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**Rules of Practice for FAA Civil Penalty
Actions; Final Rule**

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

[Docket No. 25690; Amdt. No. 13-18]

Rules of Practice for FAA Civil Penalty Actions**AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Disposition of comments.

SUMMARY: The FAA issued procedural rules, effective upon publication, to implement amendments to the Federal Aviation Act. Because the rules of practice are purely procedural and are necessary to govern on-the-record hearings required by statute, the FAA determined that notice and public comment procedures were not required by law and were impracticable, unnecessary, and contrary to the public interest. However, the FAA provided an opportunity for public comment on the rules after publication in the **Federal Register**. This notice addresses the comments submitted to the public docket on the rules of practice.

FOR FURTHER INFORMATION CONTACT: Allan H. Horowitz, Manager, Enforcement Policy Branch (AGC-260), Office of the Chief Counsel, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-3137.

SUPPLEMENTARY INFORMATION: On August 31, 1988, the Federal Aviation Administration (FAA) issued revised initiation procedures and new rules of practice to govern on-the-record hearings mandated by Congress in amendments to the Federal Aviation Act (53 FR 34646; September 7, 1988).

Although the rules of practice were implemented without prior notice and opportunity for comment, the agency allowed interested persons to comment on the final rule within 60 days following publication. Twenty comments were received. This notice responds to those comments.

Adequacy of Notice

Thirteen commenters, including the Section of Administrative Law and Regulatory Practice of the American Bar Association (the "ABA Administrative Section"), criticize the agency's adoption of these procedural rules without first proposing them and affording opportunity for public comment on the proposals. Several of these commenters urge that the Administrative Procedure Act (APA) requires such notice and that the rules are complex and important

enough to warrant it. Many of these commenters, as well as many others, also filed comments on the rules themselves.

The notice and comment requirements of the APA do not apply to rules of agency procedure. As noted in the notice publishing the rules, the legislation giving rise to the need for such rules (Pub. L. 100-223) established a Civil Penalty Assessment Demonstration Program (Demonstration Program) limited to two years' duration and required a report of its effectiveness to Congress in only eighteen months. The FAA concluded that expedited rulemaking was required.

Nevertheless, in accordance with the Regulatory Policies and Procedures of the Department of Transportation (DOT) (44 FR 11034; February 26, 1979), public comments on the rules were invited for a period of 60 days and the public was notified that the rules were subject to change based on the comments. Considering the time in which a matter under the Demonstration Program takes to move through the enforcement process, the agency believes publication of the final rule without prior opportunity for comment has not resulted in any prejudice to interested persons. The agency has considered the comments to the rules of practice before any matter has been conclusively resolved in the administrative process.

As noted, many comments were received following publication of the final rule. Those comments, as well as other comments received to date, have been fully considered by the FAA. In addition, the FAA will continually evaluate the adequacy and efficacy of these rules of practice in light of the experience gained under them in the future. The FAA is obligated to report to Congress by June 30, 1989 on the implementation of the Civil Penalty Assessment Demonstration Program, and remains open to make revisions as may be warranted.

Use of Two Forums to Adjudicate Violations of the Federal Aviation Regulations

Several commenters express concern that the final rule creates a second forum to adjudicate violations of the Federal Aviation Regulations (FAR). Specifically, they contend that cases under the Demonstration Program should be adjudicated by the National Transportation Safety Board (NTSB), which already adjudicates certificate actions. One commenter contends that placing the authority to adjudicate civil penalties in a forum other than the NTSB, which has considerable expertise

in the area of aviation safety, may result in forum shopping.

Upon examination of section 609 [49 U.S.C. 1429] and section 905 [49 U.S.C. 1475] of the Federal Aviation Act of 1958 (FAAct), as amended, it is clear that the decision to create two separate forums was that of Congress, not the FAA. Under section 609 of the FAAct, Congress expressly empowered the NTSB, an independent agency, to adjudicate orders suspending or revoking certificates issued by the FAA. On the other hand, Congress, in enacting section 905 in 1987, did not expressly designate the NTSB as the forum to adjudicate proceedings under the Demonstration Program. In the absence of explicit Congressional guidance, the FAA determined that it was inappropriate unilaterally to assign functions and duties, with respect to civil penalty actions under the Demonstration Program, to an independent agency. The NTSB's authority to review Orders of the Administrator is expressly limited to orders that affect certificates issued by the FAA. There is no corresponding provision in the enabling statute of the NTSB that addresses civil penalty actions under the FAR. However, an existing system of administrative law judges, employed by the DOT who preside over aviation economic, hazardous materials enforcement, and other proceedings, was available for use by the FAA in cases involving civil penalty actions. Instead of using the procedural rules specifically applicable to those cases, the FAA promulgated its own rules of practice, specifically applicable to civil penalty cases, for use by the administrative law judges employed by DOT.

The contention that the placement of the authority to adjudicate civil penalty actions in a forum other than the NTSB may result in forum shopping also is without merit. Implementation of the Demonstration Program has not changed the manner in which the FAA determines the appropriate type of legal enforcement action. Indeed, the primary tool the FAA uses to enforce violations of the FAR against a certificate holder is through certificate action. The agency's enforcement policy is reflected in FAA Order 2150.3A, the Compliance and Enforcement Program (Enforcement Handbook), prepared to provide guidance to agency personnel in investigation, reporting, and legal processing of enforcement cases. It was revised most recently in December 1988.

Under section 905, the Administrator is required to report to Congress, not later than June 30, 1989, on the

effectiveness of the Demonstration Program. That report will address any inconsistency between the two forums regarding enforcement of FAR provisions.

Loss of Opportunity for Jury Trial

Four commenters express concern that, in cases subject to the Demonstration Program, an alleged violator will not have an opportunity for a jury trial in a United States district court, an opportunity which previously existed as a matter of statutory right. (It is well-established that the administrative assessment of civil penalties provided by statute does not implicate the constitutional right to a jury trial under the Seventh Amendment. *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977).)

As in the case of other statutory civil penalty schemes (e.g., that governing violations of hazardous materials regulation), Congress chose administrative procedures for adjudication of penalties in this Demonstration Program. The FAA is without authority to alter that legislative choice. Under the prior statutory scheme, requests for jury trials were extremely rare. Under the Demonstration Program, persons subject to civil penalty actions will be offered opportunity for a full hearing before an administrative law judge and, as provided in section 1006 of the FAA Act [49 U.S.C. 1486], a final order of the Administrator in such cases is subject to judicial review.

Separation of Functions

Eight commenters express concern that the final rule's separation of prosecutorial functions from adjudicative and decisionmaking functions is inadequate. In particular, several commenters argue that the separation of functions is inconsistent with the APA and with constitutional requirements of due process. A few object generally to any placement of prosecutorial and adjudicative functions within the same agency, under the same agency head.

It should suffice to answer this latter objection to note that the practice of housing within one agency the functions of prosecutor, adjudicator, and decisionmaker is well-established, widespread throughout the Executive Branch of the Federal government, and was expressly contemplated by the drafters of the APA in 1946. In fact, this practice is the rule rather than the exception.

Under § 13.203, civil penalty proceedings are prosecuted by "agency attorneys," heard by "administrative

law judges," and decided on appeal by the "FAA decisionmaker." The rule provides that agency attorneys involved in prosecution of a civil penalty action will not participate in or advise the decisionmaker, after a notice of proposed civil penalty has been issued, except as a witness or counsel in the proceedings. The rule provides further that the Chief Counsel will advise the decisionmaker and will not engage in the prosecution or supervision of the prosecution of a case once a notice of proposed civil penalty has been issued.

Several commenters request that this separation of functions be elaborated further; one commenter suggested an organizational change within the Office of Chief Counsel. On January 10, 1989, the agency announced how it will implement the rule's separation of functions (54 FR 1335; January 16, 1989). The Office of Chief Counsel has also disseminated written guidance to all agency personnel who are involved with the enforcement of civil penalty actions, to ensure that the separation of functions is strictly observed. For purposes of the Demonstration Program, the Chief Counsel's office is now organized along the lines that the DOT's General Counsel's office is organized in hearing cases brought under 14 CFR Chapter 2, Parts 200-399; namely, the Chief Counsel advises the decisionmaker, as the General Counsel advises the Secretary; and the Deputy Chief Counsel supervises the agency prosecutors, as does the Deputy General Counsel.

The FAA believes therefore that it has satisfied the concern of the commenters, including the ABA Administrative Section, that the FAA's separation of functions is not as full as DOT's under Part 300. In both sets of rules, the separation of functions is effected only after an enforcement case is initiated. The separation of functions under the Demonstration Program is mandated at the time that a notice of proposed civil penalty is issued. (14 CFR 203(b).) The separation of functions in DOT hearing cases "applies after the initiation of a hearing or enforcement case by the Department." [14 CFR 300.4.] In a DOT enforcement case brought under Part 300, a case is "initiated" upon the filing of a complaint. The separation of functions within the FAA under the Demonstration Program is triggered before a complaint is filed, at the time a notice of proposed civil penalty is issued.

Two commenters are concerned with a purported inconsistency between the FAA's traditional position in hazardous materials cases pursuant to § 13.16, supported by an opinion of the

Department's General Counsel, that the requirements of the APA do not apply to such cases, and the express requirement in the statute authorizing the Demonstration Program that civil penalties may be assessed only after notice and an on-the-record hearing, in accordance with section 554 of the APA. There is no inconsistency. As the heading of revised § 13.16 makes abundantly clear, all hazardous materials civil penalty cases, regardless of amount, are now handled by the same procedures established under the Demonstration Program. The requirements of section 554 of the APA, and by reference section 556 and section 557, apply to hazardous materials civil penalty cases initiated after September 7, 1988.

Three commenters object that the rule permits the decisionmaker to confer with the prosecutor concerning whether to begin a civil penalty proceeding by issuing a notice of proposed civil penalty. The commenters express concern that any such preliminary discussion could lead to bias or predisposition of a case by the FAA decisionmaker in a particular civil penalty action.

The FAA has carefully balanced the interest of the Administrator to determine whether a case should be initiated and the rights of individuals to impartial adjudication. The Administrator, as the head of an agency empowered to perform critical prosecutorial and adjudicatory functions, must have the discretion to be involved in a preliminary decision to proceed with an enforcement action. Such participation could lead to a decision not to initiate the case. At the same time, the Administrator must function independently of the prosecutor in the event that an appeal is taken from the initial decision of an administrative law judge. As a practical matter, the Administrator performs two fundamentally different functions when participating in a preliminary determination of whether sufficient evidence exists to initiate a case and when reviewing an initial decision on appeal based on evidence contained in the record.

The Administrator lawfully may participate in a decision to bring a case. By its terms, the APA's prescription of separation of functions is not designed to restrict the head of the agency. Section 554(d)(2) states, "[t]his subsection does not apply * * * to the agency or a member or members of the body comprising the agency." The Administrator, as FAA decisionmaker on appeal under the Demonstration

Program, is thus not subject to the separation of functions mandated by the APA. The restrictions instead are directed to the "employee who presides at the reception of evidence" (administrative law judge) and the "employee engaged in the performance of investigative or prosecuting functions" (agency attorney). [5 U.S.C. 554(d).] See *Attorney General's Manual on the Administrative Procedure Act*, at 53-58 (1947).

Although the Administrator is specifically exempted from the APA prescriptions, the FAA elected to separate the prosecutorial and adjudicatory functions, at a very early stage in the proceedings, to ensure the independence and impartiality of the decisionmaker in the event of appellate proceedings under the Demonstration Program. In addition, the rules provide that a final decision and order of the Administrator, issued after appeal, and the basis for that decision, ultimately is subject to judicial scrutiny.

The two court decisions relied on by these commenters are inapposite. Both involved challenges to the exercise of investigative or prosecutorial functions by the adjudicator. In *Finer Foods Sale Co. v. Block*, 708 F.2d 774 (D.C. Cir. 1983), the only issue presented was whether the judicial officer's earlier involvement in a reparations order precluded him from deciding a disciplinary case. *Grolier v. FTC*, 615 F.2d 1215 (9th Cir. 1980), concerned whether an attorney-advisor to a member of the Federal Trade Commission could participate as an administrative law judge in a case if he had previously engaged in the performance of investigative or prosecuting functions. Under the Demonstration Program there is no doubt that the FAA adjudicator and decisionmaker are neither engaged in prosecution nor subject to the supervision or direction of one who is.

Initiation of the Hearing Proceeding

Four commenters, including the ABA Administrative Section, object to the procedure of initiating the hearing process with an order of civil penalty rather than a notice of proposed civil penalty. Specifically, the commenters object that when an individual requests a hearing the agency issues an order which asserts findings or determinations of violations rather than allegations. The commenters believe that this procedure shifts, or appears to shift, the burden of proof to the individual charged with the violation.

The assertions in a notice of proposed civil penalty or an order of civil penalty essentially are equivalent to

unanswered allegations. In the scheme of the procedural rules, these allegations do not become "findings" until they are admitted, unanswered, or determined after administrative adjudication. Only then do they result in findings that bind the parties. The order of civil penalty sets out the prosecutorial position as a result of an investigation and any informal proceedings. It represents notice of what the agency attorney intends to prove at the hearing and does not shift the burden of proof from the agency to an individual who has received the order. This process is similar to practice before the NTSB where the FAA issues "orders" affecting an individual's certificate before a hearing is held before an NTSB administrative law judge. Section 13.224 clearly states that the agency has the burden of proving the findings asserted in the order. This provision is in compliance with section 556(d) of the APA which provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

Further, § 13.208 provides that the order of civil penalty shall serve as the complaint, which begins the hearing process. Because the order serves as the complaint, which is in essence a charging document, there should be no perception that the agency has shifted the burden of proof or that an adjudicatory decisionmaker has prejudged the matter.

Compromise of a Civil Penalty Action

Three commenters express concern regarding the effect of the Demonstration Program on civil penalty compromises.

Formerly, all FAA civil penalty actions were settled by compromise whenever agreement on an acceptable penalty could be reached without institution of suit in a United States district court. Such compromises do not result in a formal adjudication or finding or a violation. This avenue continues to be available for penalties above the \$50,000 maximum specified for Demonstration Program cases, and results from the statutory limitation of the Administrator's authority only to "compromise" a penalty in those cases. (49 U.S.C. 1471) Such violations may be adjudicated only by the district court.

In contrast, Congress has expressly authorized the Administrator to "assess" civil penalties in cases under the Demonstration Program "upon written notice and finding of violation." (49 U.S.C. 905) The FAA knows of no evidence that Congress intended that some cases involving penalties of \$50,000 or less would be adjudicated

under the Demonstration Program (e.g., with a finding of violation) and that others would not. Accordingly, the agency intends to proceed in accordance with the Demonstration Program in all such cases. Alleged violators must, in any event, be treated consistently.

These requirements of the Demonstration Program have no effect on the ability of persons to seek to negotiate reductions in the amounts of proposed penalties or to settle on such amounts at any stage of the proceedings. Nevertheless, since such settlements will result in an order including findings of violations, respondents in some cases may be reluctant to enter into settlements which might have been acceptable to them under the former "compromise" scheme. The FAA is satisfied that Congress considered such factors in choosing to establish an alternative scheme which affords a more expeditious and efficient method for adjudicating civil penalties.

Location of Hearings

One commenter questions the rule's provisions for the selection of the location for a hearing. This commenter suggests that, particularly for those cases in which the alleged violation occurred aboard an aircraft in flight and the alleged violator is a passenger, provision should be made for the hearing to be held near the place of the alleged violator's residence.

The rules provide that both the person requesting the hearing and the agency attorney may suggest a location for the hearing. (14 CFR 13.16(i) and 13.208(b)) Where there is no agreement between the person requesting the hearing and the agency attorney, the docket clerk shall assign a hearing location near the place where the incident occurred. (14 CFR 13.208(c)) If a party is not satisfied with this assignment, he or she may file a motion with the administrative law judge to request a different hearing location or the administrative law judge may, on his or her own motion, change the hearing location. (14 CFR 13.221(c)) The administrative law judge may decide any location for the hearing based on a review of factors that include, but are not limited to, "due regard to where the majority of the witnesses reside or work, the convenience of the parties, and whether the location is served by scheduled air carrier." (14 CFR 13.221(c))

The FAA believes that these procedures give adequate consideration to the needs of the respondents as well as of witnesses who will be involved in these cases. The FAA believes that cases involving an alleged violation

committed by a passenger aboard an aircraft in flight and where there is no agreement between the person requesting the hearing and the agency attorney regarding the location of the hearing, will be rare. In addition, after review of the comment and the provisions of the rule dealing with the location of a hearing, the FAA believes that the current provisions are flexible enough to avoid hardship to either the respondent or the witnesses involved in a particular case.

If either party disagrees with the location of the hearing set by the docket clerk, either party may submit a motion to the administrative law judge to change the location of the hearing. The FAA was aware that an inconvenient location could cause hardship to the parties; thus, the FAA provided that a motion to change the location for a hearing could be submitted as soon as an administrative law judge has been assigned to the proceedings. The FAA anticipates that the location of the hearing, and any disputes regarding the location, will be resolved definitively by the administrative law judge very early in the proceedings.

Discovery

One commenter expresses concern about the discovery process provided in the rules. This commenter criticizes several of the aspects of the discovery scheme, including that it is to be conducted without the consent or approval of the administrative law judge, that all of a respondent's discovery requests must be served on the agency attorney of record with no "companion courtesy" for respondents regarding agency requests, and that the test for what is discoverable is unduly broad.

The FAA, in promulgating these rules, was mindful of the lack of a discovery scheme in the rules of proceeding for enforcement hearings before the NTSB. Because of the absence of a clearly delineated discovery process in the NTSB rules, disputes regarding discovery have often resulted and hearings have been delayed while parties waited for the administrative law judges to resolve the disputes. The agency resolved to avoid similar problems in the implementation of the Demonstration Program.

Each of the discovery rules was designed to give maximum flexibility to the parties and to ensure that discovery could be conducted as broadly as the parties wish without need for frequent actions or rulings by the administrative law judge. That such an objective is necessary can be assumed from the lack

of other comments about the discovery rules as promulgated.

The requirement to serve any discovery requests on the agency attorney of record was included because of problems often experienced in this area in NTSB cases. In those cases, respondents have served discovery requests on the technical offices of the agency and the agency attorney on the case remains unaware of the request until a reasonable time in which to answer or object has already passed.

This section of the rules is not intended to imply that the agency attorney will not serve discovery requests on the respondent. Indeed, the FAA practice is, and will remain, that agency attorneys serve counsel for the respondents or the respondents themselves if they are not represented by counsel. The FAA is not aware that any such problem exists with the service of agency discovery requests on respondents.

One commenter indicates that the informal conference procedure used by FAA in all enforcement cases prior to the Demonstration Program and adopted also for the Demonstration Program unfairly gives the FAA an opportunity for discovery at a time when the respondent comes in with "defenses laid down."

It has always been the agency's practice to hold informal conferences off the record and not to use information learned at an informal conference against a respondent. Paragraph 1207(a)(4) of the Enforcement Handbook (FAA Order 2150.3A) provides:

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.

On the other hand, if information presented at the informal conference exonerates the respondent from some or all of the alleged infractions, the agency does not continue to press those allegations. The informal proceedings most frequently serve to benefit a respondent in that allegations which are disproved or refuted during informal proceedings are dropped. In addition, there is no provision in the rules of practice that requires a respondent to participate in informal proceedings or to request and to attend an informal conference. Given this experience regarding the normal way in which the informal conference process works, the FAA does not believe there is a need to revise the rule.

Evidentiary Matters

Several commenters express concern that the standard for admissibility of evidence of § 13.222 is unduly broad. Of particular concern to commenters representing air carriers and operators of large transport category aircraft is the apparent admissibility of cockpit voice recorder (CVR) and flight data recorder (FDR) information.

These commenters argue that such evidence is inadmissible in FAA enforcement actions by regulation, statute or case law and that the rules of procedure for the Demonstration Program cannot, and should not attempt to, effect a change in the admissibility of such evidence in these cases. Each of these commenters points to § 121.359 and § 135.151, which provide that cockpit voice recorder information is not used by the Administrator in any civil penalty or certificate action. They argue that § 13.222 should be amended to specifically exclude CVR and FDR data in actions brought under the Demonstration Program.

With respect to use of the CVR and FDR data, the revisions to Part 13 of the FAR were not intended to impliedly amend either Part 121 or Part 135. Nor was it the intent of the FAA, in the promulgation of the rules of practice for civil penalty actions, to change any existing regulations, policies or practices with regard to the use of information obtained from either cockpit voice recorders or flight data recorders. The agency will continue to operate under existing rules, policies and practices in the handling of information from the cockpit voice and flight data recorders. It is not necessary to amend § 13.222 merely to reflect that it does not alter existing authority and practice.

Two commenters express dissatisfaction that § 13.222(c) makes hearsay evidence admissible in hearings conducted under the rules. Both commenters acknowledge, however, that the admission of hearsay evidence is a longstanding, accepted practice in administrative hearings. One of these commenters expresses difficulty in understanding why Congress would have mandated the application of the Federal Rules of Evidence to hearings before the National Labor Relations Board, under the Labor Management Relations Act of 1947, and yet not give the same protection to parties to FAA administrative hearings. Another indicates that, unlike the general rule of admissibility of hearsay in other administrative forums, this rule removes the discretion of the administrative law judge to exclude hearsay evidence. This,

the commenter argues, eliminates fairness from the proceeding.

The legislation which establishes the Demonstration Program requires that civil penalties under this authority be assessed only after notice and an opportunity for a hearing on the record, in accordance with section 554 of the APA. There is no requirement, either in the legislation or the APA, to conduct these hearings in accordance with the Federal Rules of Evidence. As the commenters acknowledge, the admission of hearsay in administrative hearings is a generally well-known and long-standing procedure.

Further, the fact that hearsay evidence is admissible, regardless of other considerations, does not remove the discretion of the administrative law judge. Section 13.222(c) provides that the hearsay character of the evidence goes only to the weight to be accorded that evidence. Thus, the administrative law judge retains significant discretion regarding the treatment of hearsay evidence and fairness is not compromised by this clear statement of the treatment which will be given to hearsay evidence.

Participation by Persons Other Than the Parties

One commenter states that § 13.206, the intervention section, is unnecessarily restrictive and should be amended to give the administrative law judge the discretion to allow intervention where it will serve the ends of justice. The commenter believes that allowing intervention would allow individuals and interested groups an opportunity to be heard before a penalty is assessed binding them, affecting their property or financial interests, or otherwise significantly affecting them.

The FAA believes that intervention at the hearing stage of the proceedings generally does not contribute to resolution of the issues at the hearing and may unnecessarily delay the hearing. The issues to be decided at a hearing will be factual determinations of whether a party violated distinct Federal Aviation Regulations or Hazardous Materials Regulations. In the vast majority of cases, a determination of whether an individual violated a regulation affects only the parties to an individual case. Participation by others in the fact finding hearing stage of the proceedings would not contribute significantly to the resolution of the issues before the administrative law judge. In addition, when an order of civil penalty is affirmed, modified, or reversed by the administrative law judge, that order is binding only on the parties to the hearing and would directly

affect only their financial or property interests. Nevertheless, § 13.233(f) provides that the FAA decisionmaker may allow *amicus curiae* briefs in the appeal of an initial decision. This should provide a sufficient opportunity for any persons who have a substantial interest, not sufficiently represented by the parties, with a direct interest in the proceeding, to participate in the enforcement process.

Argument Before the Administrative Law Judge

The ABA Administrative Section objects to § 13.231 which states that "[o]nly in a clearly complex or unusual case, the administrative law judge may request or the parties may agree to file written arguments with the administrative law judge." The commenter believes that it is not reasonable to prohibit parties from supporting their positions by means of written presentations and that due process and effective representation require it.

The parties are not prohibited from filing written arguments. Rather, if the parties or the administrative law judge believe that the case is complex or unusual, the parties may agree to submit or the administrative law judge may request written arguments. The FAA believes that the majority of the cases before the administrative law judges will involve simple issues, not requiring written arguments for their disposition. Delaying the proceedings to prepare written arguments on issues that could be sufficiently developed orally at the hearing is unnecessary. Written argument or written posthearing briefs may be filed if the parties agree to take on the extra burden of preparing and submitting written briefs or if the administrative law judge requests written briefs to address complex or unusual issues in a particular case.

Initial Decisions by the Administrative Law Judge

One commenter expresses concern that requiring oral decisions, except in complex or unusual cases, is not conducive to a thoughtful, well-reasoned, and fair decision. Section 13.231 allows the administrative law judge in a complex or unusual case to issue a written decision. If the administrative law judge determines that a case involves complex or unusual issues, or if the parties agree that the issues are complex or unusual, then the administrative law judge may issue a written decision. The FAA believes that the majority of cases and issues before the administrative law judges in the Demonstration Program cases will be

uncomplicated, fact determinations, not requiring the added time and expense of preparing a written decision for their disposition. The DOT administrative law judges are familiar with the requirements imposed by the APA for initial decisions. Therefore, the FAA believes that decisions issued by the administrative law judges, whether they are oral or written, will be thoughtful, well-reasoned, and fair.

The ABA Administrative Section expresses concern that the record would not be complete when the administrative law judge issued an oral initial decision, rather than a written initial decision. The FAA is undertaking steps to assure that oral initial decisions are transcribed and that those transcripts are made a part of the record.

Setting an Appropriate Sanction

Five commenters express concern over the manner in which civil penalties are assessed. Specifically, three commenters question whether the administrative law judge has the authority to reduce a proposed sanction. Two commenters argue that the amount of a proposed civil penalty should not be given deference. One commenter suggests that the final rule be amended to include the factors listed in § 13.16 (applicable to violations of the Hazardous Materials Transportation Act) when determining the appropriate amount of civil penalty for violations of the FAR. The ABA Administrative Section asserts that section 901(a)(1) of the FAA Act [49 U.S.C. 1471(a)(1)] "mandates that the FAA take into account several factors in determining the amount of civil penalty."

Congress, in enacting the FAA Act, established a comprehensive scheme for the regulation and promotion of civil aviation in order to foster its development and provide for the safe and efficient use of airspace by both civil and military aircraft. Pursuant to the FAA Act, the FAA has promulgated regulations which are "designed to enhance the safety of civil aeronautics." *FAA v. Landy*, 705 F.2d 624, 628 (2d Cir.), *cert. denied*, 104 S.Ct. 243 (1983).

Upon examination of the evolution of section 901(a)(1), it is clear that the criteria listed therein for determining the appropriate amount of civil penalty apply only to violations which relate to the transportation of hazardous materials. Specifically, in 1975, Congress amended section 901(a)(1) by:

(1) inserting immediately before the period at the end of the first sentence thereof and inserting in lieu thereof: "except that the amount of such civil penalty shall not exceed

\$10,000 for each such violation which relates to the transportation of hazardous materials"; and

(2) deleting in the second sentence thereof "Provided, that this" and inserting in lieu thereof the following: "The amount of any such civil penalty which relates to the transportation of hazardous materials shall be assessed by the Secretary, or his delegate, upon written notice upon a finding of violation by the Secretary, after notice and an opportunity for a hearing. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require. [Emphasis added.]

The FAA believes that Congress did not disturb the FAA's policy prerogatives to choose sanctions based on its determination as to what sanction is required in the interest of safety for a particular type of violation given the FAA's technical assessment of the seriousness of that type of violation, and of other relevant factors affecting safety.

Notwithstanding that Congress limited the conforming amendments to section 901(a)(1) to violations involving the transportation of hazardous materials, the FAA, as a matter of policy, determined that guidance regarding the selection of an appropriate sanction for violations of Title VI and any rule, regulation, or order issued thereunder should be developed. This policy is contained in paragraphs 204 and 207 of the Enforcement Handbook (FAA Order 2150.3A), and in the Enforcement Sanction Guidance Table, Appendix 4 to FAA Order 2150.3A.

In view of the foregoing, the FAA iterates its position, set forth in the preamble to the final rule, that the FAA's determination of a civil penalty should be given deference in order to ensure a deterrent sufficient to encourage compliance.

Moreover, the FAA believes that affording such deference, when coupled with the policy guidance regarding the selection of an appropriate sanction, is neither inconsistent with § 13.232(a) nor undercuts the authority of the administrative law judges. Rather, it provides the administrative law judges with the appropriate standards to exercise their role of reviewing the FAA's sanction decision under § 13.232(a).

Exhaustion of Administrative Remedies

One commenter objects to § 13.16(n), which states in pertinent part, "[a]n order or an initial decision of an administrative law judge, that has not

been appealed to the FAA decisionmaker, does not constitute a final order of the Administrator for the purposes of judicial review * * *." Thus, in order to obtain judicial review of a civil penalty assessed under the Demonstration Program, a party must first appeal the initial decision of the administrative law judge to the FAA decisionmaker. This commenter believes this provision violates section 557(b) of the APA, which provides, in pertinent part, "[w]hen the presiding employee [administrative law judge] makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within the time provided by rule." The commenter believes this provision allows a person to obtain judicial review directly from an initial decision of the administrative law judge.

This commenter misreads the Administrative Procedure Act. Section 557(b) must be read in conjunction with section 704 of the APA. That section provides in relevant part:

[A]gency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. [Emphasis added.]

The Attorney General's Manual on the Administrative Procedure Act, in discussing section 557(b), states that "[i]t is important to note that section [704] permits an agency to require parties to appeal from hearing officers' initial decisions to the agency as a prerequisite to obtaining judicial review." See Attorney General's Manual on the Administrative Procedure Act, at 83 n.4 (1947). The Manual, at 103, states simply that this provision "embodies the doctrine of exhaustion of administrative remedies."

FAA has complied with section 704 in providing expressly that, "[i]f a party files a notice of appeal pursuant to the procedures in Subpart G, the effectiveness of any order assessing civil penalty is stayed until a final decision and order of the Administrator has been entered on the record." (14 CFR 13.16(m))

"Stale Complaints"

Four commenters express concern that the FAA, by failing to limit the time in which the agency may commence civil penalty action, may prejudice a respondent's ability to prepare a defense. Two of these commenters believed that the final rule should

contain a provision similar to the NTSB's stale complaint rule found in 49 CFR 821.33.

Neither the FAA Act nor the Hazardous Materials Transportation Act (HMTA) prescribes stale complaint or statute of limitations requirements for commencing civil penalty actions. However, 28 U.S.C. 2462 provides a five-year statute of limitations for filing an action to enforce a civil fine or penalty. Section 2462 provides:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made therein.

Congress, by failing expressly to provide stale complaint or statute of limitations requirements in the FAA Act and HMTA, intended that the five-year statute of limitations set forth in section 2462 be applicable.

As previously noted, § 821.33 of the NTSB's rules provides for dismissal of "allegations of offenses which occurred more than 6 months prior" to the notice of proposed action under section 609(a) of the FAA Act, unless the Administrator establishes that "good cause existed for the delay, or that imposition of a sanction is warranted in the public interest, notwithstanding the delay * * *."

Notwithstanding that the enabling statute does not provide for such a limitation, the Board, as a matter of policy, decided that a 6-month delay in commencing a certificate action is *prima facie* evidence of staleness. Furthermore, the Board has given this policy the full force and effect of law by promulgating § 821.33. The FAA, on the other hand, has not made a similar policy determination. Furthermore, the FAA, in carrying out the responsibilities to enforce the FAA Act and HMTA through the commencement of civil penalty actions under the Demonstration Program is not bound by the Board's policy determinations or regulations. "The delegation of power to administer a statute carries with it the power to adopt such procedures as are necessary or proper in carrying out its administrative tasks." B. Schwartz, *Administrative Law*, at 153 (1976).

In conclusion, the sole time constraint imposed on FAA action is the statute of limitations contained in 28 U.S.C. 2462. The FAA has determined that imposition of a further limitations period, through promulgation of a stale

complaint rule, is not necessary to carry out its enforcement responsibilities.

FAA Rules Implementing the Equal Access to Justice Act

Four commenters note that the final rule does not provide procedures governing the award of attorney fees and other expenses under the Equal Access to Justice Act (EAJA). Several of these commenters express concern that

the final rule's failure to address this issue may preclude recovery under the EAJA.

The FAA believes that procedures governing the application and award of attorney fees and other expense should not be included in the final rule promulgating procedural rules to govern on-the-record hearings. Rather, FAA believes that such procedures should be promulgated in a separate rule.

Accordingly, the FAA is undertaking a rulemaking project to prescribe procedures governing EAJA awards.

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Gregory S. Walden,

Chief Counsel.

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