

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 13**

[Docket No. 25690; Amendment No. 13-24]

RIN 2120-AF14

Rules of Practice for FAA Civil Penalty Actions; Separation of Functions

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; request for comments.

SUMMARY: This final rule amends the Rules of Practice in Civil Penalty Actions, by adding to the FAA decisionmaker's advisors the Special Counsel and Director of Civil Penalty Adjudications (Special Counsel). The position of Special Counsel recently has been created, with duties that include advising the FAA decisionmaker. This rule will update the Federal Aviation Regulations to cover the duties of the new Special Counsel.

DATES: *Effective date:* September 24, 1993.

Comment date: Comments must be received on or before October 25, 1993.

ADDRESSES: Comments on this final rule may be delivered or mailed, in triplicate, to the Federal Aviation Administration, Office of the Chief Counsel, Attention: Rules Docket (AGC-10), Docket No. 25690, 800 Independence Avenue, SW., room 915G, Washington, DC 20591. Comments submitted must be marked: "Docket No. 25690."

Comments may be inspected in Room 915G between 8:30 a.m. and 5 p.m. on weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Vicki S. Leemon, Manager, Adjudications Branch, AGC-700, Federal Aviation Administration, 701 Pennsylvania Ave., NW., suite 925, Washington, DC 20004; telephone (202) 376-6470.

SUPPLEMENTARY INFORMATION:**Comments Invited**

These amendments are purely procedural rules to describe which FAA personnel advise the FAA decisionmaker regarding an initial decision or any appeal of a civil penalty action to the FAA decisionmaker. They reflect the addition of the Special Counsel, a new position in the Chief Counsel's office. They do not affect the manner in which any respondent exercises the right to appeal a proposed civil penalty. The changes to part 13 are

being adopted without notice and prior public comment because they reflect changes only in the personnel within the FAA. The Regulatory Policies of the Department of Transportation (44 FR 11034; February 26, 1979), however, provide that, to the maximum extent possible, Department of Transportation (DOT) operating administrations should provide an opportunity for public comment on regulations issued without prior notice.

Accordingly, interested persons are invited to participate in the rulemaking process by submitting such written data, views, or arguments as they may desire. Comments relating to environmental, energy, federalism, or international trade impacts that might result from these amendments are also invited. Comments must include the regulatory docket or amendment number and be submitted in triplicate to the address above. All comments received, as well as a report summarizing each substantive public contact with FAA personnel on this rulemaking, will be filed in the docket. The docket is available for public inspection before and after the comment closing date.

All comments received on or before the closing date will be considered by the Administrator. Late-filed comments will be considered to the extent practicable. This final rule may be changed in light of the comments received.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this final rule must submit a pre-addressed, stamped postcard with those comments on which the following statement is made: "Comments to Docket No. 25690." The postcard will be date-stamped by the FAA and returned to the commenter.

Availability of 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 Inquiry Center (APA-200), 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Requests must include the amendment or docket number.

Persons interested in being placed on a mailing list for future rulemaking actions should request a copy of Advisory Circular 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

Under § 13.16 of the Federal Aviation Regulations (FAR) (14 CFR 13.16), and the Rules of Practice in Civil Penalty

Actions, part 13, subpart G, of the FAR (14 CFR part 13, subpart G), the FAA may assess civil penalties in certain circumstances. Under these rules, the respondent may request a hearing before an administrative law judge (ALJ), who issues an initial decision and order. The respondent and the agency may appeal any adverse decision of an ALJ to the FAA decisionmaker. Such appeals are decided by the Administrator of the FAA, acting as the FAA decisionmaker. Sections 13.202 (definition of agency attorney) and 13.203 (separation of functions) of the FAR describe who prosecutes civil penalty actions on behalf of the agency and who advises the FAA decisionmaker. These rules were designed to ensure that a separation of functions, as required by section 5 of the Administrative Procedures Act, 5 U.S.C. 554, exists during the decisionmaking process.

Sections 13.202 and 13.203(c) designate the advisors to the FAA decisionmaker with considerable specificity. Section 13.203 currently designates the Chief Counsel, the Assistant Chief Counsel for Litigation, or attorneys on the staff of the Assistant Chief Counsel for Litigation as the advisors to the Administrator. In designating who will serve as prosecutors of civil penalty actions, § 13.202 specifically excludes the Chief Counsel, the Assistant Chief Counsel for Litigation, and attorneys on the staff of the Assistant Chief Counsel for Litigation who advise the FAA decisionmaker.

In August 1993, the position of Special Counsel and Director of Civil Penalty Adjudications was created. The duties of the incumbent of that position include serving as an advisor to the FAA decisionmaker. The Special Counsel reports to the Chief Counsel, will not be supervised by the Deputy Chief Counsel, and will perform no prosecutorial functions in the civil penalty program. In light of the creation of this new position, §§ 13.202 and 13.203 are being amended to add the Special Counsel as a person who may advise the FAA decisionmaker.

This final rule amends the designation of advisors to the FAA decisionmaker. Under the revised § 13.203(c), the Chief Counsel and Assistant Chief Counsel for Litigation will continue as advisors to the FAA decisionmaker. The Special Counsel is added as an advisor to the FAA decisionmaker. Attorneys on the staff of the Assistant Chief Counsel for Litigation or the Special Counsel may also advise the FAA decisionmaker. This final rule also amends the definition of "agency attorney" in

§ 13.202 to exclude from that definition the Special Counsel, and attorneys on the staff of the Special Counsel who advise the FAA decisionmaker. A minor editorial clarification also is being made to § 13.202.

In making these changes, care has been taken to continue a system without breaches in the separation of the prosecutorial and adjudication functions. The amended § 13.202 excludes from the definition of agency attorney (a prosecutor) all persons who may advise the FAA decisionmaker under § 13.203.

Economic Evaluation

The FAA has determined that this rule is not "major" under the criteria of Executive Order 12291. The FAA, therefore, is not required to prepare a Regulatory Impact Analysis under either the Executive Order or the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979). In nonmajor rulemaking actions, the DOT Regulatory Policies and Procedures require the FAA to prepare a regulatory evaluation, analyzing the economic consequences of proposed regulations and quantifying, to the extent practicable, the estimated costs and anticipated benefits and impacts of regulations.

The amendments in this final rule change only the duties of personnel within the Chief Counsel's office. The amendments do not affect the manner in which respondents appeal an initial decision and order to the FAA decisionmaker. The changes do not, in economic terms, alter the processes by which civil penalties are assessed within the agency. Accordingly, there are neither economic costs nor benefits associated with these amendments.

International Trade Impact Assessment

The rule makes only internal procedural changes. These changes will not impose any costs on either U.S. or foreign operators. Therefore, a competitive trade disadvantage will not be incurred by U.S. operators abroad or foreign operators in the United States.

Regulatory Flexibility Determination

In accordance with the Regulatory Flexibility Act of 1980, the FAA certifies that the rule will not have a significant economic impact, positive or

negative, on a substantial number of small entities because the rule only makes changes to the duties of certain FAA personnel. Such changes will not impose any cost burdens or result in any cost savings.

Federalism Implications

This amendment will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No state governments are affected by this rule. Therefore, in accordance with Executive Order 12612, preparation of a Federalism Assessment is not warranted.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), there are no requirements for information collection associated with this rule.

Conclusion

For the reasons discussed in the preamble, and based on the findings in the Regulatory Flexibility Determination and the International Trade Impact Analysis, the FAA has determined that this regulation is not major under Executive Order 12291. This regulation is not considered significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979). In addition, it is certified that this regulation will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 13

Enforcement procedures, Investigations, Penalties.

The Amendments

Accordingly, the Federal Aviation Administration amends part 13 of the Federal Aviation Regulations (14 CFR part 13), effective September 24, 1993, as follows:

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

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

Authority: 49 U.S.C. 106(g) and 322; 49 U.S.C. App. 1354 (a) and (c), 1374(d), 1401-1406, 1421-1432, 1471-1473, 1481, 1482, 1484-1489, 1523, 1655(c), 1808-1810, 2157 (e) and (f), 2216, 2218, 2219; Pub. L. 102-345, 106 Stat. 923; Sec. 208, Pub. L. 102-581, 106 Stat. 4872; 18 U.S.C. 6002, 6004; 49 CFR 1.47.

2. Section 13.202 is amended by revising the last sentence in the definition of *Agency attorney* to read as follows:

§ 13.202 Definitions.

* * * * *

Agency attorney * * * An agency attorney shall not include:

(1) The Chief Counsel, the Assistant Chief Counsel for Litigation, or the Special Counsel and Director of Civil Penalty Adjudications; or

(2) Any attorney on the staff of either the Assistant Chief Counsel for Litigation or the Special Counsel and Director of Civil Penalty Adjudications who advises the FAA decisionmaker regarding an initial decision or any appeal to the FAA decisionmaker; or

(3) Any attorney who is supervised in a civil penalty action by a person who provides such advice to the FAA decisionmaker in that action or a factually-related action.

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3. Section 13.203(c) is revised to read as follows:

§ 13.203 Separation of functions.

* * * * *

(c) The Chief Counsel, the Assistant Chief Counsel for Litigation, the Special Counsel and Director of Civil Penalty Adjudications, or an attorney on the staff of either the Assistant Chief Counsel for Litigation or the Special Counsel and Director of Civil Penalty Adjudications, will advise the FAA decisionmaker regarding an initial decision or any appeal of a civil penalty action to the FAA decisionmaker.

Issued in Washington, DC, September 20, 1993.

David R. Hinson,
Administrator.

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