repeats the provisions of § 13.16(e) as revised herein. Thus, a copy of the complaint will be served on an individual respondent, the president of a corporation or company that has not designated some other person in previous documents regarding that action, or the person designated during the prehearing proceedings to receive further documents in a particular civil penalty action. If a complaint is not already in the hands of the appropriate person as a result of documents exchanged during prehearing stages of the action, a respondent's attorney or other representative may enter an appearance in the action under § 13.204(b) of the rules.

The agency also reviewed 14 CFR 302.4(c) of DOT's rules, which requires respondents and the Department to specify in the first document filed in an action the name and address of the person who may be served with subsequent documents; in its rule, DOT requests but does not require the telephone number of that designated person. The FAA has not adopted a similar provision, believing that § 13.204(c) accomplishes, in essence, the same goal and provides similar opportunities and protections to the parties. Because the agency has similar concerns as the commenters representing large entities, the FAA also is adding a provision in § 13.209 that requires a respondent to serve a copy of the answer on the agency attorney who filed the complaint.

The agency believes that these revisions and minor editorial revisions to § 13.210 (filing of documents) and § 13.211 (service of documents) will provide the certainty desired by the commenters but retain some flexibility for both parties where it may be needed. These revisions should ensure that documents are regularly sent to the same office or person, who can either respond or forward those documents within the organization. Consistent practices thus should develop without inadvertently causing organizational changes or dictating internal procedural

changes. In addition, simplification of the prehearing procedures (revisions explained in the following section) should also address the concerns of large entities regarding service without operating to the detriment of small entities and individual respondents.

Prehearing Procedures

In its comments to the February 1990 NPRM, American Airlines suggested revision of the FAA's prehearing procedures in all civil penalty cases regardless of amount. American Airlines objected specifically to the time limits for responses by respondents contained in § 13.16. American suggested that the following process should be used in *all* civil penalty actions (including those not subject to the rules of practice and, thus, outside the scope of this rulemaking): (1) The rules should specify a time by which a person or entity must respond to a notice of proposed civil penalty; (2) the rules should specify that a person is able to compromise, without a finding of violation, the civil penalty proposed in a notice; (3) the rules should not result in forfeiture of a right to a hearing even if a respondent fails to meet the deadline contained in the rules for responding to a notice of proposed civil penalty; (4) the rules should state 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 as a result of prehearing procedures; (5) the rules should restrict default judgments or default admissions of liability until after a complaint has been filed either with a district court or with an administrative law judge. Presumably, American equates the term "default judgment" with the issuance of an order assessing civil penalty before a hearing has been held and a decision upholding part or all of the agency's action has been issued by an administrative law judge or the Administrator on appeal.

In its comments to the April 1990 NPRM, American Airlines stresses the importance of making the prehearing procedures in all civil penalty actions not exceeding $50,000 identical to the procedures used in civil penalty actions that exceed $50,000. *See* § 13.15. In light of its suggestion that the agency's complaint be filed within the limitations period, American believes that a short limitations period will force the parties to conduct their prehearing discussions promptly and without delay. According to American, "[I]f a respondent does not respond promptly with any of the options available (pay the fine, request an informal conference, compromise the penalty, submit additional materials in writing), the FAA may initiate a complaint and secure a default judgment through the administrative law judge." American requests that the FAA delete § 13.16 (j)(2) and (j)(3) so that a respondent's failure to comply with "draconian" time limits that apply to prehearing procedures would not be the basis upon which a default judgment is obtained against a respondent. Although American states that a respondent's failure to respond at all during the limitations period could be considered grounds for obtaining a default judgment, a response outside any time limits in the rules, but within the limitations period, should not result in a default judgment.

ALPA supports American's proposed modifications to the prehearing procedures of § 13.16. Like American, ALPA states that a respondent's failure to respond to a notice of proposed civil penalty should not result in forfeiture of a right to a hearing, but rather should lead to initiation, presumably by the agency attorney, of formal hearing proceedings. ALPA states that unrepresented respondents should not be penalized for negligent failure to respond or an untimely response. ATA also agrees with American's suggestion. ATA believes that the "draconian" sanction of default should be reserved for cases in which the agency proves a "willful disregard" for the rules of practice. Although not stated in ATA's comment, it would seem that the rules of practice to which this standard would apply would be limited to the initiation procedures of § 13.16 and would exclude the rules of practice applicable once a complaint has been filed and formal hearing procedures have begun. AOCI and AAAE believe that American's suggested criteria have merit in producing a prehearing posture of compromise and, thus, support American's recommendation for modification of the prehearing procedures.

Related to the issue of prehearing procedures, several commenters desire changes, either in the policy or the initiation procedures, regarding informal conferences. For example, American Airlines suggests clarification of § 13.16(g), the procedures regarding interim replies after a respondent submits additional information in response to a notice or after an informal conference. American states that an informal conference "seldom results in a immediate decision such that an election [of one of the options in § 13.16(g)] can be made within 10 days following the conference." American suggests that § 13.16(g) be revised in a manner that would require the agency attorney to send an interim response regarding material submitted at an informal conference, after which the respondent would have 10 days to submit the amount of the civil penalty, submit additional information, or request a hearing.

ATA expresses concern about § 13.16(j)(4) which states:

> An order assessing civil penalty shall be issued if the person charged with a violation— * * * [d]oes not comply with any agreement reached between the parties during an informal conference.

ATA believes that this provision is not "fair and evenhanded" because there is no corresponding sanction for the agency's failure to comply with any agreement reached at an informal conference. ATA objects to the lack of a standard for determining whether an agreement has been breached by a party and believes that, if either side breaches an agreement reached at an informal conference, the "remedy" should be rescission of the agreement and nothing more.

In response to these comments, the FAA is substantially revising § 13.16. The revisions, although not adopting each suggestion of the commenters, bring the prehearing procedures under the general assessment authority in line with current procedures and practice in certificate and civil penalty actions outside the assessment authority. In some respects, the revisions provide broader opportunities and protection for respondents than is provided under existing practice while keeping the flexibility apparently desired by the commenters.

One of the most significant changes deals with the type and timing of notices and the opportunities available after each notice is issued. The agency will continue to issue notices of proposed civil penalty to advise persons of any charges and the amount of a civil penalty proposed for an alleged violation. After receipt of a notice, a wide range of options are available. As was true when the rules were originally promulgated, a person may challenge the agency's action by requesting a hearing directly from a notice of proposed civil penalty. A person charged with a violation also may choose not to challenge the agency's action and simply submit the amount of the civil penalty proposed in the notice or agree to submit a different amount than that proposed. An appropriate order (either assessing a civil penalty for a violation or compromising the action or the amount of the penalty) then will be issued to close the action and reflect

receipt of a payment or an agreement to pay.

After a notice of proposed civil penalty has been issued, a person charged with a violation may participate in the same range of informal proceedings that were available under the rules adopted in the August 1988 final rule and available in all other enforcement actions. As the commenters suggest and so that the informal proceedings are flexible, the FAA is simplifying the proceedings and deleting the time limits that triggered required responses by persons who had participated in any informal proceeding. The FAA also is deleting the section, as one commenter suggests, that triggered an order assessing civil penalty if a person charged with a violation failed to comply with an agreement reach during an informal conference.

Several minor, editorial changes are made to the informal procedures to clarify the differences between each of the informal procedures. As revised, § 13.16(d)(2)(i) provides an opportunity for a person to present information that may lead the agency to conclude that the action should not be pursued, or a civil penalty is not appropriate, possibly due to an error previously unknown to the agency. Revised § 13.16(d)(2)(ii) provides an opportunity for the parties to discuss a person's ability to pay a proposed civil penalty and to submit documents that may result in a reduced civil penalty if appropriate.

And, finally, § 13.16(d)(2)(iii) provides an opportunity for a person charged with a violation to request an informal conference with the agency attorney handling the civil penalty action. Related to informal conferences, one commenter suggests that the agency "permit FAA attorneys to exchange information and to engage in meaningful settlement negotiations during informal conferences."

Agency attorneys already have that authority and a great deal of discretion to take appropriate action during or as a result of an informal conference. *See* Order 2150.3A, Paragraph 1207. Order 2150.3A already contemplates "full and open discussion of the case[,]" and amending the prehearing procedures will not alter or expand an agency attorney's exercise of discretion. Agency attorneys also have been advised that they are authorized to enter into civil penalty compromises without a finding of violation where they determine such a settlement to be in the public interest. 55 FR at 15124; April 20, 1990. Thus, no revision of agency policy is necessary. Even if it were, because the exercise of this authority and discretion is a matter of internal agency policy directed to agency employees, any change in policy would be more appropriately addressed by agency order than in the initiation procedures or rules of practice for civil penalty actions. Thus, the FAA declines to amend the prehearing procedures to address an agency attorney's authority in infomal conferences as suggested by the commenter.

In place of varied and numerous interim replies after informal proceedings under the previous prehearing procedures, a "final notice of proposed civil penalty" may be issued if a civil penalty action still is unresolved (by payment of a civil penalty, compromise of the action or amount of a civil penalty, or by a person's request for a hearing) after participation in informal proceedings. The notice also may be issued where a person fails to respond at all, within the 30-day period provided, by choosing one of the many options available after a notice of proposed civil penalty has been issued. At this point, the only option no longer available as a matter of right, as it is after issuance of a notice of proposed civil penalty, is the opportunity to participate in informal proceedings. If requested, an agency attorney certainly has the discretion and authority to provide that opportunity once again, but the agency attorney is not required to do so.

While an opportunity to participate in informal procedures may no longer be available as a result of a complete failure to respond, such a failure will not automatically result in the issuance of an order assessing civil penalty, as would occur under the original prehearing procedures. The agency believes that most commenters will support this revision. The opportunity to resolve the action by either submitting a civil penalty or compromising the action or the amount of the civil penalty, and the opportunity to request a hearing still are available at this point.

The FAA is not adopting a process favored by some commenters that would require the FAA to file a complaint and obtain a default judgment from an administrative law judge if a person charged with a violation does not respond at all to the agency's notices or interim responses. Under the process recommended by these commenters, it appears that a person charged with a violation could completely ignore any notices issued before a complaint was filed and, in essence, get three opportunities to request a hearing. In addition to the obvious delay such a process would engender, it would discourage participation in informal proceedings to resolve the action and encourage unnecessary litigation. Because such a process does not appear to serve the interests of the parties or the public, the FAA is not amending the prehearing proceedings to incorporate this process. However, as provided in the rules as originally promulgated, a person charged with a violation still has two opportunities to request a hearing: (1) After a notice of proposed civil penalty has been issued; and (2) after a final notice of proposed civil penalty has been issued. The FAA believes it is not unreasonable to issue an order ending the action where a person charged with a violation has received and failed to respond to two notices, one that provides substantial opportunities to resolve or challenge the action and a second that still provides the important opportunity to challenge the action by requesting a hearing.

The FAA also is amending the circumstances in which an order assessing civil penalty may be issued to a person or entity charged with a violation. As required by the enabling legislation and the Administrative Procedure Act, an order assessing civil penalty still will be issued only after notice and an opportunity for a hearing. As some commenters suggest, an order assessing civil penalty will encompass, where appropriate, an initial decision issued by an administrative law judge that has not been appealed in a timely manner to the Administrator and a final decision and order of the Administrator where a respondent has not filed a timely petition for review with a U.S. Court of Appeals. As revised, the prehearing procedures state that initial decisions and final decisions and orders, not further challenged as provided under the rules, are considered to be orders assessing a civil penalty where the adjudicator finds that a violation occurred and a civil penalty is warranted.

Under the rule as revised, an order assessing civil penalty will be issued by an agency attorney in only two circumstances. An agency attorney will issue an order if a person pays or agrees to pay a proposed civil penalty in response to either of the notices, and does not otherwise indicate a desire to compromise the action or the amount of the civil penalty or participate in the many options available under the prehearing procedures. An agency attorney also may issue an order assessing civil penalty where a person charged with a violation has failed to request a hearing in a timely manner after receiving the final notice of proposed civil penalty.

These orders issued by an agency attorney will contain a finding of

violation. The agency believes that it is appropriate to issue an order assessing civil penalty in these two limited situations where a person charged with a violation has failed to exercise the right to participate in informal procedures or failed to request a hearing challenging the agency's action. Several commenters suggest that the Administrator should not delegate to a prosecuting attorney any of the authority "to assess" a civil penalty. However, because the agency has severely circumscribed the circumstances under which that authority may be exercised and it may be appropriate to do so in those narrow situations, the FAA declines to withdraw all assessment authority from agency attorneys.

The final substantial change to the prehearing procedures involves compromise of civil penalties. *See* § 13.16(1). That section still is set forth separately to emphasize the authority to compromise. To clarify that there are two types of compromise (or settlement) available, a section is added to show that an opportunity to compromise the amount of a civil penalty is available at any time before referral for a collection action, whether the civil penalty is proposed in a notice, imposed by an agreement to compromise without a finding, or assessed by an order or decision. A separate paragraph of that section deals only with the authority and ability of an agency attorney to compromise the action without a finding of violation. That paragraph also sets forth the content of an order that would be issued pursuant to the parties' agreement to compromise the action. One commenter suggests that the agency change the title of an order issued after compromise of an action without a finding of violation, intimating that such a change is required by the statutory language and logic. As amended in the April 1990 final rule, the agency stated that the order would be called "order assessing civil penalty/settlement without finding of violation." While the clear implication of the order would seem to be apparent, the agency is changing the title of an order issued pursuant to such agreement to "compromise order." Thus, there will be a clear distinction from other orders issued by the agency that may contain findings of violations.

Complaint and answer

Several commenters compare the specificity required by the rules of practice for answers submitted by respondents with the apparent lack of required equivalent specificity for complaints issued by the agency. The commenters (such as ATA, AOPA, EAA, and ALPA) object to the specificity stated in the rules for a respondent's answer without a corresponding requirement for detail in the agency's complaint. ATA suggests, since § 13.209(d) requires respondents to address each allegation in each numbered paragraph of the complaint, that § 13.208 be amended to require agency attorneys to use separately-numbered paragraphs in a complaint, each of which contains a single allegation. ATA also recommends that § 13.208 of the rules also should require agency attorneys to state in "plain English" the following information in each complaint: (1) The facts supporting the jurisdiction of the agency; (2) any provision of law supporting jurisdiction; (3) facts upon which the complaint is based; (4) any provision of law allegedly violated by the respondent; (5) facts supporting any claimed penalty; and (6) any provision of law supporting such a claim.

ALPA recommends similar requirements in the rules for the agency's complaint. ALPA suggests revisions of § 13.208 to require: (1) A specific description of the events giving rise to the alleged violation; (2) the date, time, and place of each such event; and (3) the statutory or regulatory provisions alleged to have been violated. ALPA believes that this is the minimum information needed to give a respondent "meaningful notice" of the charges so that a defense can be prepared. EAA also believes that the rule regarding the agency's complaint should be more specific, suggesting that the agency revise § 13.208 to require citation of the regulations that allegedly were violated and a precise statement of the alleged facts. As discussed above, ATA suggests that the agency specify additional requirements regarding the complaint in § 13.208 to eliminate asymmetry in the rules of practice. In ATA's words, "Specificity will yield efficiency—a proposition at least as true for Complaints as for Answers." Conversely, while ALPA would impose additional requirements on the agency regarding its complaint, ALPA believes that the requirements regarding the contents of an answer are "too demanding" and "there is simply no need for that level of precision in the answer." Thus, ALPA would require of the agency more than "notice pleading," while relaxing significantly what it perceives to be "technical pleading" burdens on respondents. ALPA also sees "no need" for the provision in § 13.209(c) that requires a "brief statement of the relief requested by the person in the answer." ALPA argues that the agency should presume that, by filing the answer, the person charged with an alleged violation denies the allegations and seeks dismissal of the complaint. ALPA suggests that the FAA review the NTSB's rule regarding an answer (49 CFR 821.31(c)), which does not prohibit general denials or require a statement of the relief sought.

EAA objects to the provisions of § 13.209(d) (essentially unchanged from the rule promulgated in August 1988 except for substitution of the word "complaint" for the phrase "order of civil penalty") that a "general denial is not only unacceptable, but deemed to be an admission." FAA believes that this provision is a trap for the unwary and shifts the burden of proof from the FAA to the respondent. AOPA, ALPA, and one private attorney also believe that the rules should permit the use of a general denial, thus bringing the FAA's rules in line with the rule and practice of the NTSB.

EAA comments that a "respondent should be free to deny any aspect of the complaint." EAA did not cite any rule, rule provision, or agency practice that prevents a respondent from doing just that. Indeed, by requiring a respondent to address each allegation in each numbered paragraph of the complaint, the respondent could deny each allegation, deny each numbered paragraph, or deny only those allegations or paragraphs that the respondent wishes to contest or require that the agency attorney prove at hearing.

The FAA agrees with ATA's comment that specificity in initial pleadings is desirable for both parties. Specific allegations in a complaint and specific responses in an answer eliminate uncontested issues, narrow and focus any contested issues between the parties, and place contested issues squarely before the administrative law judge. Indeed, as a matter of practice and policy, the FAA's notices and complaints in both certificate actions and civil penalty actions comply with the suggestions and recommendations of the commenters. *See* paragraphs 1202(a)(1), 1204(b)(1), and 1205(b)(1) of Order 2150.3A. Although the commenters request additional specificity in the agency's complaint, none cites any specific instance in which the FAA did not provide enough information in its complaint to enable the respondent to prepare and defend against the FAA's civil penalty action. Nevertheless, the FAA is incorporating in § 13.208 the standards and requirements contained in Order

2150.3A. Thus, both the agency and respondents are subject to similar requirements for specificity in their initial pleadings filed in an action.

Some commenters suggest inclusion of detailed and specific statements supporting the agency's jurisdiction and citations to statutory and regulatory authority in the complaint, seeming to go beyond what ordinarily is required in a system of "notice pleading." The agency is not including such intricate requirements in § 13.208 because other mechanisms are available if the agency's complaint is so unclear that a respondent would be unable to prepare an adequate response. For example, under § 13.218(f), a respondent may file several motions in response to a complaint: (1) A motion to dismiss for insufficiency; (2) a general motion to dismiss; (3) a motion for more definite statement; or (4) a motion to strike. Section 13.209 allows a respondent to file these motions instead of an answer. Thus, before a respondent need deal with preparing a substantive answer to the charges, several procedural motions are available to clarify or even dismiss the complaint. In light of the availability and timing of these motions, the agency believes that there are sufficient mechanisms to address ambiguous or incomplete complaints that would adversely affect a respondent's ability to respond. Also, other revisions to § 13.209 discussed below lead the agency to believe that there is nothing inherently unfair in requiring an effort to prepare a specific response that is similar to the burden on the agency to set forth adequately the allegations in a complaint.

Because specificity in pleadings is desirable, the agency has not eliminated all requirements for specificity in an answer. However, the FAA is revising several parts of the rule so that, in some instances, what once was mandatory now is permissive, much like the NTSB's rule regarding a respondent's answer to a complaint. *See* 49 CFR 821.31(c). As revised, the rule permits a respondent to include any relief requested in an answer, but a respondent is not required to do so. The FAA is removing the phrase "each allegation" in the first sentence of § 13.209(e). Thus, a respondent is required to address each numbered-paragraph in the complaint instead of responding to each allegation that may be stated in a separately-numbered paragraph. If a respondent disagrees with all allegations in a paragraph, the respondent may simply deny the entire paragraph.

A general denial of a complaint still is considered a failure to file an answer; however, allegations in a separately-numbered paragraph that are not specifically denied no longer are automatically deemed to be admitted as true. Instead, the agency's revision of § 13.209(e) allows the administrative law judge to determine whether a respondent's failure to deny an allegation specifically should be considered an admission of the truth of that allegation. The FAA is not, however, amending § 13.209(f); failure to file an answer at all without good cause will continue to result in admission of the truth of each allegation.

Location of Hearings

Under the rules as set forth in the April 1990 NPRM, a person requesting a hearing was required to suggest a location for the hearing in the request submitted to the agency attorney pursuant to § 13.16(i). Under § 13.208 of the rules, the agency attorney was required to suggest a location for any hearing in the complaint filed with the hearing docket. If the respondent and the agency attorney did not agree on a location, the docket clerk would set a location for the hearing near the place where the incident occurred, in accordance with § 13.208(c). Either party could submit a motion to the administrative law judge under § 13.221(c) to change the location of the hearing; the administrative law judge also could change the location, on the law judge's own initiative, giving due regard for where the majority of the witnesses reside or work, the convenience of the parties, and service to the location by a scheduled air carrier. Three commenters object to one or more issues.

ATA objects to empowering the docket clerk to make an initial selection of a location for the hearing if the parties did not agree. In ATA's view, the clerk's decision would not necessarily obviate the involvement of the administrative law judge in a dispute over the hearing location. ATA suggests that the FAA delete § 13.208(c) as an unnecessary step in the process of determining a location for the hearing.

ALPA believes that the "place where the incident occurred" should not be the "controlling consideration" for determining the location because it may be "highly inconvenient for one or even both parties." ALPA suggests that the FAA revise § 13.208(c) so that it resembles 49 CFR 821.37(a) of the NTSB's rules. In pertinent part, that section states:

> The chief law judge or the law judge to whom the case is assigned shall set the date, time, and place for the hearing at a reasonable date, time, and place. * * * Due regard shall be given to the convenience of the parties with respect to the place of the hearing. The location of the majority of the witnesses and the suitability of a site served by a scheduled air carrier are factors to be considered in setting the place for the hearing. * * *

ALPA suggests adding to the FAA's rule only the sentence that begins "Due regard * * *." ALPA did not recommend that the FAA add the remainder of the NTSB's rule.

AOPA recommends that the FAA amend § 13.208(c) and § 13.221(c) to allow an administrative law judge to determine the location for hearing based on the convenience of the parties, particularly the convenience of the respondent. AOPA states that preferences expressed in the rules, such as a place near the location of the incident and convenient for witnesses, tend to "disadvantage respondents because they cannot match the resources of the FAA" to get to a location often far away from the respondent's base. AOPA acknowledges that there may be considerations that weigh in favor of the FAA in setting an appropriate place for a hearing, although that location may not be convenient for a respondent. In AOPA's view, the law judge is the proper person to weigh the relevant factors and determine an appropriate location for any hearing.

After reviewing the comments and those sections of the rules cited above, the FAA is revising the rules that address the location of the hearing. The FAA is deleting § 13.208(c) as requested; the hearing docket clerk no longer will make any decisions about the location of a hearing. The FAA is amending § 13.221(c) as suggested; the administrative law judge will set a reasonable location for any hearing.

The FAA based its original rule on the NTSB's rule. NTSB's rule requires the administrative law judge to give "due regard" to the convenience of the parties and consider factors such as those already contained in the FAA's rule as promulgated and proposed. Because these factors appear to be reasonable matters that an administrative law judge should consider in setting a hearing location, the FAA is not deleting that language from its rule. The FAA is, however, deleting the phrase "near where the incident occurred" and is not including it in any other section of the rules of practice. If the place where the incident occurred is a relevant factor that the administrative law judge should consider, either of the parties is free to raise that issue to the law judge. Because the administrative law judge now determines the location of the hearing, it is not necessary to keep that

portion of the first sentence in § 13.221(c) that preserves the administrative law judge's discretion, on the judge's own motion, to revise the docket clerk's selection of a location.

As discussed previously, the FAA is revising several of the prehearing procedures. Although it is changing the rules to require a respondent to file a request for a hearing with the hearing docket clerk instead of the agency attorney, the FAA is not changing the requirements regarding the contents of a request for a hearing. A respondent still must suggest a location for the hearing when filing that document so that the administrative law judge is aware of the respondent's desires. A copy of the request for a hearing must be sent to the agency attorney so that the attorney can file the complaint with the hearing docket clerk. The hearing docket clerk will forward a copy of the request for a hearing to the DOT Office of Hearings so that the administrative law judge will have a copy of the request, with the respondent's desired hearing location, when the case is assigned. Agency attorneys will continue to suggest a location for any hearing when filing the complaint so that the administrative law judge can determine a reasonable location for the hearing based on the suggestions of the parties. Although not required by the rules, the parties are encouraged to explain or support their suggested location so that the administrative law judge is aware of these considerations at the time of the determination. Under § 13.221(c) as revised, the parties may submit a motion to change the location of the hearing after the law judge has given notice of the date, time, and location of the hearing.

Verification of Interrogatory Responses

In the April 1990 NPRM, the FAA included the suggestion of a private attorney for revision of § 13.220(k)(1), a provision of the rules of practice dealing with interrogatories. The commenter objected to the provision in the rule that required a respondent, but not the agency attorney, to respond under oath to interrogatories. The commenter suggested 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.

The commenter who initially raised this issue provides no further explanation in his comments to the agency's April 1990 NPRM. NBAA takes no position whether amendment of this rule provision is legally necessary but transmits the concerns of NBAA's members that revision of the section may enhance the perception of procedural fairness. Several other commenters support deletion of the requirement that interrogatories be signed by respondents under oath or that attorneys be required to verify their authority to sign on behalf of a party.

American Airlines states that the verification requirement should be eliminated from the agency's rule because § 13.207 of the rules already requires certification of documents by a party or the party's attorney or representative. And, because responses to interrogatories are binding on the responding party, whether signed under oath or not, the requirement to respond to interrogatories "under oath" is unnecessary. ATA also agrees that the verification requirement be eliminated from the rules of practice. ATA raises several questions regarding the requirement, in addition to asserting that the section is not clearly worded, and suggests that the solution to its questions is to delete the verification requirement. ATA states that the "fact-finding process is protected" so long as the answers to interrogatories can be offered as evidence against the party who answered them. ATA believes that verification of an attorney's authority to sign interrogatories on a party's behalf is not necessary, just as it is not necessary for responses to a request for admission or a request for production of documents.

On the other hand, ALPA has no objection to the requirement in § 13.220(k)(1) that answers to interrogatories be made under oath, provided that both parties in a civil penalty action are subject to the requirement. However, ALPA states that persons qualified to administer oaths are not always readily available; thus, ALPA suggests that the agency clarify the section to provide that a "verification under the penalty of perjury, in the manner authorized by 28 U.S.C. 1746, will be deemed the equivalent of a sworn declaration."

Although not explicitly stated in its comments, ATA correctly implies that the rules of practice do not require an attorney's verification of his or her authority to sign responses on behalf of a party to a request for admission or a request for production of documents. And, while the rule appears to require verification by attorneys for either party, and thus seems to place an equal burden on both parties, it is possible that attorneys for individual respondents would, in some cases, have difficulty obtaining or submitting the required verification. Thus, the FAA is deleting from § 13.220(k)(1) the requirement that an attorney verify his or her authority to sign interrogatory responses on behalf of a party. Deleting this requirement will not impair a party's use of interrogatory responses. And, as noted by American Airlines, the certification requirements contained in § 13.207 should sufficiently protect the integrity of the process, making the additional requirement in § 13.220(k)(1) redundant.

The FAA has not clarified this section as suggested by ALPA, believing instead that deleting the requirement to respond under oath is a more efficient solution that achieves what ALPA and the other commenters request. Moreover, Rule 26(g) of the Federal Rules of Civil Procedure does not require that responses to discovery requests be made under oath. Thus, after review of this section and in accordance with the recommendations of the commenters, the FAA is deleting the requirement that a party answer interrogatories under oath. As ATA and American Airlines suggest, the FAA has modified § 13.220(k) to make it clear that interrogatory responses may be used by a party to the extent that the responses meet the general standard for admission of evidence. Thus, interrogatory responses are binding on the party that provides them and the responses may be introduced into evidence by an opposing party, in the same manner as any other evidence may be introduced and used. This modification is similar to, but not so restrictive as, a party's use at a hearing of any part or all of a deposition under § 13.220(j)(4). It clearly is within the discretion of the administrative law judge under the general evidentiary rule to determine if an interrogatory response is relevant, material, and not repetitious and, thus, should be admitted into evidence in a civil penalty action.

Discovery

Several commenters object generally to the rule directed toward discovery practice. ALPA points out that the FAA's discovery rule (§ 13.220) is more extensive than the NTSB's discovery rule. While conceding that it has "no objection to any specific provision" of the current provisions in the discovery rule, ALPA asserts that "their very comprehensiveness makes us a bit uneasy," and expresses concern that the rule might create opportunities for abuse. ALPA suggests that the discovery rule should make clear that it should be "administered and construed in a manner consistent with the Federal Rules of Civil Procedure."

AOPA also objects to the current discovery rule, asserting that it "creates

a great potential for abuse by the FAA against respondents of modest means," stating that "the sheer volume and tenor of the FAA rule seems to encourage extensive, computer-generated discovery." AOPA suggests that the FAA adopt a rule similar to that of the NTSB (49 CFR 821.19), emphasizing voluntary exchange of information, using the Federal Rules of Civil Procedure as a general guide, and allow the administrative law judge to control the discovery process. A private attorney also expresses concern that the rule allows "unbridled use of discovery by the FAA."

In the abstract, the lack of specific provisions governing discovery could more likely lead to abuse than discovery procedures that are comprehensive. The FAA is confident that the comprehensiveness of the discovery rule will protect parties against abusive and burdensome discovery, rather than encourage it. The agency is unaware of any instances of abusive discovery by the FAA, and the commenters point to none. The FAA does recognize that any system of discovery is subject to abuse and, thus, the current rules of practice provide protection against abuse. Section 13.220(f) allows the administrative law judge to limit discovery under certain circumstances and § 13.220(h) provides for protective orders in order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

Moreover, as was pointed out when the rules of practice were originally promulgated, the provisions regarding discovery contained in § 13.220 "are similar to the discovery permitted under the Federal Rules of Civil Procedure," although they are "tailored to accommodate the less formal requirements of administrative practice." 53 FR at 34650; September 7, 1988. As the commenters point out, the NTSB rule, which provides scant guidance, states that the Federal Rules of Civil Procedure may be used as a general guide for discovery before the NTSB. However, the NTSB rule also specifies that the Federal rules and the case law construing them "shall be considered by the Board and its law judges as instructive rather than controlling." This essentially is the same approach the FAA has followed. *See American Airlines* v. *FAA*, FAA Order No. 89-6 (December 21, 1989). Although the Administrator declined to follow the Federal Rules of Civil Procedure in that case, the Administrator's approach to resolve the issue—that the Federal Rules are instructive rather than controlling—is consistent with NTSB practice. In light of the fact that the FAA's rule already roughly parallels the Federal rules, the FAA does not believe that adding similar language to its discovery rule would add anything of value.

American Airlines points out that the current rule provides that responses and objections to discovery must be served within 30 days (§ 13.220(d)), but they do not specify that a failure to respond or object within 30 days constitutes a waiver of objections. American argues that the failure to timely respond to discovery should constitute a waiver of the right to object. The FAA does not agree that such a waiver is always warranted. Indeed, the Administrator has already decided, in a case involving American Airlines, that such a sanction would be too onerous where the party seeking the sanction demonstrated no prejudice by the delay. *Id.* The holding in that decision is not inconsistent with the practice in Federal courts, where courts sometimes but not always impose this sanction. In sum, the issue of what sanction should be imposed for failure timely to respond or object to discovery is one that should be decided on a case-by-case basis and entrusted in the first instance to the discretion of the administrative law judge. Accordingly, the FAA declines to alter the current discovery rule on this point.

American also asserts that the number of interrogatories permitted by the rule should be increased from one set of 30 questions to two sets of 30 questions each, arguing that it is costly to file a motion for leave to serve additional interrogatories, as is now contemplated by § 13.220(k)(2). American also states that permitting another set of 30 interrogatories would impose no additional burden on litigants. However, it seems to the agency that to double the number of interrogatories permitted would actually increase the burden of preparing for and responding to discovery. Thirty interrogatories should normally be sufficient to obtain relevant information in the typical civil penalty case. If it is not, a party can always file a motion for leave to serve additional interrogatories, upon a showing of good cause. *See* § 13.220(k)(2). The costs of filing such a motion should not be excessive. The FAA believes that the benefits of retaining the current limit on interrogatories outweigh whatever costs may be involved in filing a motion. The current maximum of 30 interrogatories which may be filed without the law judge's approval discourages unduly burdensome or excessive discovery, and is a necessary limitation.

Motions to Quash Subpoenas

Only ATA raises an issue with regard to motions to quash a subpoena. ATA takes issue with the fact that § 13.228(b) limits motions to quash to the person upon whom the subpoena is served. ATA believes that parties, and especially respondents, should be able to move to quash a subpoena that is served upon a third-party witness because the third-party witness will frequently have little reason or financial ability to resist compliance and because the real party in interest will frequently be the respondent.

Rule 45 of the Federal Rules of Civil Procedure speaks to the subpoena. Rule 45(a) applies to the subpoena *ad testificandum* (testimony), and Rule 45(b) applies to the subpoena *duces tecum* (documents). Significantly, Rule 45(b) provides for motions to quash or modify a subpoena *duces tecum*, but no such provision appears in Rule 45(a). In addition, Rule 45(d), which speaks to the subpoena for the taking of depositions and the place where they can be taken, contains language identical to that in § 13.228(b) of the rules of practice, specifying that the person served with the subpoena may move to quash or modify the subpoena. The only rule which supports the commenter's suggestion that parties, as well as the person served, should have standing to raise an objection to the subpoena is Rule 26(b). It provides that either a party or the person from whom discovery is sought may, upon good cause shown, seek relief from the court. Rule 26 applies, however, only to depositions and discovery, and it is unclear whether the commenter's suggestion is similarly limited.

Even though Rule 45 provides no support for the commenter's suggestion, and Rule 26 provides support only in the discovery situation, the more liberal approach found in Rule 26 is adopted herein. Accordingly, § 13.228(b) is amended to provide that either the person served or a party may move to quash or otherwise modify a subpoena, based on the standards contained in that section of the rules of practice.

Intervention

EAA questions the basis for the section in the rules on intervention by persons who are not parties to a civil penalty action. *See* § 13.206. That section stated that the administrative law judge must allow any person who has a statutory right to intervene to participate in the proceedings. If there was no statutory right to intervene, the administrative law judge was required

to exclude any other person's participation. EAA requests clarification of the statutes and the circumstances that would trigger intervention by a person who is not a party to the civil penalty action.

The FAA patterned its intervention section on a DOT rule. *See* 14 CFR 302.15. In light of the differences between DOT's complex route, rate, licensing, and enforcement proceedings and the FAA's civil penalty actions, the FAA chose to exclude the participation of any person who was not a party to the action. The FAA explained the basis for the section in its August 1988 final rule:

> In the FAA's experience, intervention requests are infrequent in enforcement actions, and these requests generally are denied. The FAA believes that requests to intervene would result in unnecessary delay and expense to the true parties in the civil penalty proceedings.

53 FR at 34649; September 7, 1988. The FAA continues to believe that this justification for the limited intervention provision remains valid.

In the disposition of comments submitted on the August 1988 final rule, the FAA expanded this explanation (54 FR at 11918; March 22, 1989). The FAA explained that participation by nonparties at the factfinding stage of a hearing generally does not contribute to resolution of the narrow issues before an administrative law judge in a civil penalty action, namely factual determinations regarding an alleged violation and a determination of an appropriate penalty for a violation. The FAA restated its view that motions to intervene and actual intervention by persons with interests more attenuated than those of the parties could delay the proceedings and complicate the issues in the case. Moreover, under § 13.233(f), the Administrator may allow a nonparty to submit an *amicus curiae* brief in an appeal of an initial decision. In addition to the Administrator's authority to remand a civil penalty action for the receipt of additional evidence or testimony and an initial decision on an issue, the ability to receive an *amicus* brief by a nonparty should provide sufficient opportunity for any person who has a substantial interest, not adequately represented by the parties, to participate in an agency enforcement action.

There does not appear to be any current statute specifically authorizing any person to participate in civil penalty assessment proceedings held by the FAA. Although no other commenter states any position regarding the FAA's section on intervention, EAA's comment prompted the FAA to review this section once again. Upon review, the FAA is revising its rule, adopting considerations similar to those in the NTSB's rules and expanding the circumstances under which a nonparty could attempt to intervene in a civil penalty action. The FAA is revising § 13.206 to include language similar to the NTSB's rule (*see* 49 CFR 821.9) and adding a time limit for submitting a motion for leave to intervene to an administrative law judge. As under the NTSB's rule, an administrative law judge is not required to entertain a motion for leave to intervene submitted less than 10 days before a hearing unless the party shows good cause for any delay in submitting the motion.

The FAA expects that motions for leave to intervene will be infrequent and an administrative law judge's granting of such a motion will be rare. By expanding this section of the rules, it does not appear that the parties' interests or the public interest will be adversely affected if a nonparty moves to intervene. However, it will be in the discretion of the administrative law judge, in light of the facts and circumstances of a particular case, to weigh any factors and determine whether intervention is appropriate. The administrative law judge also may determine the extent of an intervenor's participation in a civil penalty proceeding.

Hearsay Evidence and FAA Employee Testimony

In the April 1990 final rule, the FAA addressed, at great length and in great detail, the objections of previous commenters to the use of hearsay evidence in civil penalty actions and perceived limitations on FAA employee testimony based on the language of the applicable sections of the rules of practice. The FAA made several revisions to the rules of practice to address the concerns and suggestions of the commenters. In response to the April 1990 NPRM, only one commenter continues to object to the admission of hearsay evidence and three commenters continue to express concerns about the scope of an FAA employee's testimony in civil penalty actions.

With regard to the admission and use of hearsay evidence, the FAA has noted the longstanding acceptance by Federal courts and administrative agencies of the admission and use of hearsay evidence in administrative proceedings. The FAA cited several NTSB cases that expressly recognize the admissibility and use of hearsay evidence in its certificate action proceedings. Because the FAA has dealt with this issue on several prior occasions, the FAA will not repeat that discussion here. 53 FR at 34651; September 7, 1988 (promulgation of initiation procedures and rules of practice); 54 FR at 11917–11918; March 22, 1989 (disposition of comments to August 1988 final rule); 55 FR at 15118; April 20, 1990 (final rule amending the rules of practice promulgated in August 1988).

Only one commenter, a private attorney who has indicated his distinct preference for adjudication in Federal courts, disagrees with the agency's decision to permit the admission and use of hearsay evidence in civil penalty actions. The commenter states the FAA's "burden of proof is diminished since it can use 'incompetent evidence,' *i.e.*, hearsay that would not be admitted in Federal Court." This is not correct. First, an administrative law judge will determine what weight, if any, should be given to hearsay evidence admitted in the proceeding and whether it is reliable and material to the factual issues in the case. Second, all parties will have an opportunity to present hearsay evidence. Therefore, a respondent also will have an opportunity to prevail in a civil penalty action based on hearsay evidence. Thus, the agency does not see a sufficient reason to exclude potentially relevant and material evidence, albeit hearsay, particularly in light of the law judge's discretion regarding its weight.

This commenter objects to the possibility that the FAA could establish a *prima facie* case of a violation based on "statements made in court by an FAA Inspector who is merely repeating what he heard from someone out of court * * * who is not available to be cross-examined or confronted by the pilot or his lawyer." The commenter fails to explain how or why the person who made the statement "out of court" would be unavailable to the pilot or his attorney or that unavailability, if any, is a result of the agency's rules of practice. Under the agency's discovery rule, the respondent will be able to determine whether an inspector will rely on hearsay testimony, and prepare to address that evidence at the hearing. Although not stated, the FAA presumes that the comment may be based on a respondent's concern or financial inability to ensure that the "out of court" witness is available and appears at the hearing.

While this is a valid concern, the respondent is not without options. Even if the "out of court" witness were not able to appear at the hearing, the respondent or the respondent's attorney certainly could cross-examine the inspector to persuade the administrative

law judge that reliance on hearsay evidence is unreasonable and, thus, should be accorded little or no weight. Although the commenter states that the FAA's rule "eliminate[es] pilots' rights to engage in meaningful cross-examination," the commenter does not cite any example, either in a civil penalty proceeding or a certificate action proceeding before the NTSB, where this has occurred.

The FAA is confident that DOT administrative law judges are well aware of arguments regarding the admissibility and use of hearsay evidence and will exercise their discretion to determine what weight, if any, should be accorded to hearsay evidence in a particular case. In the absence of specific examples of abuse and in light of the significant support previously expressed by the majority of the commenters in favor of the admissibility of hearsay evidence, the FAA declines to change its rules to make hearsay evidence inadmissible.

Three commenters continue to raise concerns about an FAA employee's expert or opinion testimony in civil penalty actions. One comment may be based on a misreading of the revised rule. The commenter correctly cites the sentence added by the FAA in the April 1990 final rule that prohibits FAA counsel from calling a respondent's employee to give opinion testimony for the agency. However, the commenter cites the previous version of the first sentence of § 13.227. As revised, the rule now reads:

> 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.

The FAA replaced the word "testify" from the previous sentence with the phrase "be called" to address the concerns of the commenters. As stated in the preamble to the April 1990 final rule, the revised section "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." 55 FR at 15120; April 20, 1990. To the extent that the commenter's discussion is based on the previous language in § 13.227, the FAA is unable to determine if the commenter would object to the rule as revised in the April 1990 final rule and published for comment in the April 1990 NPRM.

EAA and the President of the NTSB Bar Association, and as AOPA acknowledged in its previous comments, "recognize the need for a prohibition of private persons from using the government as a source for expert testimony." But both commenters ask the FAA to explain again the rule's effect on the testimony of an FAA employee that the respondent may have consulted for advice about matters such as the airworthiness of an aircraft, acceptability of navigational equipment, or a method of aircraft construction. The commenters are concerned that if a person seeks the agency's advice, and a civil penalty action later is initiated on a related matter, the rules of practice will inhibit either the respondent's ability to call the FAA employee who gave the advice or respondent's ability to cross-examine an FAA employee who testifies as an expert or opinion witness on the issue.

In its discussion of the revisions to § 13.227 in the April 1990 final rule, the agency also discussed its expectations of how the rule would operate in practice.

> 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.

55 FR at 15117–15120; April 20, 1990. During a hearing, counsel for the FAA is entitled to pose proper objections to a respondent's attempt to call an FAA employee as an expert on the respondent's behalf or to engage in improper cross-examination of an FAA witness. The respondent is entitled to pose the same objections regarding its witnesses. In either case, the administrative law judge will rule on any objections raised by either party regarding the proper scope of cross-examination or the factual character and content of the person's testimony, presumably based on the law judge's view of the validity of the objection and the reasons supporting that objection.

In the hypothetical set forth by EAA and the President of the NTSB Bar Association, the respondent may call an FAA employee as a fact witness. The agency employee could testify about factual matters, such as where and when the respondent sought the FAA employee's advice and the content of the advice provided by the employee, offered at the hearing for what was said, not its validity. The respondent is entitled to call his or her own expert or opinion witness to testify about the validity of that advice. If the FAA calls the agency employee (previously contacted for advice by the respondent), the respondent can ask the FAA employee factual questions to develop the factual record on the issue. If the FAA calls that employee as its expert or opinion witness in the action, the respondent may elicit factual testimony from that employee and cross-examine the employee about expert or opinion testimony given on direct examination at the hearing. As the FAA stated in the April 1990 final rule:

> Because both sentences [in § 13.227] 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.

55 FR at 15120; April 20, 1990. The FAA is aware of its responsibility and ability to be a "source of information" on aviation matters and, as such, the aviation community should be able to seek freely and rely upon the FAA's advice. This traditional role of the agency is neither altered nor affected by the FAA's rules of practice, particularly as § 13.227 has been revised in the April 1990 final rule.

Evidence Related to Flight Data Recorders or Cockpit Voice Recorders

In comments to the August 1988 final rule, ATA suggested that the FAA amend § 13.222(b) to preserve expressly the "privilege that traditionally has attached" to information from flight data recorders (FDR) and cockpit voice recorders (CVR). In its comment to the April 1990 NPRM, ATA repeats this suggestion. Airborne also suggests that the FAA amend § 13.222 to include a "privilege or other exclusionary rule" to preclude admission of FDR and CVR information. Airborne states that the FAA's rule regarding the admissibility of evidence would allow admission of FDR and CVR data "even though such evidence is by statute or otherwise ruled inadmissible for any purpose other than accident and incident investigation." So as to "avoid unnecessary argument" if an FAA attorney tries to introduce hearsay FDR or CVR data, "and consistent with statute and regulation," Airborne argues that the rules of practice should expressly exclude such data, whether relevant or otherwise admissible.

To the extent that these commenters assume, or by their comments suggest, that there has ever been a restriction on the use of FDR data in evidence, the commenters are mistaken. FDR information is now and has always been admissible in enforcement actions. Indeed, § 13.7 specifically provides that, except to the extent that such use is specifically limited or prohibited, each record, document or report which is required to be maintained by the Administrator may be used in any civil penalty action, certificate action or other legal proceeding. The use of CVR information in evidence, however, is specifically limited in § 121.359(f) and § 135.151(c). Those sections state, in pertinent part:

> Information obtained from the record (produced by the cockpit voice recorder) is used to assist in determining the cause of accidents or occurrences in connection with investigations under part 830 (of the NTSB's regulations). The Administrator does not use the record in any civil penalty or certificate action.

No similar limitation applies to FDR information. *See* § 121.343(i) and § 135.152(e).

The FAA's rules of practice for civil penalty actions do not expressly or by implication amend the existing regulatory restrictions on the use of CVR information as evidence in an enforcement proceeding. The rules also do not change any existing policies or practices with regard to such use. As stated in the disposition of comments to the August 1988 final rule, the agency will continue to operate under existing rules, policies, and practice in handling information from cockpit voice recorders and flight data recorders. 54 FR at 11917; March 22, 1989. If an agency attorney attempts to introduce evidence based on CVR or FDR information in a civil penalty action, a respondent is free to object to admission of such evidence based either on the regulatory restrictions or policy arguments against such use.

Accordingly, no change to § 13.222 will be adopted in this rulemaking. Should the commenters desire reconsideration of agency policy with regard to the use of FDR information or regulatory changes with regard to restrictions on the use of CVR information in § 121.359 or § 135.151, the commenters are free to petition for such changes.

Written Arguments and Decisions

Despite the FAA's significant revision of the rules of practice dealing with written arguments and decisions, two commenters request changes to permit broader opportunities for, or to require, submission of written briefs in civil penalty actions. Airborne states that the FAA's changes regarding submission of written arguments and decisions in the April 1990 final rule do not go "far enough" and cases involving fines exceeding several thousand dollars "deserve the more deliberate and thoughtful proceedings which written advocacy and decision provide." Airborne advocates a distinction in the rules that gives "respondents a right to submit written submissions in cases over a specified dollar amount, for example, $5,000." Airborne also suggests that administrative law judges "should be encouraged by rule to submit written decision for penalties over a similar amount, with discretion to avoid such written decisions in appropriate case, provided reasons are stated on the record."

Both Airborne and a private attorney suggest that even the FAA's liberalization of the rules regarding written arguments and decisions appears to be contrary to or seem to depart from "the spirit if not letter of section 557(c) of the Administrative Procedure Act . * * *." Both commenters rely on the language in section 557(c) that states, in part, that "* * * the parties are *entitled to a reasonable opportunity to submit* * * *" certain information to a decisionmaker before a decision is issued. (Emphasis added.) Neither commenter cites any judicial or administrative decision or any specific instance of abuse of this perceived "right" to support their claim that the Administrative Procedure Act requires the agency's rules to provide for written submissions and decisions in all cases.

In the April 1990 final rule, mindful of the significant support for the proposition by the commenters, the agency amended the rules of practice to leave the decision of submission of written arguments and issuance of written decisions entirely to the administrative law judge. The agency will not here repeat its discussion of the amended rules related to this issue. 55 FR at 15120–15121; April 20, 1990. The FAA believes that the administrative law judges will properly discharge their obligation to provide a "reasonable opportunity" for submission of written arguments, in light of the facts and circumstances of a particular case before them. Moreover, administrative law judges are best able to determine the necessity for and the obligation to issue a written decision in a particular civil penalty action.

Authority of Administrative Law Judges

Two commenters, American Airlines and Airborne, suggest that the rules should be amended to provide administrative law judges with the power to award costs and fees, impose sanctions, and issue orders of contempt. American urges that administrative law judges should have the power to impose reasonable sanctions, particularly where a party is the subject of discovery abuses such as delayed or inappropriate responses to discovery. Airborne requests that § 13.205(b), which places limitations on the power of the administrative law judge, be eliminated from the rules unless the FAA can provide a justification for the rule.

The powers of an administrative law judge, as set forth in § 13.205, are based on the Administrative Procedure Act. Section 556(c) of the Administrative Procedure Act provides that a hearing officer may regulate the course of the hearing, "[s]ubject to published rules of the agency and within its powers." 5 U.S.C. 556(c). In accordance with section 556(c), administrative law judges are vested with enumerated powers only to the extent such powers have been given to the agency. See Attorney General's Manual on the Administrative procedure Act, at 123 (1947). Administrative law judges may not exercise authority which exceeds the authority granted to the agency or which exceeds the enumerated powers published in the agency's regulations. *See id.* at 123–124; *Western Airlines, Inc.*, FAA Docket 85–108(HM) at 8 (December 12, 1987).

Neither the Federal Aviation Act of 1958, as amended, nor the Hazardous Materials Transportation Act authorizes the FAA to cite a party for contempt or to impose costs or any other monetary sanction as a means of regulating abuses that may occur during the course of an administrative hearing. Since administrative law judges act for the agency and have only those powers which the agency itself possesses, they cannot exercise this authority as part of FAA's civil penalty assessment proceedings.

The source of the inherent power to punish contempt is Article III of the Constitution. *In re Seqoia Auto Brokers, Ltd., Inc.*, 827 F.2d 1281, 1284 (9th Cir. 1987). The agency is not an Article III court and, therefore, does not possess the inherent power to issue orders of contempt. *Western Airlines, Inc.*, at 8. While Congress may confer certain powers on agencies to regulate the conduct of persons who appear before them in adjudicatory hearings, and has done so for other agencies, it has not so

authorized the FAA or DOT. *Id.* Accordingly, DOT administrative law judges lack authority to issue orders of contempt to sanction the conduct of attorneys during FAA administrative hearings. While the agency and, accordingly, the administrative law judges do not have the power of contempt, they are not precluded from issuing orders that bar a person from a specific proceeding for obstreperous or disruptive behavior during that proceeding. *See*, § 13.205(b). Such exclusions are not based on an agency's power to regulate or discipline attorneys or the inherent power of contempt, but on the power to adjudicate, which includes the power to protect a proceeding from disruption. *Western Airlines, Inc.*, at 9. With regard to abuses of discovery, § 13.220 enables a law judge to sanction abusive conduct or protect against such abuses.

In view of the foregoing, the FAA believes there is a sound basis for § 13.205 of the rules of practice, and this section is adopted without change. The amendment urged by American and Airborne is beyond the authority of the FAA and has not been adopted. While the limitations on the administrative law judge's authority exist whether codified or not, the FAA believes these limitations should be set forth in a regulation in order to apprise all parties to a proceeding of the extent of the administrative law judges' authority.

Interlocutory Appeal

Several commenters (EAA, AOPA, ATA, American Airlines, and one private attorney) express concern about an interlocutory appeal of right available only to the FAA in the rules of practice. Section 13.219(c)(4) states, in pertinent part:

> 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 * * * [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).

Section 13.218(f)(2)(ii) states, in pertinent part:

> 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) (interlocutory appeals of right) of this subpart.

EAA objects to "any one party in an adjudicatory process" having the unilateral right of interlocutory appeal, and believes that whether to permit an interlocutory appeal should be left to the discretion of the administrative law judge. AOPA urges the FAA to eliminate the provision because it is "unfair and has the potential for abuse in unduly protracting litigation to the disadvantage of respondents." The private attorney objects to the "interlocutory appeal rights of the FAA" without further elaboration or discussion.

ATA, while noting that the provision "theoretically promotes efficient use of resources by avoiding piecemeal trials[,]" objects to the unilateral character of the provision. If the policy is correct, then both parties should be permitted to appeal decisions on motions to dismiss, subject to sanctions for frivolous appeals taken to delay the adjudicatory process. On the other hand, if the policy is without basis, then "neither side should be permitted to interrupt the trial process." American Airlines takes a position similar to ATA, although for reasons somewhat different from ATA. American asserts that there is "little to gain" by providing an interlocutory appeal of right for a partial dismissal of the agency's complaint, stating that such an appeal will "encourage piecemeal appeals" and "delay the adjudication on the merits" of the remainder of the case. American believes that if the FAA cannot show the necessary "harm" to support an interlocutory appeal for cause, then no interlocutory appeal should be allowed. According to American, any dismissal of part of the agency's complaint could be reviewed on appeal to the Administrator.

The agency notes that, although the language of § 13.218(f)(2)(ii) and § 13.219(c) referred only to agency attorneys, this provision reflected the fact that only agency attorneys issue complaints in these proceedings; thus, respondents generally will be the only parties filing a motion to dismiss under § 13.218(f)(2). That section was directed at respondents only and specifically provided that a "party may file a motion to dismiss a *complaint* instead of [filing] an answer * * *." (Emphasis added.) As would be expected, respondents generally would not appeal the dismissal of a portion of the agency's complaint. Nevertheless, the agency is amending § 13.219(c) because the rules do not provide a corresponding avenue of interlocutory appeal of right available to respondents if an administrative law judge grants an agency motion to dismiss all or part of a respondent's request for a hearing. The FAA is deleting § 13.219(c)(4) from the rules of practice and revising § 13.218(f)(2)(ii) accordingly.

The FAA believes that an interlocutory appeal of a partial dismissal of the initial documents (request for a hearing and complaint) filed in an action will promote efficient use of adjudicatory resources in the long run. If the Administrator reverses the administrative law judge's partial dismissal, then the entire case can be tried at the same time. The FAA is persuaded by ATA's comment that if the justification for the provision has merit, then both parties should be able to appeal a partial dismissal of the initial document filed in an action. The FAA also agrees with the comments of EAA and American, at least to the extent that the commenters believe that these appeals should not be available as of "right," but instead should be interlocutory appeals for cause granted in the discretion of the administrative law judge.

Therefore, the FAA is amending § 13.218(f)(2) so that both parties can file a motion to dismiss the first document filed in a civil penalty proceeding, either a complaint or a request for a hearing. Both parties also may file a written request for an interlocutory appeal for cause of a partial dismissal of one of these documents. An administrative law judge's dismissal of all of the complaint or dismissal of the request for a hearing may be appealed under the provisions of § 13.233, the general section on appeals from an initial decision.

Both ATA and American comment on the timeframe within which a notice of interlocutory appeal must be filed with the Administrator under § 13.219(d), both stating that three days is unduly burdensome and is an insufficient amount of time to prepare a proper appellate brief with supporting documents. ATA urges the FAA to provide "a week to prepare an opening brief and a week to prepare a reply." It is not clear whether "a week" means five working days, seven working days, or seven calendar days including weekends and holidays. American urges the FAA to revise the rule to provide (1) a 10-day period to file the appellate brief and (2) to clarify the action that triggers the time period for filing the appellate brief (either receipt, service, or issuance of the order forming the basis for the interlocutory appeal).

The FAA concurs with American's comment and is revising § 13.219(d) to provide a 10-day period (10 calendar days under § 13.212) to file an interlocutory appeal brief after service of the administrative law judge's order forming the basis of the interlocutory appeal. Although American preferred that receipt of the order would be the triggering event, establishing a person's receipt of documents can be extremely difficult. Under § 13.211(e) related to

service of documents by mail, an additional five days is added to any prescribed time period to account for delays that may be attributable to the mail service. Thus, the FAA believes the date of service is the appropriate event to trigger the 10-day time period for filing an interlocutory appeal brief.

Modification of Civil Penalty

The FAA made significant changes to § 13.232(a) that, as adopted in August 1988, required an administrative law judge to support a reduction of the civil penalty sought by the agency for an alleged violation. Many commenters objected to this requirement and, in response to those comments, the agency deleted the requirement from the rules of practice. In the April 1990 final rule, the FAA discussed the fact that this requirement had been deleted and the effect of § 13.232, as amended. 55 FR at 15121–15122; April 20, 1990. Nevertheless, EAA and the President of the NTSB Bar Association continue to assert that the rules of practice inhibit an administrative law judge's ability to modify a proposed civil penalty based on evidence presented at a hearing.

The President of the NTSB Bar Association criticizes the FAA's apparent reliance on the "highly criticized *Muzquiz* doctrine" (*Muzquiz* v. *NTSB*, 2 NTSB 1474 (1975)) and asks the FAA to eliminate it from the agency's adjudicatory process. EAA echoes the same comment in nearly the same words, stating that elimination of "that doctrine is essential to fairness in any adjudicatory system." As early as the February 1990 NPRM and again in the April 1990 final rule, the agency noted that its rules of practice in this regard do not follow *Muzquiz*. *Muzquiz* is a decision of the NTSB, binding only on its administrative law judges. These comments seem to be misplaced because the FAA rule, even as adopted in August 1988, did not exist as articulated by the NTSB in *Muzquiz*. Moreover, in the April 1990 final rule, the agency revised § 13.232(a) to remove any appearance that *Muzquiz* was controlling.

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).

55 FR at 15121; April 20, 1990. It is not clear from the comments how the agency could further revise that section to address the commenter's general criticism.

As the agency has noted previously, a discussion of any sanction found appropriate by the law judge may prove useful to both parties, and any administrative or judicial adjudicator, on appeal of an administrative law judge's initial decision. *See* 55 FR at 7984; March 6, 1990. Moreover, the Administrative Procedure Act requires some articulation of the administrative law judge's sanction decision, at whatever level of detail deemed appropriate by the law judge. *See* 55 FR 15122; April 20, 1990. EAA understands "the utility of an articulation of the basis" for the administrative law judge's decision regarding the amount of a civil penalty. However, EAA objects to raising this requirement "to the level of having to subjectively satisfy the FAA's final decision maker who, under this system will be ruling *de novo*." EAA is mistaken: § 13.233 (b) and (j) limit the scope of appellate review and do not provide for *de novo* review of an initial decision.

New Issues on Appeal

In response to the February 1990 NPRM, several commenters (NACA, American Airlines, and one private attorney) objected to language in § 13.233(j)(1) that permitted the FAA decisionmaker to raise any issue, *sua sponte*, that is required for proper disposition of the proceedings. AOPA and the California Aviation Council raised this issue in comments to the August 1988 final rule. The commenters objected to the apparent failure of the rule to provide an opportunity to submit evidence (although the rule permitted additional argument) and develop the record on any "new" issue raised by the decisionmaker on appeal. Although the FAA stated that the rule, as previously written, adequately protected the parties, the FAA revised § 13.233(j) in the April 1990 final rule to make clear that the decisionmaker will remand a case for receipt of evidence, development of the record, and an initial decision related to that issue.

Only two commenters, one of whom raises this issue again, discuss this issue. EAA recommends a "further restriction" on the decisionmaker's ability to raise new issues on appeal. Despite the discussion in the April 1990 NPRM and the revisions to the section, EAA and one private attorney still claim that the section operates to the detriment of respondents. These two commenters believe that the section provides an opportunity for prosecutors, without a "reciprocal right" given to pilots, to raise new issues that should have been raised at the outset of the proceedings. Both commenters are mistaken, however, because this section refers only to the FAA decisionmaker's ability *sua sponte* to raise new issues. That section does not permit either party to raise new issues on appeal.

Section 13.233(j) essentially adopts a rule and practice enshrined in the NTSB's rules of appellate practice and procedure in appeals to the full Board of initial decisions issued by NTSB administrative law judges in certificate action proceedings. Section 821.49 of the NTSB's rules (49 CFR 821.49) states, in pertinent part:

> The Board on its own initiative may raise any issue, the resolution of which it deems important to a proper disposition of the proceedings, in which event a reasonable opportunity shall be afforded to the parties to submit argument thereon.

The Administrator may only raise a "new" issue where it is "required for proper disposition of the proceedings," ostensibly a higher standard than the NTSB's rule that permits the Board to raise a "new" issue that it "deems important to a proper disposition * * *." In light of the FAA's revision to permit the parties to submit evidence and develop the record on an issue raised by the Administrator, § 13.233(j) arguably provides more protection for the parties than is provided in the NTSB's rule. The FAA adopted the provision because it could benefit unrepresented respondents who may not have adequately briefed a relevant and dispositive issue. The FAA continues to believe that it will so operate in practice.

Moreover, the FAA is not aware of, and the commenters do not cite, any abuse of this section by the FAA decisionmaker in the proceedings conducted thus far (or by the NTSB, under its somewhat different standard). The FAA believes that the integrity of appellate decisionmakers in these proceedings, and the potential for judicial review of their decisions on this issue, ensure that both parties will be treated equally and fairly if this authority is exercised on appeal. Thus, the FAA declines to change that section of the rules of practice.

Delegation of Authority

ATA and American Airlines object to the language in § 13.16(c) that delegates the Administrator's authority "to initiate and assess civil penalties" to the Deputy Chief Counsel, the Assistant Chief Counsel for Regulations and Enforcement, and the Assistant Chief Counsel for a region or center. Specifically, these commenters contend that the delegation of authority "to assess" civil penalties on behalf of the Administrator should be withdrawn, because such a delegation "literally delegates the Administrator's

decisionmaking responsibilities to the agency's prosecutors."

The FAA does not agree with the conclusion that, by delegating to agency attorneys the authority to assess civil penalties in only two narrow circumstances discussed earlier, the Administrator has delegated his decisionmaking responsibilities. Civil penalties are assessed only under specific circumstances set forth in the rules of practice. Thus, the disputed delegation does not involve any of the Administrator's substantive decisionmaking functions, but pertains only to the ministerial assessment of civil penalties already determined—by rule or decision—to be warranted. The Administrator's authority substantively to "decide" cases has not been delegated to agency prosecutors. In accordance with a suggestion by American Airlines, the agency is amending the definition of "order assessing civil penalty" in the rules of practice. That definition states that an initial decision by an administrative law judge or a final decision and order of the Administrator, unless timely appealed, shall be considered an order assessing civil penalty where the adjudicator finds that a violation occurred and a civil penalty is warranted.

ATA also questions the Administrator's delegation of authority to the Chief Counsel and the Assistant Chief Counsel for Litigation to take certain minor and procedural actions on his behalf. *See* 55 FR 15094; April 20, 1990, ATA asserts that if the delegation is not restricted to appellate proceedings, "it trenches on the authority of administrative law judges." ATA states that the scope of the delegation is ambiguous, and suggests amending it to make clear that it applies only to appellate proceedings.

The FAA believes that it is clear from the delegation as currently written that it applies only to appellate proceedings. The delegation is made pursuant to § 13.202, which defines the term "FAA decisionmaker" as "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." (Emphasis added.) The current delegation is thus restricted as ATA suggests and, therefore, there is no reason to amend the delegation.

Sanction Criteria

American Airlines objects to what it views as the asymmetry of § 13.16(a)(1) concerning the respective criteria considered by the agency before assessing civil penalties for violations of the Hazardous Materials Transportation Act on the one hand and violations of the Federal Aviation Act of 1958, as amended, on the other. Previous commenters also have raised this objection.

Section 13.16(a)(4) states that an order assessing civil penalty for a violation of the Hazardous Materials Transportation Act or a rule, regulation, or order issued thereunder, will be issued only after consideration of certain enumerated factors. American believes that this section should provide for consideration of the same factors before an order assessing civil penalty is issued for a violation of the Federal Aviation Act or its implementing regulations.

American believes the rule is contrary to the procedures set forth in Order 2150.3A, which states that all civil penalties should be assessed in accordance with established criteria. Therefore, American recommends that the FAA either change the rule to provide that these criteria will be considered before a penalty is assessed for any violation or delete the criteria entirely from the regulation.

Section 13.16(a)(4) lists the factors that must be considered because the Hazardous Materials Transportation Act specifically requires that these factors be considered to determine the appropriate amount of civil penalty for a violation of the act or the hazardous materials regulations. Section 1809(a)(1) of the Hazardous Materials Transportation Act provides, in pertinent part:

> In determining the amount of such penalty, the Secretary (whose authority is delegated to the FAA Administrator for violations of the regulations pertaining to the transportation of hazardous materials by air) shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

Since the FAA is required by statute to consider these criteria before issuing an order assessing a civil penalty for a violation of the Hazardous Materials Transportation Act and the implementing regulations, the agency believes that they should be set forth in the regulation.

No such similar criteria are statutorily required to be considered for aviation safety and security violations under the Federal Aviation Act, as amended. However, as a matter of policy, the FAA has determined that similar criteria should be considered before assessing civil penalties against persons who violate the Federal Aviation Act or any rule, regulation, or order issued thereunder. The FAA believes that the criteria which are evaluated before a civil penalty is assessed under section 905 of the Federal Aviation Act of 1958, as amended, are more appropriately placed in agency orders, rather than in the regulations governing the initiation and hearing procedures of civil penalty actions. Agency guidelines directed to its own employees ordinarily are set forth in agency orders rather than in regulations. Indeed, these factors presently are set forth in Order 2150.3A, which is available to the public.

Accordingly, the FAA is not deleting the criteria listed in § 13.16(a)(4) or amending § 13.16(a) to provide that these criteria also will be considered before an order assessing civil penalty is issued for a violation of the Federal Aviation Act. Since, as a matter of policy, the FAA considers these criteria prior to a civil penalty assessment under section 905, a respondent is not prejudiced simply because this policy is set forth in an agency order rather than in a regulation.

Compromise Without a Finding of Violation

In the April 1990 final rule, the FAA announced a significant change, responsive to the desires of the commenters, to permit settlements without admissions or formal findings of a violation and amended the rules of practice to reflect this change in policy. In its comments to the April 1990 NPRM, American Airlines urges further modification of § 13.16 to notify respondents that agency attorneys may enter into compromise agreements under which a civil penalty is settled without a finding of a violation. Such settlements, which are within the discretion of agency attorneys, are expressly permitted under revised § 13.16(1)(1). American claims that a respondent may be unaware of the possibility of settlement of a civil penalty action, or when and how to propose such a settlement, because the prehearing procedures do not specifically refer to compromise as an option after receipt of a notice. Although the opportunity to compromise is not specifically listed as one of the options available after receipt of a notice, the section on compromise is set apart in the prehearing procedures as a separate section. That section also clearly states that the opportunity or option to compromise either the amount of a civil penalty or the entire civil penalty action is available at any time before the agency refers the action to

the U.S. Attorney for initiation of collection proceedings. Thus, § 13.16(1) as amended is sufficiently clear and the agency declines to amend further the prehearing procedures.

AOCI and AAAE are pleased that the agency incorporated their comments regarding compromise in the April 1990 final rule. AOCI and AAAE "assume that the fact that the agreement would expressly state that no finding of violation had been made by the FAA would preclude the admission of the compromise agreement as evidence of a violation in a subsequent civil case to which FAA is not a party." AOCI and AAAE ask the FAA to verify that understanding.

In the April 1990 final rule, the agency noted that changes to the rules were made, in part, to " * * * assure that orders in [cases compromised without a finding of violation] may not be used by the agency as evidence of a prior violation in civil penalty or certificate action proceedings." The agency addressed only subsequent use of a compromised civil penalty over which it has control, namely, determination of an appropriate sanction for future violations by the same respondent and use as evidence of a prior violation in a civil penalty or certificate action proceeding.

The agency can neither dictate nor affect, no matter what its intent on the issue, the practices and procedures of other entities such as the Department of Transportation, the National Transportation Safety Board, or Federal courts where a compromised civil penalty action may be in issue. This would be particularly true in "a subsequent civil case in which FAA is not a party." In such a case, it would be incumbent on the parties and the adjudicators in that proceeding, not the FAA, to determine the nature of the compromise and what use, if any, would made of the compromise agreement.

Comments Beyond the Scope of the April 1990 NPRM

1. Forum Shopping, Criteria for Selection of Sanction, and Double Jeopardy Considerations

AOPA cites two concerns regarding these issues: (1) Potential "forum shopping" by agency attorneys for prosecution of the same Federal Aviation Regulations against the same class of alleged violators, particularly AOPA's membership of aircraft owners and pilots; and (2) "subtle but real pressure" on one forum to become more responsive to the prosecutors as case law on procedural rules and substantive precedent develop in light of the "unreviewable discretion of the FAA prosecutors in selecting the remedy" for an alleged violation. While AOPA believes that these problems would not be eliminated so long as there are two separate fora to adjudicate alleged violations of the regulations, the problem could be "significantly mitigated" if the agency's prosecutorial discretion to select a remedy for an alleged violation is limited by rule and the FAA's rules are as "parallel as possible" to the NTSB's rules of practice. AOPA suggests that the agency establish procedures to prevent forum shopping and adopt a rule, based in part on the guidance in Order 2150.3A, to govern selection of an appropriate sanction.

Two commenters, EAA and one private attorney, object to the lack of guidance or regulatory provision in the rules of practice, setting forth the criteria used by the agency to determine whether certificate action or civil penalty action should be taken for a violation of the Federal Aviation Regulations. As stated previously, agency guidance to its employees is set forth in agency orders rather than in regulations. Guidance governing the agency's determination of the appropriate type of enforcement action for a violation is set forth in chapter 2 of Order 2150.3A. This guidance is supplemented by appendix 4 to Order 2150.3A, the Enforcement Sanction Guidance Table (hereinafter the "Sanction Guidance Table"). Chapter 2 addresses those circumstances where the agency will pursue certificate action rather than civil penalty action and also the situation where the agency may choose to initiate both certificate action and civil penalty action for the same violation. The Sanction Guidance Table, on the other hand, ensures consistency in the levels of sanctions proposed by the agency, providing a normal range of sanctions (civil penalty or certificate actions) for alleged first time violators who violate a single specified regulation.

As a matter of policy, the FAA refrains from pursuing civil penalty and punitive certificate actions (*e.g.*, a fixed term of suspension) for the same violation. While this policy does not preclude the agency from taking remedial certificate action (*e.g.*, revocation; indefinite suspension) and punitive civil penalty action for the same violation, this rarely occurs. Both types of certificate action may be taken only when an alleged violator demonstrates a lack of qualifications to hold a certificate issued by the FAA and, when the facts and circumstances surrounding the violation are so egregious, punitive civil penalty action also may be necessary to deter similarly-situated persons from committing similar violations.

Because this guidance is internal agency policy, used by FAA employees to perform their enforcement-related duties and responsibilities, the FAA believes that it is properly set forth in agency orders, rather than promulgated as a regulation. Accordingly, the FAA is not including a provision in the rules of practice specifically setting forth the criteria used by the agency to choose the type of enforcement action for a violation.

One private attorney argues that the rules should be "* * * 'clarified' to prohibit the agency from prosecuting a pilot twice before alternate tribunals for the same alleged violation." This attorney argues, both in response to the April 1990 NPRM and in previous submissions, that such clarification is necessary to ensure there is no violation of the Double Jeopardy clause of the Fifth Amendment to the U.S. Constitution. He states, in pertinent part:

> Assuming civil penalty actions are "quasi-criminal" in nature, no pilot who has prevailed in a § 609 suspension/revocation proceeding should again be placed in jeopardy in the context of a § 905 civil penalty action. (Footnote omitted.)

At the outset, it is unclear whether the Double Jeopardy clause would foreclose the subsequent initiation of a civil penalty action after disposition of certificate action against a pilot. *Compare Roach* v. *National Transp. Safety Bd.*, 804 F.2d1147, 1153–54 (10th Cir. 1986) (revocation or suspension of pilot certificate is not a criminal penalty), *with U.S.* v. *Halper*, 490 U.S. _____, 109 S. Ct. 1892, 1901–1902 (1989) (civil penalties may constitute punishment under Double Jeopardy clause). The FAA, however, as a matter of policy, will not initiate a civil penalty action against a certificate holder after a punitive certificate action for the same charges has been disposed of on its merits. *See* Order 2150.3A, paragraph 206(a)(3).

On rare occasions in the past, the FAA initiated a civil penalty action after dismissal of a suspension action under the NTSB's stale complaint rule. Because the resolution of the suspension action in such cases is not a decision on the merits, the agency does not consider subsequent initiation of a civil penalty action to trigger double jeopardy considerations.

The FAA's policy, however, is not to institute civil penalty and punitive certificate actions against a certificate holder for the same offense. This policy

does not preclude taking remedial certificate action, most typically revocation, and civil penalty action based on the same violation, although the occasions for seeking both sanctions have historically been few. *Id.* Accordingly, the FAA believes that its policy is consonant with the principles reflected in the Double Jeopardy clause, and therefore, no additional assurance need be codified in the rules of practice governing hearings in civil penalty actions.

2. Termination of the FAA's Authority to Assess Civil Penalties or Transfer of the Authority to the NTSB.

In their comments to the agency's rulemaking docket, several commenters (AOPA, EAA, the President of the NTSB Bar Association, ALPA, and several individuals and private attorneys) continue to object to administrative adjudication of civil penalties within the FAA and urge that the civil penalty assessment authority be transferred to the NTSB. While some commenters admit that any transfer to another entity or agency is not required as a matter of law, they assert that it should be done as a matter of sound public policy. The commenters suggest a variety of solutions and different recommendations regarding termination of the authority or transfer of the authority.

Not all commenters, however, advocate a transfer or termination of the FAA's administrative assessment authority. NBAA supports the agency's administrative process due to, in NBAA's words, the "lack of interest" expressed by "most" U.S. Attorneys in pursuing civil penalty actions against individuals on the agency's behalf. NBAA states that the agency's administrative civil penalty authority is necessary because "it recognizes the safety-based value of an expeditious and fair resolution of these cases." In a letter to Senator Wendell Ford, dated April 24, 1990, the President of ATA also noted that organization's support for a 2-year extension of the agency's general assessment authority. The President of ATA stated, in pertinent part:

> I am pleased to advise you that ATA believes the proposed rules, as modified and with the fine tuning that should result from the rulemaking process, can now provide the procedural framework for fair and impartial administrative proceedings. * * * We recognize and appreciate the fact that the FAA has modified these rules of procedure considerably since they were originally promulgated in September 1988, and our members look forward to working with the FAA to see that the program fulfills its original objectives—speedy resolution of alleged violations and enhanced vigilance in the safety and security operations of the industry.

Moreover, notwithstanding the recommendation of its consultant, the Administrative Conference "takes no position at this time on whether the adjudication of civil penalty actions * * * should remain a function of the DOT, or whether it should be shifted to the NTSB." In rejecting the consultant's recommendation, the Chairman of the Administrative Conference notes that "There are arguments on both sides." The Chairman has indicated, however, the Administrative Conference's interest, if Congress extends the agency's assessment authority, to study further "the question of whether the Federal Aviation Administration or the National Transportation Safety Board is the more appropriate agency to adjudicate civil penalty cases." (Chairman Breger's letters to Congress, transmitting Recommendation 90–1, dated June 20, 1990.)

As the agency has stated previously, termination of the authority or transfer of the authority is outside the scope of the rulemaking and beyond the power of the FAA to accomplish by regulation. Also, the FAA is not the appropriate recipient of one commenter's suggestion for "close Congressional oversight" of the continuing implementation of the authority. These issues are legislative matters solely for Congress to consider and resolve. The position of the Federal Aviation Administration and the Department of Transportation, supporting not only retention but permanent extension of the agency's general civil penalty assessment authority, has been articulated previously and will not be repeated here.

One commenter states that "The entire concept of Civil Penalty Assessment or Civil Penalty Actions for fines of $50,000 or less should be discarded." When this comment is read in the context of the discussion that follows however, the commenter seems to advocate adjudication by an agency separate from the Department of Transportation and the FAA. Although the commenter believes that there is no provision for "review and modification of the original findings * * * by a court[,]" the rules of practice specifically state that judicial review of a final decision and order of the Administrator in these actions is available. See § 13.6(k) as renumbered herein and § 13.235 of the rules of practice.

Two commenters, ALPA and EAA, assert that the FAA's "goal" in seeking administrative assessment authority and retaining jurisdiction over civil penalty adjudication is to address alleged violations of airport and air carrier security regulations. Without citing specific support for the assertion, these commenters contend that the primary reason for the legislation granting administrative authority to the FAA was to provide for adjudication of alleged security violations. This perception is raised for the first time in this rulemaking. The perception may mistakenly arise from the large number of civil penalty actions not exceeding $50,000 initiated against air carriers for alleged security violations after the rules were adopted; it is rebutted, however, by the very few civil penalty cases initiated against airport operators. It simply is not true that the agency sought the general civil penalty assessment authority solely to enforce air carrier and airport security regulations. As the agency stated in the August 1988 final rule,

> During preliminary Senate discussions of the proposed civil penalty amendment, Congress noted the FAA's lack of statutory authority to "prosecute violators of (the Federal Aviation Regulations)" without referring those actions to the United States Attorney for prosecution in a United States District Court. Congress observed that the inability or failure of the United States Attorney to prosecute civil penalty actions resulted in an ineffective deterrent to individuals or entities who violate the Federal Aviation Regulations. Congress determined that "there clearly is a need" for administrative hearings, tried and heard by the FAA, to provide effective enforcement of the FAA's safety regulations. * * * The amendment enables the FAA to circumvent the complex and lengthy process of referring these civil penalty cases to the United States Attorney (for prosecution and adjudication) and, therefore, to strengthen the FAA's enforcement process. Under the 1987 amendment, the FAA may prosecute civil penalty actions without referring the action to the United States Attorney for prosecution in a United States District Court.

53 FR at 34646; September 7, 1988. Neither the legislative history nor the statutory amendment contain any indication that either the agency or Congress intended the general civil penalty assessment authority to apply only to the limited area of air carrier or airport operator alleged violations of security regulations.

3. *Equal Access to Justice Act.*

Two individuals comment on the FAA's EAJA regulations. One commenter chides the FAA for its "failure to address the applicability of the Equal Access to Justice Act." This commenter articulated the same criticism in response to the February 1990 NPRM. In the April 1990 final rule,

the agency again specifically indicated that EAJA applies to these proceedings.

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

54 FR at 15127; Aril 20, 1990.

The other commenter essentially criticizes § 14.05, the provision on allowable fees and expenses. The commenter notes that this provision is worded differently from the analogous NTSB provision, in that the FAA specifically provides that, "Fees may be awarded for work performed after the issuance of a complaint." *See* § 14.05(e). The NTSB regulation does not contain such a provision. The commenter believes that, "The restriction on fees and expenses which a pilot may recover is another illustration of the Agency's lack of qualifications to adjudicate aircraft operations and maintenance cases internally."

Concerns about the EAJA regulations, which are contained in part 14 of the Federal Aviation Regulations, are not within the scope of this rulemaking. Commenters wishing to recommend substantive changes to part 14 may submit a petition for rulemaking, which the agency will review at that time. However, in an effort to be responsive to this commenter, the agency will repeat the sequence of events which led to the adoption of the EAJA provision in question.

When the Equal Access to Justice Act was enacted, both the Department of Justice and the Administrative Conference of the United States published model regulations that other Executive branch agencies could implement. Both model rules were silent with regard to when the eligibility for an award of attorney fees begins to accrue. The NTSB adopted the model regulations, which is why its regulations are also silent on this issue. When the FAA issued its proposed EAJA regulations, such regulations were also based on the model regulations that had been issued several years ago. Like the model regulations and the NTSB regulation, the FAA's proposed regulation was silent on the issue of when the eligibility for an award of attorney fees begins to accrue. As discussed in the preamble to the interim final rule, § 14.05 was added in response to a comment submitted by ATA, which stated that the regulation as proposed was ambiguous.

The provision of the interim final rule that resulted, and to which this commenter objects, is derived from the statutory language. In the preamble to the interim final rule, the agency stated:

While the FAA recognizes that legal advice and associated expenses may begin to accrue as early as when a party receives a letter of investigation, the EAJA authorizes reimbursement for legal expenses incurred only in connection with an "adversary adjudication," which is defined in the EAJA as "an adjudication under section 554 of this title[.]" 5 U.S.C. 504(b)(1)(C). A section 554 adjudication is one "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. 554(a). The eligibility for an EAJA award, therefore, is triggered when the party in question is offered the opportunity for an agency hearing. In terms of the FAA Rules of Practice, the opportunity for a hearing arises only when the FAA issues (a complaint), which begins the adversary adjudication. Consequently, legal expenses that are incurred before that time are not incurred in connection with an adversary adjudication and thus not covered by the EAJA and this regulation.

54 FR at 46198; November 1, 1989.

The FAA's EAJA regulations, including the provision in question and the above discussion, were reviewed by the Department of Justice before they were adopted by the FAA. The Department of Justice is the principal agency with regard to EAJA matters. The Department of Justice did not, at that time, object either to the provision or the FAA's interpretation of EAJA. Based on the concern of this commenter, the agency once again contacted the Department of Justice to inquire as to the soundness of the FAA interpretation.

After discussing the matter internally, the Department of Justice informed the FAA that it adheres to its view that the FAA's interpretation is reasonable and consistent with the statute. Therefore, the agency elects not to revise § 14.05 as requested.

4. *Applicability of Compromise Policy to Closed Cases.*

In the summary preceding the preamble to the February 1990 NPRM, the FAA indicated its willingness to consider applying any rule changes to pending civil penalty actions "where appropriate." During a public meeting on March 12, 1990, the agency solicited comment on whether and to what extent any changes should be applied to cases already initiated, including cases that had been resolved. Several commenters suggested that the agency's revised compromise policy should be applied to cases currently in some phase of the administrative civil penalty process. In the preamble to the April 1990 final rule, the FAA addressed those comments, stating:

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.

NACA objects to the FAA's application of its revised compromise policy to pending cases only. Because some carriers paid a civil penalty for "minor violations" before the agency changed its compromise policy, NACA asserts that "equity would dictate that all cases settled" under the previous policy should be "adjusted, on motion of an affected party," to permit compromise without a finding of violation, particularly in light of the April 13 decision issued by the court of appeals.

The FAA carefully reviewed the numerous comments and recommendations on this issue, and considered such factors as administrative burdens and benefits to respondents, to determine whether and to what extent the revised policy should be applied to cases already initiated, including resolved cases. In light of all those factors, including the fact that over 1800 cases had been resolved by the issuance of an order assessing civil penalty, the FAA reached what it considers to be an equitable resolution of the competing interests involved here. NACA did not provide any data showing the number of carriers who would not have paid a proposed civil penalty if the new compromise policy had been available at the time. Moreover, it is not clear how many respondents paid a civil penalty without availing themselves of the opportunity for a hearing or an appeal because an alleged violation actually occurred and, therefore, was not contested. To the extent the FAA has indicated its willingness to consider whether and how to use a previous order that contains a finding of violation, the agency believes that the respondents have been treated fairly and accorded such benefit as can be achieved.

Contrary to NACA's reliance on the court's April 13 decision, the rules were invalidated based solely, in the court's opinion, on the procedural defect of failing to provide notice and a prior opportunity for comment on the rules of practice. The court's decision did not address any substantive challenges or issues regarding the agency's rules or the agency's policies, including its civil

penalty compromise policy. Thus, the agency is not required to reopen closed cases to provide an opportunity for settlement without a formal finding of violation.

4. Airport Liability

AOCI and AAAE continue to urge review of the agency's policy of proposing "* * * civil Penalties against publicly-owned airports for the acts and omissions of airport tenants not under the airports' control on the basis of strict liability. * * *" As the FAA has stated, this issue is technically and practically beyond the scope of this rulemaking and is more appropriately addressed as a matter of policy or possibly in other rulemaking actions. *See* 55 FR at 5127; April 20, 1990. Citation by AOCI and AAAE of a report of the Senate Commerce, Science and Transportation Committee (Report 101–168), urging the FAA to reconsider its policy, does not alter the fact that this issue cannot and should not be resolved in this rulemaking action.

Regulatory Evaluation

The FAA has determined that this final rule is not a major action under the criteria of Executive Order 12291; thus, the FAA is not required to prepare a Regulatory Impact Analysis under either the Executive Order of 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 "matters of policy and prudence" in one commenter's words, 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 several additional sections of the rules not previously the subject of criticism or specific comment by the aviation industry or not yet amended by the agency in previous rulemaking actions. For example, sections amended in this document simplify the prehearing procedures in civil penalty actions, define more precisely service of documents and pleadings in civil penalty actions, delete several provisions determined to be unnecessary or redundant, refine the rules of practice as suggested by the commenters. Previous revisions to the rules, made effective by notice given in this document, changed the designation of a document filed in civil penalty actions, expanded certain sections of the rules to reflect existing statutes or regulations, eliminated provisions perceived by some to favor the agency, and expanded 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 April 1990 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. 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 April 1990 NPRM or suggestions made by 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 April 1990 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 deterined 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 in 14 CFR Part 13

Enforcement procedures, Investigations, Penalties.

The 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 13 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:

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

(a) *General.* 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) *Order assessing civil penalty.* An order assessing civil penalty may be issued for a violation described in paragraph (a) of this section, or as otherwise provided by statute, after notice and opportunity for a hearing. A person charged with a violation may be subject to an order assessing civil penalty in the following circumstances:

(1) An order assessing civil penalty may be issued if a person charged with a violation submits or agrees to submit a civil penalty for a violation.

(2) An order assessing civil penalty may be issued if a person charged with a violation does not request a hearing under paragraph (e)(2)(ii) of this section within 15 days after receipt of a final notice of proposed civil penalty.

(3) Unless an appeal is filed with the FAA decisionmaker in a timely manner, an initial decision or order of an administrative law judge shall be considered an order assessing civil penalty if an 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.

(4) Unless a petition for review is filed with a U.S. Court of Appeals in a timely manner, a final decision and order of the Administrator shall be considered an order assessing civil penalty if the FAA decisionmaker finds that an alleged violation occurred and a civil penalty is warranted.

(c) *Delegation of authority.* The authity of the Administrator, under section 901 and section 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 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. A notice of proposed civil penalty will be sent to the individual charged with a violation or to the president of the corporation or company charged with a violation. In response to a notice of proposed civil penalty, a corporation or company may designate in writing another person to receive documents in that civil penalty action. The notice of proposed civil penalty contains a statement of the charges and the amount of the proposed civil penalty. Not later than 30 days after receipt of the notice of proposed civil penalty, the person charged with a violation shall—

(1) Submit the amount of the proposed civil penalty or an agreed-upon amount, in which case either an order assessing civil penalty or compromise order shall be issued in that amount;

(2) Submit to the agency attorney one of the following:

(i) Written information, including documents and witness statements, demonstrating that a violation of the regulations did not occur or that a penalty or the amount of the penalty is not warranted by the circumstances.

(ii) A written request to reduce the proposed civil penalty, the amount of reduction, and the reasons and any documents supporting a 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.

(iii) A written request for an informal conference to discuss the matter with the agency attorney and to submit relevant information or documents; or

(3) Request a hearing in which case a complaint shall be filed with the hearing docket clerk.

(e) *Final notice of proposed civil penalty.* A final notice of proposed civil penalty may be issued after participation in informal procedures provided in paragraph (d)(2) of this section or failure to respond in a tim1y manner to a notice of proposed civil penalty. A final notice of proposed civil penalty will be sent to the individual charged with a violation, to the president of the corporation or company charged with a violation, or a person previously designated in writing by the individual, corporation, or company to

receive documents in that civil penalty action. If not previously done in response to a notice of proposed civil penalty, a corporation or company may designate in writing another person to receive documents in that civil penalty action. The final notice of proposed civil penalty contains a statement of the charges and the amount of the proposed civil penalty and, as a result of information submitted to the agency attorney during informal procedures, may modify an allegation or a proposed civil penalty contained in a notice of proposed civil penalty.

(1) A final notice of proposed civil penalty may be issued—

(i) If the person charged with a violation fails to respond to the notice of proposed civil penalty within 30 days after receipt of that notice; or

(ii) If the parties participated in any informal procedures under paragraph (d)(2) of this section and the parties have not agreed to compromise the action or the agency attorney has not agreed to withdraw the notice of proposed civil penalty.

(2) Not later than 15 days after receipt of the final notice of proposed civil penalty, the person charged with a violation shall do one of the following—

(i) Submit the amount of the proposed civil penalty or an agreed-upon amount, in which case either an order assessing civil penalty or a compromise order shall be issued in that amount; or

(ii) Request a hearing in which case a complaint shall be filed with the hearing docket clerk.

(f) *Request for a hearing.* Any person charged with a violation may request a hearing, pursuant to paragraph (d)(3) or paragraph (e)(2)(ii) 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 hearing docket clerk (Hearing Docket, Federal Aviation Administration, 800 Independence Avenue, SW., Room 924A, Washington, DC 20591, Attention: Hearing Docket Clerk) and shall mail a copy of the request to 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.

(g) *Hearing.* If the person charged with a violation requests a hearing pursuant to paragraph (d(3) or paragraph (e)(2)(ii) of this section, the original complaint shall be filed with the hearing docket clerk and a copy shall be sent to the person requesting the hearing. 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.

(h) *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 have been entered on the record. The FAA decisionmaker shall review the record and issue a final decision and order of the Administrator that affirm, modify, or reverse the initial decision. The FAA decisionmaker may assess a civil penalty but shall not assess a civil penalty in an amount greater than that sought in the complaint.

(i) *Payment.* A person shall pay a civil penalty by sending a certified check or money order, payable to the Federal Aviation Administration, to the agency attorney.

(j) *Collection of civil penalties.* If a person does not pay a civil penalty imposed by an order assessing civil penalty or a compromise order within 60 days after service of the order, the Administrator may refer the order to the United States Attorney General, or the delegate of the Attorney General, to begin proceedings to collect the civil penalty. The action shall be brought 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).

(k) *Exhaustion of administrative remedies.* A party may only petition for review of 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. Neither an initial decision or order issued by an administrative law judge, that has not been appealed to the FAA decisionmaker, nor an order compromising a civil penalty action constitutes 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.

(l) *Compromise.* The FAA may compromise any civil penalty action initiated in accordance with section 901 and section 905 of the Federal Aviation Act of 1958, as amended, involving an amount in controversy not exceeding $50,000, or any civil penalty action initiated 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 before referring the action to the United States Attorney for collection.

(1) An agency attorney may compromise any civil penalty action where a person charged with a violation agrees to pay a civil penalty and the FAA agrees to make no finding of violation. Pursuant to such agreement, a compromise order shall be issued, stating:

(i) The person agrees to pay a civil penalty.

(ii) The FAA makes no finding of a violation.

(iii) The compromise order shall not be used as evidence of a prior violation in any subsequent civil penalty proceeding or certificate action proceeding.

(2) An agency attorney may compromise the amount of any civil penalty proposed in a notice, assessed in an order, or imposed in a compromise order.

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

Subpart G—Rules of Practice in FAA Civil Penalty Actions

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 before September 7, 1988, 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 that has been filed with the hearing docket after a hearing has been requested pursuant to § 13.16(d)(3) or § 13.16(e)(2)(ii) 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 a document that contains a finding of 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 and may direct payment of a civil penalty. Unless an appeal is filed with the FAA decisionmaker in a timely manner, an initial decision or order of an administrative law judge shall be considered an order assessing civil penalty if an 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. Unless a petition for review is filed with a U.S. Court of Appeals in a timely manner, a final decision and order of the Administrator shall be considered an order assessing civil penalty if the FAA decisionmaker finds that an alleged violation occurred and a civil penalty is warranted.

Party means the respondent or the Federal Aviation Administration (FAA).

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 agency records, a residential, business, or other address submitted by a person on any document provided under this subpart, or any other address shown by other reasonable and available means.

Respondent means a person, corporation, or company named in a complaint.

§ 13.203 Separation of functions.

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

(b) An agency 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) A person may submit a motion for leave to intervene as a party in a civil penalty action. Except for good cause shown, a motion for leave to intervene shall be submitted not later than 10 days before the hearing.

(b) If the administrative law judge finds that intervention will not unduly broaden the issues or delay the proceedings, the administrative law judge may grant a motion for leave to intervene if the person will be bound by any order or decision entered in the action or the person has a property, financial, or other legitimate interest that may not be addressed adequately by the parties. The administrative law judge may determine the extent to which an intervenor may participate in the proceedings.

§ 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, the party, or the party's representative has read the document and, based on reasonable inquiry and to the best of that person'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) *Filing.* The agency attorney shall file the original and one copy of the complaint with the hearing docket clerk, or may file a written motion pursuant to § 13.218(f)(2)(i) of this subpart instead of filing a complaint, not later than 20 days after receipt by the agency attorney of a request for hearing.

The agency attorney should suggest a location for the hearing when filing the complaint.

(b) *Service.* An agency attorney shall personally deliver or mail a copy of the complaint on the respondent, the president of the corporation or company named as a respondent, or a person designated by the respondent to accept service of documents in the civil penalty action.

(c) *Contents.* A complaint shall set forth the facts alleged, any regulation allegedly violated by the respondent, and the proposed civil penalty in sufficient detail to provide notice of any factual or legal allegation and proposed civil penalty.

(d) *Motion to dismiss allegations or complaint.* Instead of filing an answer to the complaint, a respondent may move to dismiss the complaint, or that part of the complaint, alleging a violation that occurred more than 2 years before an agency attorney issued a notice of proposed civil penalty to the respondent.

(1) An administrative law judge may not grant the motion and dismiss the complaint or part of the complaint if the administrative law judge finds that the agency has shown good cause for any delay in issuing the notice of proposed civil penalty.

(2) If the agency fails to show good cause for any delay, an administrative law judge may dismiss the complaint, or that part of the complaint, alleging a violation that occurred more than 2 years before an agency attorney issued the notice of proposed civil penalty to the respondent.

(3) A party may appeal the administrative law judge's ruling on the motion to dismiss the complaint or any part of the complaint in accordance with § 13.219(b) of this subpart.

§ 13.209 Answer.

(a) *Writing required.* A respondent shall file a written answer to the complaint, or may file a written motion pursuant to § 13.208(d) or § 13.218(f)(1–4) of this subpart instead of filing an answer, 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 original and one copy of the answer for filing with the hearing docket clerk, not later than 30 days after service

of the complaint, to the Hearing Docket, Federal Aviation Administration, 800 Independence Avenue, SW., Room 924A, Washington, DC 20591, Attention: Hearing Docket Clerk. The person filing an answer should suggest a location for the hearing when filing the answer.

(c) *Service.* A person filing an answer shall serve a copy of the answer on the agency attorney who filed the complaint.

(d) *Contents.* An answer shall specifically state any affirmative defense that the respondent intends to assert at the hearing. A person filing an answer may include a brief statement of any relief requested in the answer.

(e) *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 numbered paragraph of the complaint. Any statement or allegation contained in the complaint that is not specifically denied in the answer may be deemed an admission of the truth of that allegation. A general denial of the complaint is deemed a failure to file an answer.

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

§ 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. A person shall serve a copy of each document on each party in accordance with § 13.211 of this subpart.

(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 each party at the time of filing. Service on a party's attorney of record or a party's designated representative may be considered adequate service on the party.

(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 agree to extend for a reasonable period 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, an 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 an 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 under 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 respondent may file a motion to dismiss the complaint for insufficiency instead of filing an answer. If the administrative law judge denies the motion to dismiss the complaint for insufficiency, the respondent 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, specifying the grounds for dismissal. If an administrative law judge grants a motion to dismiss in part, a party may appeal the administrative law judge's ruling on the motion to dismiss under § 13.219(b) of this subpart.

(i) *Motion to dismiss a request for a hearing.* An agency attorney may file a motion to dismiss a request for a hearing instead of filing a complaint. If the motion to dismiss is not granted, the agency attorney shall file the complaint and shall serve a copy of the complaint

on each party not later than 10 days after service of the administrative law judge's ruling or order on the motion to dismiss. If the motion to dismiss is granted and the proceedings are terminated without a hearing, the respondent may file an appeal pursuant to § 13.233 of this subpart. If required by the decision on appeal, the agency attorney shall file a complaint and shall serve a copy of the complaint on each party not later than 10 days after service of the decision on appeal.

(ii) *Motion to dismiss a complaint.* A respondent may file a motion to dismiss a complaint instead of filing an answer. If the motion to dismiss is not granted, the respondent shall file an answer 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. If the motion to dismiss is granted and the proceedings are terminated without a hearing, the agency attorney may file an appeal pursuant to § 13.233 of this subpart. If required by the decision on appeal, the respondent shall file an answer 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 respondent may file a motion requesting a more definite statement of the allegations contained in the complaint instead of filing an answer. If the administrative law judge grants the motion, the agency attorney shall supply a more definite statement not later than 15 days after service of the ruling granting the motion. If the agency attorney fails to supply a more definite statement, 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 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.* An agency attorney may file a motion requesting a more definite statement if an answer fails to respond clearly 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. The respondent's failure to supply a more definite statement may be deemed an admission of unanswered allegations in the complaint.

(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 the 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(b) 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.

(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, the party's attorney, or the party's representative may sign the party's responses to interrogatories. If a party objects to an interrogatory, the party shall state the objection and the reasons for the objection. An opposing party may use any part or all of a party's responses to interrogatories at a hearing authorized under this subpart to the extent that the response is relevant, material, and not repetitious.

(1) 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.

(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, time, and location of the hearing.

(b) *Date, time, and location of the hearing.* The administrative law judge to whom the proceedings have been assigned shall set a reasonable date, time, and location 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. The administrative law judge shall give due regard to the convenience of the parties, the location where the majority of the witnesses reside or work, and whether the location is served by a scheduled air carrier.

(c) *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 FAA, 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 FAA 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.* A party, or 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 supoena including, but not limited to, a statement that the testimony, document, 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 employee of the agency who appears at the direction of the agency, a witness who appears at a deposition 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.* Unless appealed pursuant to § 13.233 of this subpart, the initial decision issued by the administrative law judge shall be considered 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.

§ 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 support 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. Unless a petition for review is filed pursuant to § 13.235, a final decision and order of the Administrator shall be considered an order assessing civil penalty if the FAA decisionmaker finds that an alleged violation occurred and a civil penalty is warranted.

(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 or 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 a 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 June 27, 1990.

James B. Busey,

Administrator.

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