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Part III

Department of Transportation

Federal Aviation Administration

**14 CFR Parts 13 and 14
Rules of Practice for FAA Civil Penalty
Actions; Final Rule**

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 13 and 14

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

Rules of Practice for FAA Civil Penalty Actions

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

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

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

DATES: Effective date: April 20, 1990.

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

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

SUPPLEMENTARY INFORMATION

Availability of the Final Rule

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

Background

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

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

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

this rule discusses legal issues to the extent they were raised by the commenters.

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

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

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

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

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

The Committee on Adjudication held two public meetings to consider Professor Fallon's report. In the words of Marshall J. Breger, Chairman of the Administrative Conference, there was "vigorous participation and comment by affected groups" during the meetings. Chairman Breger's Letter to Congress at 1 (March 13, 1990). As noted by the Chairman, the Committee on Adjudication specifically addressed the issue of the appropriate forum to adjudicate FAA's civil penalty actions. After listening to comment from the aviation community and the agency, and after some deliberation, the Committee on Adjudication "was unable to decide whether a transfer of such responsibilities was warranted." The Committee noted that "[t]he Conference may at some time in the future address this issue if the program continues." Chairman Breger's Letter to Chairman Oberstar at 2 and 3 (March 28, 1990).

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

Association's several substantive challenges to the rules of practice.

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

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

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

Purpose of the Final Rule

This document is intended to complete the actions pledged by the FAA to the Subcommittee on Aviation of the House Committee on Public Works and Transportation at the hearing held on November 15, 1988.

Pursuant to this commitment and in order to address the comments submitted on the rules and proposed changes, the FAA is amending the rules of practice either as proposed, as modified after review of the comments, or as suggested by different commenters.

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

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

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

Discussion

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

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

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

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

1. Complaint

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

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

Adj.Com.Rec. at 5 (March 8, 1990).

NATA also proposes that the FAA further change the definition of "complaint" to read, in part: "an alleged regulatory violation resulting in filing of

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

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

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

2. Separation of Functions

Many commenters continue to object to the separation of functions provided in the rules of practice, even if amended as proposed by the agency in the NPRM. Some of these commenters believe that

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

The agency has on four previous occasions explained the basis for the separation of functions contained in the rules of practice; on the last three occasions, it has responded to concerns that the separation is inadequate. On January 10, 1989, the agency announced how the separation would be implemented within the agency, and specifically within the Office of Chief Counsel. 54 FR 1335; January 13, 1989. On March 17, 1989, in its disposition of comments, the agency responded to the concerns expressed by commenters to the final rule issued on August 31, 1988. 54 FR 11914; March 22, 1989. On October 27, 1989, in the preamble to the final rule implementing the Equal Access to Justice Act (EAJA), the agency responded to similar concerns expressed by four commenters. 54 FR 46198; November 1, 1989.

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

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

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

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

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

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

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

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

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

a. *The view that any separation of functions is inadequate so long as both prosecutorial and adjudicative functions are housed within one agency.* As previously noted, some commenters are opposed to any combination of prosecutorial and adjudicative functions within the FAA. Several oppose a legislative extension of the agency's authority to assess civil penalties

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

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

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

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

It has long been settled that placement of prosecutorial and adjudicative functions within the same agency does not violate principles of fairness or due process embedded in the U.S. Constitution. There are now over 200 statutes authorizing the assessment of civil penalties in which Congress has entrusted the prosecution and adjudication to one administrative agency. As the Chairman of the Administrative Conference has stated, "Such a system has never been held to violate basic principles of fairness or due process." Chairman Breger's Letter to Chairman Oberstar at 2 (March 26,

1990). "Although at least eleven Supreme Court opinions have dealt with problems about separation of functions, the Court has never held a system of combined functions to be a violation of due process." K. Davis, 3 *Administrative Law Treatise* 343 (2d ed. 1980). Professor Fallon states, "Today, there should be little doubt about the constitutionality of administrative assessment of civil money penalties for violations of the Federal Aviation Act and its implementing regulations." Fallon Report at 17 (March 1990).

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

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

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

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

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

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

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

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

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

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

Adjudication is not rendered unfair because the adjudicator—either the administrative law judge or the Administrator—has previously formed an opinion of law or policy that may affect the outcome of a case before the adjudicator. What is required is impartiality in the determination of facts, the credibility of witnesses, and

the application of the law to a particular set of circumstances. See K. Davis, 3 *Administrative Law Treatise* 371-389 (2d ed. 1980). The Administrator's prior pronouncements of agency enforcement policy, even should they affect a case brought before him, in no way render the Administrator unfit to decide the case fairly. Indeed, it is incumbent even on administrative law judges to apply faithfully the law and policy set forth as agency policy by the head of the agency. As Professor Bruff states, "Everyone agrees that [administrative law judges] must follow their agency's regulations and published policies as well as the statutes and caselaw." *Restructuring Judicial Review in Administrative Law*, at 22. (September 1, 1989) (draft report prepared for Federal Courts Study Committee and the Administrative Conference). See also, Zwerdling, *Reflections on the Role of an Administrative Law Judge*, 25 *Ad.L.Rev.* 9, 12-13 (1973) ("Once we have stressed the importance of maintaining the administrative law judge's independence, however, the other side of the coin is recognition that he is governed and bound by his agency's rulings and directives * * *"). So it hardly seems unfair to the respondent that the head of the agency, on review of an administrative law judge's initial decision, applies that law or policy.

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

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

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

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

previously-unquestioned administrative practice, and would be inconsistent with sound public policy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

considered to be the best contemporaneous construction of the Act, stated why this is so:

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

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

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

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

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

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

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

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

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

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

The separation of functions reviewed by the court of appeals in *Columbia Research* is different than the FAA's separation. In that case, the court disapproved of a separation whereby an Assistant General Counsel prosecutes and the General Counsel decides. Under the FAA rules of practice, the decisionmaker ordinarily is the Administrator, an official whose

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

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

Second, concerning the Chief Counsel's supervision of advisors to the decisionmaker, NBAA fears that the Chief Counsel's "pervasive, yet hidden, power [to approve promotions, performance reviews, assignments, etc.] consciously, or even more powerfully unconsciously, may influence any FAA attorney in her or his advice to the Administrator on an appeal." It is difficult to understand the basis for this concern. Assuming the Chief Counsel advises the decisionmaker, there is nothing wrong with his supervision of other attorneys who also perform that function. "Judging should be separated from functions that are incompatible with judging; that is what is meant by separation of functions." K. Davis, 3 *Administrative Law Treatise* 340 (2d ed. 1960). Because the Chief Counsel and the staff attorney would both be functioning as advisors to the decisionmaker, and both would play no role in the investigation or prosecution of the case or of a factually-related case, there is no combination of functions; there is only one function.

d. *The view that the Assistant Chief Counsel for Litigation's role is inconsistent with principles of fairness and the Administrative Procedure Act.*

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

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

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

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

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

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

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

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

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

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

3. Effect of admissions

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

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

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

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

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

This paragraph of Order 2150.3A limits any subsequent use of information learned at an informal conference to "material" facts that may be used, if found relevant and material by an administrative law judge, solely for impeachment of testimony given under oath. Admissions by a respondent at an informal conference may not be used to sustain the agency's burden of proving

at the hearing the allegations in its complaint. In light of this existing limitation on the agency, the FAA is not adopting this suggestion in this rulemaking.

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

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

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

a. Factual Testimony of FAA Employees

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

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

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

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

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

Related to this issue, two private attorneys and Rocky Mountain Helicopters object to the admissibility and use of hearsay testimony, either as a general matter or particularly when given by an FAA employee, because such testimony is "not admissible" in Federal courts. Although hearsay is deemed inadmissible in Federal court under Rule 802 of the Federal Rules of Evidence, Rule 903 contains 24 distinct exceptions to Rule 802 under which hearsay testimony is admitted routinely in Federal court proceedings. And, while the Federal courts have chosen to tailor the admissibility and use of such evidence in their proceedings, the Federal courts also have stated that hearsay generally is admissible and widely accepted in civil administrative proceedings. *Veg-Mix, Inc. v. U.S. Dept. of Agriculture*, 832 F.2d 601, 606 (D.C. Cir. 1987) ("* * * [I]f hearsay evidence meets the standards of the Administrative Procedure Act by being relevant, material, and unrepetitious * * * agencies are entitled to weigh it according to its 'truthfulness, reasonableness, and credibility' " (citations omitted)); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021 (3d Cir. 1986), citing *Richardson v. Perales*, 402 U.S. 399, 410 (1971); *Johnson v. United States*, 628 F.2d 187, 190 (D.C. Cir. 1980).

The NTSB has recognized the admissibility and use of hearsay evidence in its proceedings. *Administrator v. Irish*, NTSB Order EA-3060 at 7 (March 14, 1990); *Administrator v. Budar*, 3 NTSB 1913, 1914 (1979); *Administrator v. Ortner*, 2 NTSB 396, 397 n.5 (1973); *Administrator v. Trier*, 2 NTSB 379, 380 (1973) ("It is axiomatic that hearsay evidence is admissible in administrative proceedings, in contradistinction to practice in law courts. The issue with respect to hearsay concerns the weight to be attached to it in each case, rather than to its admissibility").

In light of the broad admissibility of this evidence in administrative proceedings and the discretion vested in the administrative law judge to determine the weight accorded hearsay evidence, the FAA is not revising the

rules of practice to restrict the admissibility and use of relevant and material evidence, including hearsay. Notably, the majority of the commenters agree with the FAA that hearsay testimony should be admitted, particularly as it applies to the admissibility of relevant and material factual testimony given by FAA employees in civil penalty actions. Although hearsay is admissible under the rules of practice, hearsay evidence (admissible under § 13.222(c)) must meet the admissibility criteria in § 13.222(b) applicable to all evidence in these proceedings.

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

b. Expert or Opinion Testimony of FAA Employees

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

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

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

NBAA, in support of its position, cites the possible need of a private party to introduce into evidence a prior statement by an FAA employee of an opinion on the requirements of the Federal Aviation Regulations, on which statement the private party had relied.

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

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

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

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

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

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

The FAA continues to believe that the rule in question should not be deleted. It

accurately reflects a Departmental regulation that is outside the scope of this rulemaking and embodies a limitation recognized as wholly proper. The NTSB's decision in *Administrator v. Sims and McGhee*, 3 NTSB 672 (1977) is a case in point, cited by a private aviation attorney who commented on the NPRM. In that case, the NTSB upheld the exclusion of an FAA employee from testifying as an expert or opinion witness on behalf of pilots in an enforcement proceeding. The NTSB stated:

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

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

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

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

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

On the other hand, ALPA does not read the rule as "imposing any limit on

cross-examination of a witness called by the FAA; rather, the rule is concerned only with the scope of the testimony that can be offered by an FAA employee called by the respondent." ALPA urges that any changes to the rule should make it clear that there is no limit on the normal scope of cross-examination, including the posing of opinion questions to an FAA witness in some circumstances.

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

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

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

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

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

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

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

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

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

The FAA believes that adding this provision responds to the primary concern of commenters who continue to object to § 13.227 because it still appears asymmetrical. Revised § 13.227 now

addresses only an FAA employee's obligation to appear as an expert or opinion witness and the agency's ability to choose experts or opinion witnesses. Because both sentences now speak only to "calling" an expert or opinion witness, and not in terms of "testifying," this section should not restrict an FAA employee's factual testimony or a party's ability to cross-examine an opposing expert or opinion witness.

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

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

5. Written Arguments

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

To address these concerns, the FAA proposed to leave the decision to submit written briefs in the hands of the parties or the administrative law judge, if the law judge determined that written submissions are "necessary or required for resolution of the issues or the case." Most commenters express some opinion about the proposal; however, their

suggestions for additional changes vary and, in some cases, are inconsistent. Some commenters continue to believe that the agency is attempting to restrict the ability to file written briefs and urge further changes to the rule.

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

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

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

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

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

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

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

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

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

FAA will not require their submission in its rules.

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

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

6. Modification of Civil Penalty by an Administrative Law Judge

Previous commenters objected to a sentence in § 13.232(a) that required an administrative law judge to support in an initial decision a reduction of the civil penalty sought by the agency for an alleged violation. Despite the provision in the rules squarely placing the burden of proof on the agency, this sentence was criticized as improperly shifting the burden of justifying a civil penalty from the agency attorney to the

administrative law judge. The agency noted that this requirement was not unique to the FAA, and that the sentence in § 13.232(a) was patterned after decisions by the NTSB. Indeed, the NTSB requires its administrative law judges to show a "clear and compelling" basis for reduction of a proposed sanction in certificate actions, a much higher standard than that contained in § 13.232(a). *Muzquiz v. NTSB*, 2 NTSB 1474 (1975).

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

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

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

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

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

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

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

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

particularly in light of the history and discussion surrounding this provision.

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

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

7. *Compromise of penalties*

The FAA solicited comment on the agency's policy against civil penalty compromises that result in no formal finding of violation. In the NPRM, the FAA asked a series of detailed questions to aid its understanding of the commenters' positions on the existing compromise policy and assist in the formulation of possible changes to that policy. The agency announced publicly, both in the NPRM and at the public meeting, "somewhat of a retreat" in the way it had construed the statute, which had contributed to its policy of insisting on a finding of violation in all cases in

which payment was received. The agency noted that the FAA could proceed to a final rule and need not await a "legislative correction" to the statute if the FAA concluded, as a matter of policy, that compromises without findings are an appropriate resolution of some cases. The Adjudication Committee of the Administrative Conference had recommended just such a review and reconsideration of the statute and legislative history pending legislative clarification. Adj.Com.Rec. at 4 (March 8, 1990).

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

a. *Policy Change Versus Rule Amendment.*

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

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

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

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

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

NACA believes that a "flexible approach to settlement" should be

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

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

b. Use of Compromised Civil Penalties

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

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

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

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

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

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

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

c. Compromise System

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

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

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

It may be helpful to a discussion of the compromise issue to first distinguish

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

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

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

The amendment only permits such a compromise settlement. It does not require it or specify conditions for its acceptability. The FAA is persuaded by the comments that some case-by-case flexibility is needed here and agrees that prosecutorial discretion should not be circumscribed by regulation. Contemporaneously with the issuance of these amendments, FAA attorneys have been advised that they are authorized to enter into civil penalty compromise settlements with no findings where they determine such settlement to be consistent with the public interest. In making such determinations, they will consider violation history as well as any other relevant factors. For example,

public policy considerations would generally favor settlements without findings for inadvertent first-time violations, and disfavor such settlements where the violations were deliberate or were repetitive of, or substantially related to, violations previously adjudicated or settled, with or without a finding. In addition, the agency may, from time to time, issue policy guidance on this issue, where the agency determines that the public interest is served by insisting on findings in a certain category or type of case. But again, no inflexible criteria are being established at this time. The FAA intends to closely monitor case dispositions to evaluate continuously the need for any national policy guidance in this area.

8. Conforming Amendments and Editorial Changes

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

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

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

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

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

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

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

In the summary preceding the preamble to the NPRM, the FAA indicated its willingness to consider applying changes to the rules of practice to pending civil penalty actions, "where appropriate." 55 FR 7980; March 6, 1990. During the public meeting, the agency solicited comments on whether and to what extent any changes to the rules

should be applied to cases already initiated, including cases that have been resolved. Representatives of ATA, American Airlines, and Alaska Airlines spoke in response to this suggestion. Meeting Transcript at 21-22, 26, 39-40, 50-53, 66 (March 12, 1990).

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

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

NACA suggests that the change from "order of civil penalty" to "complaint" should "embrace all of the cases that have been handled under the final rule since its adoption." Without discussing the benefits or burdens of the suggestion, NACA states that the respondent should be offered the choice to reopen a civil penalty case. At the public meeting, the representative of American Airlines recognized "the burden on the system that would happen if all cases had to be reopened." In its written comments, American Airlines recommends that the rules changes should apply to all cases in which a complaint has been filed but the case has not been litigated. American does not recommend the re-opening of all litigated or resolved cases, however. American suggests that litigated cases should be retried only if by applying the new rules the result could be different. Each litigant * * * should be given the opportunity to request a new hearing under the new procedures if the litigant can show that the result could be affected by evidence that was excluded under the old rules. If the litigant cannot meet its burden, then no new hearing need be granted.

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

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

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

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

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

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

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

10. Comments Beyond the Scope of the NPRM

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

a. Termination of or Opposition to the Program

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

Three commenters (AOIC and AAAE, Rocky Mountain Helicopters) also express their belief that the program

may not have been needed or necessary, although not all commenters agree. ALPA and NBAA concur in the need for an administrative procedure for these cases. Indeed, NBAA states that "the past system of waiting interminably for resolution of these cases in federal district court was unacceptable."

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

b. Transfer to the NTSB

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

Many commenters state their desire for the FAA to transfer authority to adjudicate civil penalties to the NTSB. Some commenters suggest that the FAA "assist" in transferring its authority under the statute to the NTSB. Several commenters also go so far as to suggest that it is within the FAA's power to transfer adjudication of civil penalties to the NTSB. It obviously is not, as other commenters recognize. AOPA remarks that it "may be argued that [transfer to the NTSB] will require legislation and

coordination with the NTSB." ALPA states that the issue "would have to be addressed in legislation" and APA repeats that it would require "congressional vesting of adjudicatory power to the NTSB in civil penalty cases." NBAA and AOPA criticize the FAA for failing to invite comment in the NPRM on the transfer of civil penalty adjudicatory functions to the NTSB. However, in one commenter's words, the issue is "outside the scope of the present rulemaking." It is beyond the agency's authority to transfer its adjudicatory functions by rulemaking or any other administrative mechanism. Simply stated, the FAA cannot expand unilaterally the NTSB's statutory jurisdiction to review or adjudicate FAA enforcement actions. Thus, it matters little whether this issue was raised by the agency in its NPRM. Congress, not the FAA or the NTSB, ultimately must resolve the debate.

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

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

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

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

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

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

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

d. Equal Access to Justice Act

Two commenters continue to complain that the civil penalty program and the rules of practice are inadequate because they fail to address the applicability of EAJA to the agency's civil penalty cases. As part of a

comparison of the FAA and NTSB rules, one commenter notes that EAJA regulations are "conspicuously absent in the current civil penalty rules." The commenter believes that this "omission" reflects that the civil penalty rules "are still heavily one-sided in favor of the FAA and replete with provisions unfavorable to any unfortunate respondent subject to them."

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

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

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

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

carrier's detection of simulated weapons at carrier screening checkpoints and any enforcement actions that arise from a carrier's failure to detect a simulated weapon.

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

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

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

Regulatory Evaluation

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

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

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

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

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

The commenters did not discuss any significant economic impact, positive or negative, on small entities, as those terms are defined in the Regulatory

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

Conclusion

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

List of Subjects

14 CFR Part 13

Enforcement procedures, Investigations, Penalties.

14 CFR Part 14

Equal access to justice, Lawyers.

The Amendments

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

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

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

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

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

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

(a) * * *

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

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

* * * * *

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

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

(a) * * *

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

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

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

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

(e) * * *

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

(g) * * *

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

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

(l) *Hearing.* If the person charged with a violation requests a hearing pursuant to paragraph (e)(3) or paragraph (g)(3) of this section, a complaint shall be issued and shall be filed with the hearing docket clerk. The procedural rules in subpart G of this part apply to the hearing and any appeal. At the close of the hearing, the administrative law judge shall issue, either orally on the record or in writing, an initial decision, including the reasons for the decision, that contains findings or conclusions on

the allegations contained, and the civil penalty sought, in the complaint. The initial decision issued by the administrative law judge shall become an order assessing civil penalty if a party does not appeal the administrative law judge's initial decision to the FAA decisionmaker.

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

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

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

§ 13.201 Applicability.

(a) * * *

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

(2) A civil penalty action in which a complaint has been issued for a violation arising under the Federal

Aviation Act of 1958, as amended (49 U.S.C. 1471, *et seq.*) and the Hazardous Materials Transportation Act (49 U.S.C. 1801, *et seq.*), or a rule, regulation, or order issued thereunder.

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

§ 13.202 Definitions.

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

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

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

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

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

6. Section 13.203 is revised to read as follows:

§ 13.203 Separation of functions.

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

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

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

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

§ 13.208 Complaint.

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

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

§ 13.209 Answer.

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

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

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

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

§ 13.218 Motions.

(f) * * *

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

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

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

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

(i) *Complaint.* A party may file a motion requesting a more definite statement of the allegations contained in the complaint instead of an answer. If the administrative law judge grants the motion, and the agency attorney does not supply a more definite statement not later than 15 days after service of the

order granting the motion, the administrative law judge shall strike the allegations in the complaint to which the motion is directed. If the administrative law judge denies the motion, the respondent shall file an answer with the administrative law judge and shall serve a copy of the answer on each party not later than 10 days after service of the order of denial.

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

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

§ 13.219 Interlocutory appeals.

(c) * * *

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

11. Section 13.220 is amended by revising paragraph (1)(3) to read as follows:

§ 13.220 Discovery.

(1) * * *

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

12. Section 13.227 is revised to read as follows:

§ 13.227 Expert or opinion witnesses.

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

13. Section 13.231 is revised to read as follows:

§ 13.231 Argument before the administrative law judge.

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

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

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

14. Section 13.232 is revised to read as follows:

§ 13.232 Initial decision.

(a) *Contents.* The administrative law judge shall issue an initial decision at the conclusion of the hearing. In each oral or written decision, the

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

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

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

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

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

§ 13.233 Appeal from initial decision.

* * * * *

(j) * * *

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

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

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

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

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

§ 14.05 Allowance fees and expenses.

* * * * *

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

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

James B. Busey,
Administrator.

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

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Corrections**Federal Register**

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DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Parts 13 and 14****[Docket No. 25890; Amdt. Nos. 13-20 and 14-1]****Rules of Practice for FAA Civil Penalty Actions***Correction*

In rule document 90-9174 beginning on page 15110, in the issue of Friday, April 20, 1990, make the following corrections:

1. On page 15116, in the third column, in the seventh line, "FAA" should read "EAA".

2. On page 15121, in the third column, in the first complete paragraph, in the 12th line, "whether" should read "Whether".

§ 13.232 [Corrected]

3. On page 15131, in the second column, in § 13.232 (c), in the next to last line, "an" should read "on".

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