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: Final rule; request for comments.

SUMMARY: This final rule sets forth revised initiation procedures and new rules of practice in FAA civil penalty actions. The rules are needed to provide detailed procedures for on-the-record hearings required in civil penalty actions by legislation recently passed by Congress. The rules are intended to provide an appropriate level of procedural formality in civil penalty proceedings, focus attention on the rights of individuals subject to civil penalties, and ensure that due process is afforded those individuals during the civil penalty enforcement process.

DATES: The final rule is effective on September 7, 1988. Comments must be received on or before November 7, 1988.

ADDRESS: Comments on this final rule may be delivered or mailed, in duplicate, to the Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-204), Docket No. 25690, 800 Independence Avenue SW., Room 915G, Washington, DC 20591. Comments submitted on the final rule must be marked: Docket No. 25690. Comments may be inspected in Room 915G between 8:30 a.m. and 5:00 p.m. on weekdays, except Federal holidays.

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

SUPPLEMENTARY INFORMATION:

Comments Invited

The new rules contained in this amendment are purely procedural rules to govern on-the-record hearings required by statute. The amendments to the current regulations are required so that the regulations will conform to existing and recently enacted statutory authority. Because both the procedural rules and revised regulations are required to implement the recently enacted legislative amendment to the Federal Aviation Act of 1958, they are being adopted without notice and prior public comment. However, the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 26, 1979) provide that, to the maximum extent possible, Department of Transportation (DOT) operating administrations should provide an opportunity for public comment on regulations issued without prior notice.

Accordingly, interested persons are invited to participate in the rulemaking by submitting written data, views, or arguments as they may desire. Comments must include the regulatory docket or amendment number identified in this final rule and be submitted in duplicate to the address above. All comments received will be available in the Rules Docket for examination by interested persons. These rules may be changed in light of the comments received on this final rule.

Commenters who want the FAA to acknowledge receipt of comments submitted on this final rule must submit a preaddressed, stamped postcard with those comments on which the following statement is made: "Comments to Docket No. 25690." The postcard will be date stamped by the FAA and returned to the commenter. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of Final Rule

Any person may obtain a copy of this final rule by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attn: Public Inquiry Center (APA-230), 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-3484. Requests must include the amendment number identified in this final rule. Persons interested in being placed on a mailing list for future rulemaking actions should request a copy of Advisory Circular 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

These procedural rules were developed by the FAA to respond to an amendment to the Federal Aviation Act of 1958, contained in Pub. L. 100-223, the Airport and Airway Safety and Capacity Expansion Act of 1987, enacted by Congress and signed by the President on December 30, 1987. During preliminary Senate discussions of the proposed civil penalty amendment, Congress noted the FAA's lack of statutory authority to "prosecute violators of [the Federal Aviation Regulations]" without referring those actions to the United States Attorney for prosecution in a United States District Court. Congress observed that the inability or failure of the United States Attorney to prosecute civil penalty actions resulted in an ineffective deterrent to individuals or entities who violate the Federal Aviation Regulations. Congress determined that "there is clearly a need" for administrative hearings, tried and heard by the FAA, to provide effective enforcement of the FAA's safety regulations. As ultimately enacted, the amendment to the Federal Aviation Act gives the FAA the authority to assess civil penalties for violations arising under the Federal Aviation Act, or a rule, regulation, or order issued thereunder, after written notice and a finding of violation by the Administrator. The legislative amendments give the FAA the authority to "assess" a civil penalty for a violation of the FAA's safety regulations. This specific authority enables the FAA to issue an order that informs an individual of the alleged violation and that triggers an opportunity for a hearing on the merits of the allegations in the order.

Prior to the 1987 amendment, the FAA could assess civil penalties and prosecute the civil penalty actions only in cases involving a violation of the Hazardous Materials Transportation Act, or a rule, regulation, or order issued pursuant to that Act. The FAA could refer the case to a United States Attorney for *in personam* collection procedures in a United States District Court if an individual did not pay an assessed civil penalty. Under the Federal Aviation Act, the FAA could propose and compromise a civil penalty against an individual for a violation of that Act, or a rule or a regulation issued pursuant to that Act, but could not prosecute those civil penalty actions. If the proposed civil penalty could not be settled by agreement of the parties, the FAA was forced to refer that action to a United States Attorney for prosecution in a United States District Court. Prosecution in the United States District Court could result in a judicial determination of violation and liability for a civil penalty. If an individual did not pay a civil penalty determined by the United States District Court, the FAA could refer collection of the penalty to the United States Attorney.

The recent amendment revised that practice for selected civil penalty actions. The amendment enables the FAA to circumvent the complex and lengthy process of referring these civil penalty cases to the United States Attorney and, therefore, to strengthen the FAA's enforcement process. Under

the 1987 amendment, the FAA may prosecute civil penalty actions without referring the action to the United States Attorney for prosecution in a United States District Court. An order assessing civil penalty issued by the FAA will result in a finding of violation, just as prosecution of a civil penalty action in the District Court could result in a finding of violation and liability for a civil penalty. Any order assessing civil penalty issued by the Administrator, including an order that accepts a reduced civil penalty in settlement of the action, will contain a finding of violation.

Notwithstanding the revised authority given to the FAA, Congress explicitly reserved and retained exclusive jurisdiction in the United States District Courts over any civil penalty action initiated by the Administrator that involves a civil penalty of more than $50,000; a direct *in rem* action or an *in rem* action based on the violation alleged in the civil penalty action; a suit based on seizure of an aircraft that is subject to a lien for payment of an assessed civil penalty; and a suit for injunctive relief based on the violation alleged in the civil penalty action. Therefore, these actions will be proposed and compromised by the FAA or prosecuted by the United States Attorney using the same process and procedures as the FAA has used in the past.

Since 1974, the FAA has had the authority to initiate and assess a civil penalty for a violation of the Hazardous Materials Transportation Act. Pursuant to the 1987 legislation, the FAA may initiate and assess civil penalties, not in excess of $50,000, for violations of the Federal Aviation Act. The legislation requires that civil penalty actions brought under this authority be assessed only after notice and an opportunity for a hearing on the record, in accordance with section 554 of the Administrative Procedure Act. The authority granted to the FAA by the amended legislation is effective only for a 2-year period beginning December 30, 1987 and ending December 30, 1989.

The amendments to the Federal Aviation Act require the Administrator to establish a "Civil Penalty Assessment Demonstration Program" in accordance with the legislation and to study the effectiveness of that program. The legislation also requires the FAA to report to Congress, no later than June 30, 1989, on the results of the study required by the legislation. The Administrator is required to report on the minimum levels of civil penalties established in the Act and whether additional changes to the civil penalty program are necessary to provide an adequate safety deterrent. The Administrator also is required to make recommendations regarding the effectiveness and continuation of the Civil Penalty Demonstration Program authorized under section 905 of the Federal Aviation Act of 1958.

In formulating the procedural rules for the Demonstration Program, the FAA reviewed the present regulations governing proposal and initiation of civil penalty actions and the present regulations governing hearing procedures contained in Part 13 of the Federal Aviation Regulations. The FAA also reviewed the procedural rules governing hearings conducted by other agencies with authority to prosecute actions and conduct administrative hearings. The FAA believes that the detailed procedural rules set forth in this final rule, and the revisions of the sections of Part 13 that describe the process of initiating and proceeding with a civil penalty action, protect the due process rights of individuals subject to a civil penalty.

Discussion of Legal Enforcement Proceedings

Section 13.15 applied to all civil penalty actions proposed for a violation of the Federal Aviation Act of 1958. The FAA is amending § 13.15 of the Federal Aviation Regulations so that it no longer applies to the civil penalty authority that was transferred to the FAA by the 1987 legislative amendment. This section is now limited to civil penalty actions that are within the exclusive jurisdiction of the United States District Courts and are not encompassed within the authority given to the FAA by Congress in the Civil Penalty Assessment Demonstration Program legislation.

Section 13.15 now applies only to civil penalty actions that involve an amount in excess of $50,000. Section 13.15 sets forth the procedures used by the agency to propose and compromise a civil penalty action. The amendment of this section is not intended to alter the procedures that were used in the past in all civil penalty actions brought for violations of the Federal Aviation Act. The amended section contains the maximum civil penalty that the FAA may propose for each specific violation of the Federal Aviation Act or the Federal Aviation Regulations, including the increased civil penalty that the FAA may propose against an air carrier and a commercial operator. The amended section now refers to the FAA's authority to take enforcement action based on a violation of the prohibition in the Federal Aviation Act and the regulations that deal with smoking on aircraft and tampering with smoke detectors on aircraft. The amended section also contains the delegation of the Administrator's authority to propose and compromise actions to specific individuals in the FAA, and the procedure by which the FAA may settle a civil penalty action.

Section 13.16 applied only to civil penalty actions for violations of the Hazardous Materials Transportation Act. The authority contained in the 1987 amendment is similar to the authority granted to the agency in the Hazardous Materials Transportation Act with one exception. The statutory authority to prosecute civil penalty actions brought under the Federal Aviation Act is limited to civil penalties that do not exceed $50,000; the authority to bring civil penalty actions under the Hazardous Materials Transportation Act is not so limited.

The FAA believes that one set of procedures, before and during the hearing, for hazardous materials cases and cases brought pursuant to the Federal Aviation Act would eliminate confusion and duplication in civil penalty proceedings. The FAA determined that it was more efficient to incorporate civil penalty procedures under the Federal Aviation Act into an existing system rather than create an entirely new process of initiation and prosecution of civil penalty actions.

Thus, the FAA retained the basic organization and procedures contained in § 13.16, which are familiar to the aviation industry in hazardous materials civil penalty actions, and amended that section to implement the new statutory authority given to the FAA to prosecute a civil penalty action for a violation of the Federal Aviation Act. However, the procedures were modified so that an individual may request a hearing on the merits of an order of civil penalty instead of on the merits of a notice of proposed civil penalty. This modification reflects the procedures used by the FAA and the aviation community in certificate actions before the National Transportation Safety Board (NTSB) and provides a familiar and similar procedural structure for all regulatory enforcement actions taken by the FAA. A request for hearing under these procedural rules need not be a formal, technical document. The rule allows an individual to request a hearing by merely submitting a handwritten letter to the agency attorney. An individual requesting a hearing also has an opportunity to suggest a location for the hearing in this document.

Prior to the amendment of § 13.16, an individual who had received a notice of proposed civil penalty for a violation of the Hazardous Materials Transportation Act could immediately request a hearing on the allegations contained in that notice. An individual subject to a notice of proposed civil penalty could only request a hearing before the Administrator issued an order assessing a civil penalty. After the Administrator issued an order, the rule provided no further opportunity for a hearing on the merits of the notice.

Based on the FAA's experience in certificate actions, the FAA believes that a hearing on the allegations contained in a notice, which is merely a proposal, is premature. The notice is issued after the FAA has completed an investigation of the allegations. However, the individual may or may not have taken part in the investigatory process. The FAA reviewed the existing notice and prehearing procedures contained in § 13.16 and retained the informal proceedings that are available after a notice of proposed civil penalty is issued. Therefore, the rule provides an opportunity for informal proceedings in which an individual may submit information or discuss the matter with an agency attorney. These informal proceedings enable an individual to submit information including mitigating factors or extenuating circumstances that may affect the FAA's decision to continue to prosecute a civil penalty action. The FAA views the informal proceedings as an opportunity to narrow the differences between the parties with the intention of settling a civil penalty action. Even if the parties can not agree to settle the matter, the informal proceedings serve to focus any remaining unresolved issues.

Recognizing that some individuals may not take advantage of the opportunity to participate in informal proceedings provided in the rule, and to comply with the Congressional mandate to provide an opportunity for a hearing, the amended rules provide two opportunities for an individual to request a hearing on alleged violations of the Federal Aviation Act or Hazardous Materials Transportation Act. First, an individual may forgo the informal proceedings provided in § 13.16 by requesting a hearing after receipt of a notice of proposed civil penalty. The notice of proposed civil penalty will be reviewed by the agency attorney, and in appropriate cases, an order of civil penalty will be issued which will serve as the complaint in the proceedings. This review gives the FAA a final opportunity to determine if prosecution of the action is warranted. Second, an individual may request a hearing after participating in any informal proceedings with an agency attorney. Thus, the order of civil penalty issued after a request for a hearing in these cases enables the agency to tailor the order of civil penalty to reflect any changes to the notice of proposed civil penalty based on information submitted during the informal proceedings. The FAA believes that it is appropriate and logical to hold a hearing on the merits of the order of civil penalty which contains the most concise statement of alleged facts and regulatory or statutory violations.

The basic provisions of § 13.16 regarding referral of an action to the United States Attorney for collection of an assessed civil penalty have been retained. Therefore, the FAA need only refer civil penalty actions under § 13.16 to the United States Attorney for collection of the penalty if a person subject to an order assessing civil penalty does not pay the assessed civil penalty. In addition, the agency may use the procedures established by the Department of Transportation to implement the Debt Collection Act to collect any assessed civil penalty.

Section 13.16 requires an individual to proceed through the entire administrative process set forth in these rules before appealing any decision or order to an appellate court. A party may appeal a final decision and order of the Administrator, issued after appeal of an administrative law judge's initial decision to the FAA decisionmaker, if the party complies with the requirements of section 1006 of the Federal Aviation Act of 1958, as amended. A party may not appeal an initial decision of an administrative law judge directly to the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia. The requirement to exhaust administrative remedies prior to appellate review by a court of appeals guarantees that the issues have been fully developed before the agency and provides a complete administrative record for judicial review.

Promulgation of these rules does not revoke, expressly or implicitly, Subpart D of Part 13. Although that subpart will not govern civil penalty actions addressed in this final rule, Subpart D will continue to govern hearings requested to review FAA orders charging a violation of Title V of the Federal Aviation Act of 1958, as amended; orders of compliance, cease and desist orders, orders of denial, or orders of compliance under the Federal Aviation Act of 1958, as amended; the Airport and Airway Development Act of 1970; and the Airport and Airways Improvement Act of 1982, as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987; and orders of immediate compliance under the Hazardous Materials Transportation Act.

Discussion of Procedural Rules

Section 13.201 repeats the provisions of the Federal Aviation Act and the Hazardous Materials Transportation Act defining who is subject to a civil penalty for specific violations and the maximum civil penalty that the Administrator may assess for a violation. That section specifically states that the procedural rules contained in Subpart G do not apply to civil penalty proceedings that were initiated before the effective date of the procedural rules. Cases or hearings that were initiated prior to the issuance of these rules are governed by the rules in effect at the time they were initiated.

Section 13.202 includes definitions of words and phrases used repeatedly in the procedural rules and definitions of concepts that may not be clear from the language of a particular rule. Definitions of "mail" and "personal delivery" have been included to ensure that filing and service requirements are consistent and to provide a variety of methods by which a person can file and serve documents. For example, an overnight express courier stated in "mail" would include services that deliver packages the day after they are deposited with the courier, such as DHL, Federal Express, and the U.S. Postal Service's ExpressMail. Services that deliver packages on the same day they are presented to the messenger are encompassed within the definition of "personal delivery." The terms "contract or express messenger services," used in the definition of "personal delivery," include the use of bicycle or automobile messengers who deliver packages within a local, specified area and individuals employed by firms or businesses that deliver documents or mail for that business.

Section 13.203 describes the individuals within the FAA who will prosecute civil penalty actions. Agency attorneys will represent the agency during the initiation of a civil penalty action, any settlement of a civil penalty action, any hearing requested under Subpart G of Part 13, and any appeal of an initial decision issued after the hearing. The rule states that agency attorneys involved in prosecution of a civil penalty will not, at any time or in

any manner, advise the FAA decisionmaker during the hearing or the appeal of a civil penalty action. An agency attorney who prosecutes a civil penalty action on behalf of the agency is permitted by this section to consult with, and advise, the FAA decisionmaker regarding the action until a notice of proposed civil penalty is issued by the Administrator. The Administrator is permitted to participate in the decision whether to issue a notice of proposed civil penalty in the first instance. Section 13.203 also describes the individuals who will advise the FAA decisionmaker during any appeal of a decision by an administrative law judge. These individuals are separated from the agency attorneys who prosecute civil penalty actions. This provision ensures that the FAA decisionmaker is insulated from any person who is involved in prosecution of a civil penalty action. Thus, the Administrator's duty to function as an independent decisionmaker in the administrative process remains untainted by the collateral agency prosecutorial function.

Section 13.204 states that persons charged with a violation may provide their own representation during a hearing or an attorney may represent the person charged with a violation. The FAA does not keep a register of attorneys who may participate in hearings under this subpart. No attorney is required to submit an application to practice before the FAA in civil penalty hearings. Like the procedural rules of practice of the NTSB in air safety proceedings, the FAA rule allows other individuals, who are not licensed attorneys, to advise or represent a person charged with a violation. Nothing in this section prohibits individuals from representing themselves if they so desire. To that end, the rules were drafted so that individuals who represent themselves are not misled by overly-technical procedural requirements.

Section 13.205 describes the authority, and limitations of that authority, of the administrative law judge in civil penalty proceedings. The powers of the administrative law judge are based on the powers outlined in the Administrative Procedure Act. Section 13.205 includes a provision that enables the administrative law judge to disqualify himself or herself from the proceedings. In addition, a party can request that an administrative law judge not participate in a particular proceeding if the party files a motion for disqualification pursuant to § 13.218. If the administrative law judge denies a party's motion for disqualification, the party may file an interlocutory appeal for cause pursuant to § 13.219.

Unlike its counterpart in Subpart D, § 13.206 prohibits intervention by any person who does not have a statutory right to intervene. In the FAA's experience, intervention requests are infrequent in enforcement actions, and these requests generally are denied. The FAA believes that requests to intervene would result in unnecessary delay and expense to the true parties in the civil penalty proceedings.

Section 13.207 is included in the procedural rules to ensure that a party does not submit documents that may require a response under the rules or that may raise extraneous issues solely to harass another party or to increase the time and expense of the proceedings. The FAA believes that this section will help to protect the integrity of the proceedings.

Sections 13.208 and 13.209 state the procedures and requirements for filing a complaint in the proceedings and for filing an answer to the allegations contained in the complaint. After an individual has requested a hearing, the agency attorney will file an order of civil penalty, which serves as the complaint in the proceedings, with the hearing docket clerk. The rule allows an individual to submit the answer in the form of a letter and in legible, handwritten form. This section is intended to provide great flexibility and easy access in the hearing process so that an individual is not forced to hire an attorney for the proceedings.

An individual who requests a hearing is permitted to suggest a location for a hearing with his or her request pursuant to § 13.16(i) of Subpart C. If the agency attorney disagrees with the individual's suggested location, § 13.208 enables the agency attorney to suggest a different location for the hearing. If the parties do not agree on the location for the hearing, the hearing docket clerk will set the hearing for a location near the place where the incident occurred. The FAA believes that this location will be convenient because most of the witnesses and the relevant evidence will be available at that location. In addition, the administrative law judge has the authority to grant a party's motion to move the hearing to a location other than the location set by the hearing docket clerk. Pursuant to § 13.221(c), either party can submit information to the administrative law judge that supports a motion to move the hearing if that location later proves to be inconvenient or inaccessible.

Pursuant to § 13.209, an individual has 30 days from the time that the order of civil penalty was served to file an answer. If an individual fails to file any answer within the 30 days, without good cause for the failure to file, the allegations in the order of civil penalty are considered to be admitted and an order assessing civil penalty will be issued. The FAA recognizes that this is a severe penalty for failure to file an answer. However, the FAA believes that this will discourage spurious or dilatory requests for a hearing. The FAA anticipates that this section will encourage a person who legitimately disputes the finding of violation contained in the order to use the hearing process to resolve genuine issues of fact and law.

The rule requires that a person specifically address each allegation in the order of civil penalty. This requirement eliminates the burden on the parties of submitting evidence and proving matters that are not truly in dispute.

The rules provide requirements for filing and service of documents submitted in civil penalty actions. Since certain consequences flow from the date of filing or the date of service, §§ 13.210 and 13.211 specifically address the dates when documents are considered to have been filed or served during the proceedings. Under § 13.211, a certificate of service is not required in these actions. The FAA believes that a requirement to attach a certificate of service to a document is overly-technical and could prejudice an individual who is unfamiliar with procedural requirements. The FAA believes it is prudent to avoid the dismissal of an action based solely on a technical, procedural requirement. However, because certain benefits attach to the use of a certificate of service, the rule allows any party to attach a certificate of service to a document submitted for filing.

Section 13.211 includes an automatic 5-day extension of time to respond or act after a party has received a document that was served by mail. The rule provides a 5-day grace period so that a party will not be penalized for unanticipated or unexplained delays in the mail during that grace period. The FAA believes that the additional time period is sufficient and will eliminate disputes based on unavoidable delays not directly attributable to a party.

The FAA has included many provisions in these rules that allow the parties to determine schedules and procedures without requiring the administrative law judge to issue an

order on each issue. The FAA believes that these provisions provide flexibility for the parties and the ability to accommodate reasonable requests, while preserving the due process rights of individuals and prosecutorial discretion of the agency. Many of these matters can be agreed upon between the parties without oversight by the administrative law judge until there is a dispute that the parties cannot resolve. For example, § 13.213 allows each party to extend the time for filing any document once, without the consent of the administrative law judge, if they can agree to the extension. If the parties do not agree to an extension, the rule allows one party to submit a motion to the administrative law judge requesting an extension.

Similarly, § 13.217 allows the parties to control many of the prehearing and discovery aspects of a civil penalty action. In most of these situations, the parties are in the best position to schedule discovery matters and determine the course of prehearing proceedings. If the parties fail to agree on a joint procedural or discovery schedule, the FAA envisions that the parties will follow the rules addressing prehearing motions and the rules governing discovery. This section does require that the parties submit all prehearing motions, responses to these motions, and agree to close discovery not later than 15 days before the hearing. This requirement gives the administrative law judge time to resolve all pending motions before the hearing and gives the parties time to prepare for the hearing.

Section 13.218 sets forth general requirements for any motions submitted by the parties and also addresses the requirements for certain motions that are commonly submitted by either or both of the parties before and during hearings. This section requires the administrative law judge to rule on prehearing and discovery motions within a specific time before the hearing so that the factual and legal issues are sufficiently narrowed and the parties have adequate time to prepare for the hearing.

Several of the specific motions addressed in the rule may be filed by a person subject to an order of civil penalty instead of an answer. The motions that may be filed instead of an answer are a motion to dismiss the order of civil penalty for insufficiency because the order fails to state a violation, a general motion to dismiss, and a motion for more definite statement of the allegations contained in the order of civil penalty. Under the rules, the action will not be dismissed for failure to file an answer if these motions are filed instead of the answer. The rules also describe the procedures that the parties must follow after the administrative law judge has ruled on one of these motions.

Section 13.218 allows any party to submit a motion for decision that would terminate the proceedings at any time before the administrative law judge has issued an initial decision. This motion is intended to provide a single mechanism for early disposition of the case where the pleadings or evidence, or both, submitted by a party show that there is no factual dispute between the parties and that the matter should be resolved by the administrative law judge. This single motion is intended to include different, but conceptually similar, motions such as a motion for summary judgment and a motion for judgment on the pleadings. Section 13.218 also addresses the procedures that a party must use in order to file a motion for disqualification of an administrative law judge.

Section 13.219 allows the parties to appeal certain decisions of the administrative law judge to the FAA decisionmaker during the course of the proceedings instead of waiting until the administrative law judge has issued an initial decision. This section describes the interlocutory appeals permitted by the rule. The rule provides an interlocutory appeal, with the consent of the administrative law judge, if a party demonstrates good cause for the appeal. The rule also allows appellate review by the FAA decisionmaker, without the consent of the administrative law judge, for decisions that deny a motion for disqualification, bar an attorney from the proceedings, fail to dismiss the proceedings after the parties have settled the action, exceed the limitations on the power of the administrative law judge contained in the rules, and dismiss part of the proceedings pursuant to a motion to dismiss. Although the rule provides an immediate interlocutory appeal of right if an administrative law judge imposes any sanction not specified in the procedural rules, this section does not limit the FAA decisionmaker's ability to sustain the sanction. The FAA decisionmaker has broad authority to review the circumstances that prompted the sanction and to determine whether the sanction is appropriate in those circumstances.

If a party notes or files an interlocutory appeal, the appeal suspends the proceedings until the stay dissolves or the FAA decisionmaker has resolved the issues raised in the interlocutory appeal. The rule provides accelerated time limits for filing a notice of interlocutory appeal and brief in support of the interlocutory appeal. The FAA has included a specific provision in the rule on interlocutory appeals that would provide sanctions against a party who files unnecessary or dilatory interlocutory appeals. Further, documents filed in an interlocutory appeal must be signed by the party, by the attorney, or by the party's representative and, therefore, that person certifies that the document is submitted for a proper purpose. A party, an attorney, or a party's representative who files an interlocutory appeal in violation of the certification rule is subject to the sanctions specified in that rule.

Section 13.220 provides discovery rules that are similar to the discovery permitted under the Federal Rules of Civil Procedure. However, the discovery rules have been tailored to accommodate the less formal requirements of administrative practice. The discovery rules provide procedures to request confidential orders or protective orders that are intended to protect proprietary data or information and sensitive material that has been requested by a party.

The discovery rules require a party to supplement or change a response to a discovery request as soon as new information is received. This requirement relieves the requesting party from the burden of submitting additional requests to update or correct prior responses. The duty to supplement or amend prior responses is based on, but is not broader than, the duty contained in the revised discovery rules of the Federal Rules of Civil Procedure.

The rule permits a party to take depositions of any person. The person taking the deposition is required to notify the person who will be deposed, the administrative law judge, the hearing docket clerk, and each party, at least 7 days before the date scheduled for the deposition. However, the administrative law judge may allow a party to take a deposition with less than 7 days notice. The person being deposed is required to sign the deposition unless the parties waive that requirement. The rule limits the use of the deposition by a party at the hearing only upon a showing of good cause by the party who wants to use the deposition.

The rule states that a party cannot serve more than 30 interrogatories to any other party. Each subpart of a question is counted as a separate question. The rule limits the number of

interrogatories to avoid repetitive and burdensome requests. A party may receive permission from the administrative law judge to serve additional interrogatories in certain limited situations.

Unlike the rule limiting the number of interrogatories, the FAA did not limit the number of requests for admission that a party may serve on another party. The rule specifies severe penalties for a party's failure to respond in some manner to a request for admission. Material that is admitted by a party can be used for all purposes in the hearing and any appeal. In addition, the FAA may use information that has been admitted by a party where it is relevant to future enforcement proceedings by the FAA. The FAA's use of admitted information is necessary because the Hazardous Materials Transportation Act requires the Administrator to consider a person's history of prior violations when determining the amount of civil penalty to be assessed in other unrelated civil penalty actions. Also, consideration of an individual's compliance disposition is necessary to determine an appropriate civil penalty that would deter violations of the FAA's safety regulations. The FAA's experience in certificate actions before the NTSB supports consideration of prior violations when determining an appropriate sanction.

Section 13.220 provides a method to compel a party to comply with reasonable discovery requests. The rule also provides a method to force a party to comply with a discovery order or an order to compel issued by the administrative law judge. This section of the rule limits the sanctions that the administrative law judge can impose to the particular failure of the party. This will avoid complete dismissal of the case based solely on a failure to participate in discovery.

Section 13.221 sets forth general rules for notice of the date, time, and location of the hearing. The administrative law judge is required to give the parties 60 days notice of the date and time of the hearing. The FAA anticipates that the administrative law judge will allow ample, but not excessive, opportunity for the parties to enter into a joint procedural schedule or to conduct discovery without the aid of a joint schedule. Even if the administrative law judge sets a hearing date as soon as the case is assigned, the FAA believes that 60 days is sufficient time for the parties to conduct discovery and file prehearing motions. The rule allows the parties to agree that the hearing be held on an earlier date if the administrative law judge is available on the earlier date.

During the 2-year civil penalty assessment demonstration program, the FAA has elected to use administrative law judges employed by the Department of Transportation who will travel to the hearings. The FAA has attempted to craft a rule that provides maximum flexibility to accommodate persons requesting hearings under these rules and to accommodate the schedules of the administrative law judges.

Section 13.222 places very few restrictions on the type of evidence that a party may submit in support of the case or a defense. All evidence is admissible in civil penalty assessment proceedings except evidence that is not relevant or material to the action or that is repetitious of evidence already submitted by a party. This section was intended to be as broad as, and consistent with, the Administrative Procedure Act so that the administrative law judge can consider all relevant and material evidence in the action.

The FAA is aware that, in many cases, individuals subject to an order of civil penalty must rely on hearsay evidence in defense of their case. The FAA believes that general admissibility of all evidence, including hearsay, is critical to ensure a full and complete record for decision. To ensure that hearsay evidence is not excluded in civil penalty actions, the FAA has inserted a specific provision stating that hearsay evidence is admissible in civil penalty actions. The reliability and probative value of the hearsay evidence will be considered when deciding the weight to be accorded hearsay evidence.

Section 13.226 allows the parties to request that portions of the record be sealed and prohibited from disclosure to the public. The administrative law judge may order information withheld from the public if revealing the information would be detrimental to aviation safety or would not be in the public interest. The administrative law judge may prohibit disclosure of any information that is not required, by statute or regulation, to be disclosed to the public.

Section 13.228 provides that a party may obtain a subpoena, once it has been signed by the docket clerk or the administrative law judge, from the hearing docket clerk. The party who obtains the subpoena is responsible for delivering the subpoena to the person whose attendance is required to testify or to produce documents. Under the rule, a party is entitled to seek judicial enforcement of a subpoena if the party shows that the person subject to the subpoena has failed or refused to comply with the terms of the subpoena. The FAA believes that the burden of obtaining judicial enforcement of a subpoena properly lies with the party who seeks to compel attendance at a hearing or to compel production of documents in a proceeding.

Any person who receives a subpoena may request that the administrative law judge nullify, or modify, the requirement to appear or the requirement to produce documents described in the subpoena. A motion to quash or modify a subpoena can be submitted to the administrative law judge any time before the time stated in the subpoena for testimony or production of documents. The requirement to appear or to produce documents is suspended from the time the person files the motion with the administrative law judge until the administrative law judge rules on the motion.

Section 13.230 describes the material that will constitute the record in the proceedings. All testimony submitted by any party during the hearing, all exhibits received into evidence by the administrative law judge, any motions submitted to the administrative law judge, and all rulings by the administrative law judge or the FAA decisionmaker on interlocutory appeal are included in the record. Any person may examine a copy of the record at the hearing docket. In addition, any person may have a copy of those portions of the record, that are not sealed or subject to a confidential order, if they pay the costs of copying the record.

Pursuant to § 13.231, the FAA intends that, in the majority of cases, oral arguments will be made by the parties during the hearing and at the close of the hearing. The FAA believes that oral argument is appropriate for civil penalty actions, is more efficient, and is less burdensome on the parties. At the same time, oral argument does not limit full presentation of the issues and complete development of the arguments that a party wishes to present to the administrative law judge for consideration. The FAA believes that written argument, either during the hearing or at the close of the hearing, is necessary only in clearly complex or unusual cases. For example, cases involving highly technical equipment or maintenance violations, or cases requiring a detailed analysis of several parts of the Federal Aviation Regulations, might warrant written argument or briefs. Therefore, written argument or written posthearing briefs should 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 or arguments to address complex or unusual issues in a particular case.

Section 13.232 states the requirements for an initial decision issued by an administrative law judge in civil penalty actions. The initial decision must include, among other things, findings of fact, conclusions of law, the grounds that support these findings and conclusions, determinations of the credibility of witnesses, and a discussion of the basis for rulings of the administrative law judge during the hearing. The FAA believes that requiring a detailed discussion of the basis for the decision will guarantee that the parties have full and complete information to decide whether to appeal and, if so, on what basis to appeal.

The rule also requires that the administrative law judge provide copies of any unpublished or unreported initial decision referenced in an initial decision to the parties and to the FAA decisionmaker. This section provides access by the parties and the FAA decisionmaker to information, otherwise unavailable, that served as a basis for an initial decision. The FAA believes that this information will help the parties evaluate the necessity of an appeal and will help the FAA decisionmaker understand the basis for the initial decision.

The initial decision also must include a determination of the reasonableness of the civil penalty contained in the order of civil penalty. It is clear that the agency attorney must explain the basis for the civil penalty in order for the administrative law judge to make such a determination. For example, pursuant to statutory mandate, the agency attorney considers all information known to the agency, and all information submitted by an individual, before issuing an order of civil penalty. The Federal Aviation Act gives the FAA the authority to ensure aviation safety by promulgating and enforcing safety regulations and providing appropriate sanctions for violations of those regulations. The FAA's determination of a civil penalty, to deter violations of the safety regulations, should be given deference to encourage compliance and to ensure a sufficient deterrent effect. If the administrative law judge affirms the order of civil penalty but reduces the amount of the civil penalty, the administrative law judge should state why the reduction is appropriate. The FAA believes that requiring an explanation for any reduced sanction is critical for consideration of any appeal of the reduction and determination of civil penalties in future actions.

In the majority of cases, the administrative law judge is not required to issue a written decision. The administrative law judge is entitled, and is encouraged, to issue an initial decision orally; a written decision should be reserved for clearly complex or unusual cases. The FAA believes that the freedom and ability to issue oral decisions will greatly reduce the time required to resolve the issues addressed during the hearing. In addition, the FAA anticipates that an oral decision may help reduce the time and expense for the parties and may reduce the adjudicatory burden on the administrative law judge.

Section 13.233 contains the procedures that a party must follow to file an appeal of the administrative law judge's initial decision with the FAA decisionmaker. The basis for appeal by a party to the FAA decisionmaker has been circumscribed in these rules because the flexible hearing process provided in these rules will result in a full and complete analysis of the facts in a civil penalty action. The FAA believes that limiting the basis upon which a party may appeal an initial decision will preclude frivolous and unnecessary appeals of initial decisions that merely delay the proceedings and decrease the deterrent effect of civil penalty. However, the rules preserve the FAA decisionmaker's discretion to take any action that the FAA decisionmaker determines may be necessary to resolve an issue on appeal.

If a party appeals an initial decision, the party is required to file a notice of appeal and an appeal brief. The party must include the page numbers from the transcript in an appellate brief if he or she relies on evidence or information contained in the transcript for the appeal. An opposing party may file a reply brief in an appeal. A party may not submit additional briefs unless specifically permitted by the FAA decisionmaker. The rule prohibits a party from submitting any additional brief until that party has obtained permission from the FAA decisionmaker. There is no right to oral argument on appeal. Oral argument will be permitted only if the FAA decisionmaker finds that oral argument is necessary to develop the issues on appeal.

Section 13.233 also provides that only a final decision and order of the Administrator, issued after appeal of an initial decision, is precedent in subsequent civil penalty actions. The rule also provides that any portion of an initial decision that has not been appealed is not precedent in any other civil penalty action. Neither an administrative law judge nor the FAA decisionmaker is required to decide an issue in conformity with any previous, unappealed initial decision that did not result in a final decision and order of the Administrator. This section is not intended to preclude an administrative law judge from using similar reasoning or analysis in similar civil penalty actions.

Section 13.234 allows a party to request that the FAA decisionmaker reconsider or modify the final decision and order of the Administrator on appeal. The FAA decisionmaker is not required to accept any petition to reconsider or to modify any decision. The rule provides that the Administrator will not reconsider or modify any decision that was not appealed to the FAA decisionmaker under these rules.

The FAA decisionmaker will issue the decision and order of the Administrator after a party has appealed the administrative law judge's initial decision to the FAA decisionmaker. Decisions that have been appealed to the FAA decisionmaker and result in a decision and order of the Administrator constitute final orders of the Administrator that may be appealed to courts of appeals of the United States or the Court of Appeals for the District of Columbia pursuant section 1006 of the Federal Aviation Act.

Reason for No Notice and Immediate Adoption

These rules are needed immediately to implement the statutory authority given to the FAA in Pub. L. 100–223, signed by the President on December 30, 1987. The amendments enable the FAA to assess civil penalties for violations arising under the Federal Aviation Act, or a rule, regulation, or order issued thereunder, upon written notice and finding of violation by the Administrator. The legislation requires that civil penalty actions initiated under this authority be assessed only after notice and an opportunity for a hearing on the record in accordance with section 554 of the Administrative Procedure Act. The authority granted to the FAA by the amended legislation is effective only until December 30, 1989.

The amendment to the Federal Aviation Act requires the Administrator to set up a "Civil Penalty Assessment Demonstration Program" to study the effectiveness of the amendment. The legislation also requires the FAA to report to Congress, no later than June 30, 1989, on the results of the study required by the legislation. The FAA reviewed

the proposed civil penalty, including records indicating a financial inability to pay or records showing that payment of the proposed civil penalty would prevent the person from continuing in business, or

(3) The person shall submit a written request to the agency attorney for an informal conference to discuss the matter with the agency attorney and to submit relevant information or documents to the agency attorney.

(g) *Procedures following interim reply or informal conference.* Not later than 10 days after the person charged with a violation receives an interim reply to any submission made in accordance with paragraphs (f)(1) or (f)(2) or not later than 10 days after an informal conference, the person charged with the violation shall do one of the following:

(1) The person shall submit the amount of the proposed civil penalty in which case an order assessing civil penalty shall be issued in that amount.

(2) The person shall submit additional written information to the agency attorney for consideration.

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

(h) *Order of civil penalty.* An order of civil penalty shall be issued if the person charged with a violation requests a hearing in accordance with paragraph (e)(3) or paragraph (g)(3) of this section.

(i) *Request for a hearing.* Any person who receives a notice of proposed civil penalty may request a hearing, pursuant to paragraph (e)(3) or paragraph (g)(3) of this section, to be conducted in accordance with the procedures in Subpart G of this part. A person requesting a hearing shall file a written request for a hearing with the agency attorney. The request for a hearing may be in the form of a letter but must be dated and signed by the person requesting a hearing. The request for a hearing may be typewritten or may be legibly handwritten. A person requesting a hearing shall include a suggested location for the hearing in the request for a hearing.

(j) *Order assessing civil penalty.* An order assessing civil penalty shall be issued if the person charged with a violation—

(1) Submits the amount of the proposed civil penalty in which case the order assessing civil penalty shall reflect receipt of the civil penalty;

(2) Does not respond in a timely manner to the notice of proposed civil penalty;

(3) Does not respond in a timely manner to interim replies from the agency attorney under paragraph (g) of this section; or

(4) Does not comply with any agreement reached between the parties during an informal conference.

(k) *Payment.* A person charged with a violation may pay the amount of the civil penalty proposed in the notice or stated in the order, or an amount agreed upon, by sending a certified check or money order, payable to the Federal Aviation Administration, to the agency attorney.

(l) *Hearing.* If the person charged with the violation requests a hearing pursuant to paragraph (e)(3) or paragraph (g)(3) of this section, the order of civil penalty shall be issued and shall be filed with the hearing docket clerk as the complaint in the proceedings. 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 affirms, modifies, or reverses the order of civil penalty. An order of civil penalty, as affirmed or modified 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 any order assessing civil penalty is stayed until a final decision and order of the Administrator has been entered on the record. The FAA decisionmaker shall review the record of the hearing and issue a final decision and order of the Administrator that affirms, modifies, or reverses the order assessing civil penalty. The FAA decisionmaker shall not assess a civil penalty in an amount greater than the amount stated in the order of civil penalty.

(n) *Exhaustion of administrative remedies.* A party may only appeal a final decision and order of the Administrator to the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia pursuant to section 1006 of the Federal Aviation Act of 1958, as amended. An 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 appellate review under section 1006 of the Federal Aviation Act of 1958, as amended.

(o) If a person subject to an order assessing civil penalty does not pay the assessed civil penalty within 60 days after service of the order assessing civil penalty, the Administrator may refer the order to the United States Attorney General, or the delegate of the Attorney General, to begin proceedings in a United States District Court, pursuant to the authority in section 903 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1473), or section 110 of the Hazardous Materials Transportation Act (49 U.S.C. 1809), to collect the civil penalty.

(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.

4. Section 13.31 is revised to read as follows:

§ 13.31 Applicability.

This subpart applies to proceedings in which a hearing has been requested in accordance with §§ 13.19(c)(5), 13.20(c), 13.20(d), 13.75(a)(2), 13.75(b), or 13.81(e).

PART 13—INVESTIGATIVE AND ENFORCEMENT PROCEDURES

5. Part 13 is amended by adding a new Subpart G to read as follows:

Subpart G—Rules of Practice in FAA Civil Penalty Actions

Sec.

Sec.

Subpart G—Rules of Practice in FAA Civil Penalty Actions

§ 13.201 Applicability.

(a) This subpart applies to the following actions:

(1) A civil penalty action, initiated after September 7, 1988, in which an order of civil penalty has been issued 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 initiated after September 7, 1988, in which an order of civil penalty has been issued for a violation arising under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471 *et seq.*) and the Hazardous Materials Transportation Act (49 U.S.C. 1801 *et seq.*), or a rule, regulation, or order issued thereunder.

(b) This subpart applies only to proceedings initiated after September 7, 1988. All other cases, hearings, or other proceedings pending or in progress at the time this subpart is effective are not affected by the rules in this subpart.

(c) Notwithstanding the provisions of paragraph (a) of this section, the United States district courts shall have exclusive jurisdiction of any civil penalty action initiated by the Administrator—

(1) Which involves an amount in controversy in excess of $50,000;

(2) Which is an *in rem* action or in which an *in rem* action based on the same violation has been brought;

(3) Regarding which an aircraft subject to lien has been seized by the United States; and

(4) In which a suit for injunctive relief based on the violation giving rise to the civil penalty has also been brought.

§ 13.202 Definitions.

"Administrative law judge" means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105.

"Agency attorney" means the Assistant Chief Counsel for Regulations and Enforcement, the Assistant Chief Counsel for a region or center, or an attorney designated to prosecute a case. An agency attorney shall not include any attorney who advises the FAA decisionmaker regarding an initial decision or any appeal to the FAA decisionmaker or who is supervised by a person who provides advice to the FAA decisionmaker in a case.

"Attorney" means a person licensed by a state, the District of Columbia, or a territory of the United States to practice law or appear before the courts of that state or territory.

"Complaint" means an order of civil penalty issued pursuant to 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.

"FAA decisionmaker" means the Administrator of the Federal Aviation Administration, acting in the capacity of the decisionmaker on appeal, or any person to whom the Administrator has delegated the Administrator's decisionmaking authority in a civil penalty action. As used in this subpart, the FAA decisionmaker is the official authorized to issue a final decision and order of the Administrator in a civil penalty action.

"Mail" includes U.S. certified mail, U.S. registered mail, or use of an overnight express courier service.

"Order assessing civil penalty" means an order that contains a finding or determination of violation arising under the Federal Aviation Act, 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, and directs a person to pay a civil penalty for the violation.

"Order of civil penalty" means an order issued after a person requests a hearing pursuant to § 13.16(e)(3) or 13.16(g)(3) of this part and which is filed with the docket clerk as the complaint in the proceedings.

"Party" means the agency attorney or the respondent named in an order of civil penalty.

"Personal delivery" includes hand-delivery or use of a contract or express messenger service. "Personal delivery" does not include use of government interoffice mail service.

"Pleading" means a complaint, an answer, and any amendment of these documents permitted under this subpart.

"Properly addressed" means a document that shows an address contained in FAA records, a residential, business, or other address submitted by a person on any document provided by this subpart, or any other address shown by other reasonable and available means.

"Respondent" means a person to whom a civil penalty is directed and who has received an order of civil penalty.

§ 13.203 Separation of functions.

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

(b) Any agency attorney engaged in the performance of prosecutorial functions in a case shall not, in that case or a factually related case, participate in, or advise the FAA decisionmaker regarding, an initial decision or any appeal to the FAA decisionmaker under this subpart, except as a witness or counsel in public proceedings. The prohibition described in this paragraph shall begin at the time that a notice of proposed civil penalty is issued.

(c) The Chief Counsel shall not perform prosecutorial functions in a case and shall not supervise the agency attorney in the performance of prosecutorial functions in a case. The prohibitions described in this paragraph shall begin at the time that the notice of proposed civil penalty is issued.

(d) The Chief Counsel or the delegate of the Chief Counsel, other than individuals described in paragraph (a) of this section, shall advise the FAA decisionmaker regarding an initial decision or any appeal to the FAA decisionmaker under this subpart.

§ 13.204 Appearances and rights of parties.

(a) Any party may appear and be heard in person.

(b) Any party may be accompanied, represented, or advised by an attorney or representative designated by the party and may be examined by that attorney or representative in any proceeding governed by this subpart. An attorney or representative who represents a party may file a notice of appearance in the action, in the manner provided in § 13.210 of this subpart, and shall serve a copy of the notice of appearance on each party, in the manner provided in § 13.211 of this subpart, before participating in any proceeding governed by this subpart. The attorney or representative shall

include the name, address, and telephone number of the attorney or representative in the notice of appearance.

(c) Any person may request a copy of a document upon payment of reasonable costs. A person may keep an original document, data, or evidence, with the consent of the administrative law judge, by substituting a legible copy of the document for the record.

§ 13.205 Administrative law judges.

(a) *Powers of an administrative law judge.* In accordance with the rules of this subpart, an administrative law judge may—

(1) Give notice of, and hold, prehearing conferences and hearings;

(2) Administer oaths and affirmations;

(3) Issue subpoenas authorized by law and issue notices of deposition requested by the parties;

(4) Rule on offers of proof;

(5) Receive relevant and material evidence;

(6) Regulate the course of the hearing in accordance with the rules of this subpart;

(7) Hold conferences to settle or to simplify the issues by consent of the parties;

(8) Dispose of procedural motions and requests; and

(9) Make findings of fact and conclusions of law, and issue an initial decision.

(b) *Limitations on the power of the administrative law judge.* The administrative law judge shall not issue an order of contempt, award costs to any party, or impose any sanction not specified in this subpart. If the administrative law judge imposes any sanction not specified in this subpart, a party may file an interlocutory appeal of right with the FAA decisionmaker pursuant to § 13.219(c)(4) of this subpart. This section does not preclude an administrative law judge from issuing an order that bars a person from a specific proceeding based on a finding of obstreperous or disruptive behavior in that specific proceeding.

(c) *Disqualification.* The administrative law judge may disqualify himself or herself at any time. A party may file a motion, pursuant to § 13.218(f)(6), requesting that an administrative law judge be disqualified from the proceedings.

§ 13.206 Intervention.

(a) Any person who has a statutory right to participate in the proceedings shall be allowed to intervene in the proceedings by the administrative law judge.

(b) In all other cases, the administrative law judge shall not allow any person to intervene in any proceeding governed by this subpart.

§ 13.207 Certification of documents.

(a) *Signature required.* The attorney of record, the party, or the party's representative shall sign each document tendered for filing with the hearing docket clerk, the administrative law judge, the FAA decisionmaker on appeal, or served on each party.

(b) *Effect of signing a document.* By signing a document, the attorney of record, the party, or the party's representative certifies that the attorney or party has read the document and, based on reasonable inquiry and to the best of the attorney or party's knowledge, information, and belief, the document is—

(1) Consistent with these rules;

(2) Warranted by existing law or that a good faith argument exists for extension, modification, or reversal of existing law; and

(3) Not unreasonable or unduly burdensome or expensive, not made to harass any person, not made to cause unnecessary delay, not made to cause needless increase in the cost of the proceedings, or for any other improper purpose.

(c) *Sanctions.* If the attorney of record, the party, or the party's representative signs a document in violation of this section, the administrative law judge or the FAA decisionmaker shall—

(1) Strike the pleading signed in violation of this section;

(2) Strike the request for discovery or the discovery response signed in violation of this section and preclude further discovery by the party;

(3) Deny the motion or request signed in violation of this section;

(4) Exclude the document signed in violation of this section from the record;

(5) Dismiss the interlocutory appeal and preclude further appeal on that issue by the party who filed the appeal until an initial decision has been entered on the record; or

(6) Dismiss the appeal of the administrative law judge's initial decision to the FAA decisionmaker.

§ 13.208 Complaint.

(a) In accordance with §§ 13.16(e)(3) and 13.16(g)(3), an order of civil penalty shall serve as the complaint. The agency attorney shall serve the original order of civil penalty on the person requesting the hearing.

(b) The agency attorney shall file the complaint, attaching a copy of the request for a hearing, and shall suggest a location for the hearing, with the hearing docket clerk not later than 20 days after receipt of a person's request for hearing.

(c) If the agency attorney and the person requesting the hearing do not agree on the location for the hearing, the hearing docket clerk shall assign a hearing location near the place where the incident occurred.

§ 13.209 Answer.

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

(b) *Filing and address.* A person filing an answer shall personally deliver or mail the answer for filing with the hearing docket clerk to the Hearing Docket, Federal Aviation Administration, 800 Independence Avenue SW., Room 914E, Washington, DC 20591, Attn: Hearing Docket Clerk.

(c) *Contents.* A person filing an answer shall include a brief statement of the relief requested by the person in the answer. The person shall include specifically any affirmative defense in the answer that the person intends to assert at the hearing.

(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 order of civil penalty. A general denial of the order of civil penalty is deemed a failure to file an answer. Any statement or allegation contained in the order of civil penalty that is not specifically denied in the answer is deemed an admission of the truth of that allegation.

(e) *Service.* A person filing an answer shall comply with the service requirements of § 13.211 of this subpart.

(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 order of civil penalty and an order assessing civil penalty shall be issued.

§ 13.210 Filing of documents.

(a) *Address and method of filing.* A person tendering a document for filing shall personally deliver or mail the signed original and one copy of each document to the Hearing Docket, Federal Aviation Administration, 800 Independence Avenue SW., Room 914E,

Washington, DC 20591, Attn: Hearing Docket Clerk. After an administrative law judge has been assigned to the proceedings, a person shall personally deliver or mail the signed original of each document to the hearing docket clerk and shall serve a copy of each document on each party and the administrative law judge.

(b) *Date of filing.* A document shall be considered to be filed on the date of personal delivery; or if mailed, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark.

(c) *Form.* Each document shall be typewritten or legibly handwritten.

(d) *Contents.* Unless otherwise specified in this subpart, each document must contain a short, plain statement of the facts on which the person's case rests and a brief statement of the action requested in the document.

§ 13.211 Service of documents.

(a) *General.* A person shall serve a copy of any document filed with the Hearing Docket on the administrative law judge and on each party at the time of filing.

(b) *Type of service.* A person may serve documents by personal delivery or by mail.

(c) *Certificate of service.* A person may attach a certificate of service to a document tendered for filing with the hearing docket clerk. A certificate of service shall consist of a statement, dated and signed by the person filing the document, that the document was personally delivered or mailed to each party on a specific date.

(d) *Date of service.* The date of service shall be the date of personal delivery; or if mailed, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark.

(e) *Additional time after service by mail.* Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, or on a date certain after service by mail, 5 days shall be added to the prescribed period.

(f) *Service by the administrative law judge.* The administrative law judge shall serve a copy of each document including, but not limited to, notices of prehearing conferences and hearings, rulings on motions, decisions, and orders, upon each party to the proceedings by personal delivery or by mail.

(g) *Valid service.* A document that was properly addressed, was sent in accordance with this subpart, and that was returned, that was not claimed, or that was refused, is deemed to have been served in accordance with this subpart. The service shall be considered valid as of the date and the time that the document was deposited with a contract or express messenger, the document was mailed, or personal delivery of the document was refused.

(h) *Presumption of service.* There shall be a presumption of service where a party or a person, who customarily receives mail, or receives it in the ordinary course of business, at either the person's residence or the person's principal place of business, acknowledges receipt of the document.

§ 13.212 Computation of time.

(a) This section applies to any period of time prescribed or allowed by this subpart, by notice or order of the administrative law judge, or by any applicable statute.

(b) The date of an act, event, or default, after which a designated time period begins to run, is not included in a computation of time under this subpart.

(c) The last day of a time period is included in a computation of time unless it is a Saturday, Sunday, or a legal holiday. If the last day of the time period is a Saturday, Sunday, or legal holiday, the time period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

§ 13.213 Extension of time.

(a) *Oral requests.* The parties may reasonably agree to extend the time for filing a document under this subpart. If the parties agree, the administrative law judge shall grant one extension of time to each party. The party seeking the extension of time shall submit a draft order to the administrative law judge to be signed by the administrative law judge and filed with the hearing docket clerk. The administrative law judge may grant additional oral requests for an extension of time where the parties agree to the extension.

(b) *Written motion.* A party shall file a written motion for an extension of time with the administrative law judge not later than 7 days before the document is due unless good cause for the late filing is shown. A party filing a written motion for an extension of time shall serve a copy of the motion on each party. The administrative law judge may grant the extension of time if good cause for the extension is shown.

(c) *Failure to rule.* If the administrative law judge fails to rule on a written motion for an extension of time by the date the document was due, the motion for an extension of time is deemed granted for no more than 20 days after the original date the document was to be filed.

§ 13.214 Amendment of pleadings.

(a) *Filing and service.* A party shall file the amendment with the administrative law judge and shall serve a copy of the amendment on all parties to the proceeding.

(b) *Time.* A party shall file an amendment to a complaint or an answer within the following:

(1) Not later than 15 days before the scheduled date of a hearing, a party may amend a complaint or an answer without the consent of the administrative law judge.

(2) Less than 15 days before the scheduled date of a hearing, the administrative law judge may allow amendment of a complaint or an answer only for good cause shown in a motion to amend.

(c) *Responses.* The administrative law judge shall allow a reasonable time, but not more than 20 days from the date of filing, for other parties to respond if an amendment to a complaint, answer, or other pleading has been filed with the administrative law judge.

§ 13.215 Withdrawal of a complaint or request for a hearing.

At any time before or during a hearing, the agency attorney may withdraw a complaint or a party may withdraw a request for a hearing without the consent of the administrative law judge. If the agency attorney withdraws the complaint or a party withdraws the request for a hearing and the answer, the administrative law judge shall dismiss the proceedings in this subpart with prejudice.

§ 13.216 Waivers.

Waivers of any rights provided by statute or regulation shall be in writing or by stipulation made at a hearing and entered into the record. The parties shall set forth the precise terms of the waiver and any conditions.

§ 13.217 Joint procedural or discovery schedule.

(a) *General.* The parties may agree to submit a schedule for filing all prehearing motions, a schedule for conducting discovery in the proceedings, or a schedule that will govern all prehearing motions and discovery in the proceedings.

(b) *Form and content of schedule.* If the parties agree to a joint procedural or discovery schedule, one of the parties

shall file the joint schedule with the administrative law judge, setting forth the dates to which the parties have agreed, and shall serve a copy of the joint schedule on each party.

(1) The joint schedule may include, but need not be limited to, requests for discovery, any objections to discovery requests, responses to discovery requests to which there are no objections, submission of prehearing motions, responses to prehearing motions, exchange of exhibits to be introduced at the hearing, and a list of witnesses that may be called at the hearing.

(2) Each party shall sign the original joint schedule to be filed with the administrative law judge.

(c) *Time.* The parties may agree to submit all prehearing motions and responses and may agree to close discovery in the proceedings under the joint schedule within a reasonable time before the date of the hearing, but not later than 15 days before the hearing.

(d) *Order establishing joint schedule.* The administrative law judge shall approve the joint schedule filed by the parties. One party shall submit a draft order establishing a joint schedule to the administrative law judge to be signed by the administrative law judge and filed with the hearing docket clerk.

(e) *Disputes.* The administrative law judge shall resolve disputes regarding discovery or disputes regarding compliance with the joint schedule as soon as possible so that the parties may continue to comply with the joint schedule.

(f) *Sanctions for failure to comply with joint schedule.* If a party fails to comply with the administrative law judge's order establishing a joint schedule, the administrative law judge may direct that party to comply with a motion or discovery request or, limited to the extent of the party's failure to comply with a motion or discovery request, the administrative law judge may—

(1) Strike that portion of a party's pleadings;

(2) Preclude prehearing or discovery motions by that party;

(3) Preclude admission of that portion of a party's evidence at the hearing; or

(4) Preclude that portion of the testimony of that party's witnesses at the hearing.

§ 13.218 Motions.

(a) *General.* A party applying for an order or ruling not specifically provided in this subpart shall do so by motion. A party shall comply with the requirements of this section when filing a motion with the administrative law judge. A party shall serve a copy of each motion on each party.

(b) *Form and contents.* A party shall state the relief sought by the motion and the particular grounds supporting that relief. If a party has evidence in support of a motion, the party shall attach any supporting evidence, including affidavits, to the motion.

(c) *Filing of motions.* A motion made prior to the hearing must be in writing. Unless otherwise agreed by the parties or for good cause shown, a party shall file any prehearing motion, and shall serve a copy on each party, not later than 30 days before the hearing. Motions introduced during a hearing may be made orally on the record unless the administrative law judge directs otherwise.

(d) *Answers to motions.* Any party may file an answer, with affidavits or other evidence in support of the answer, not later than 10 days after service of a written motion on that party. When a motion is made during a hearing, the answer may be made at the hearing on the record, orally or in writing, within a reasonable time determined by the administrative law judge.

(e) *Rulings on motions.* The administrative law judge shall rule on all motions as follows:

(1) *Discovery motions.* The administrative law judge shall resolve all pending discovery motions not later than 10 days before the hearing.

(2) *Prehearing motions.* The administrative law judge shall resolve all pending prehearing motions not later than 7 days before the hearing. If the administrative law judge issues a ruling or order orally, the administrative law judge shall serve a written copy of the ruling or order, within 3 days, on each party. In all other cases, the administrative law judge shall issue rulings and orders in writing and shall serve a copy of the ruling or order on each party.

(3) *Motions made during the hearing.* The administrative law judge may issue rulings and orders on motions made during the hearing orally. Oral rulings or orders on motions must be made on the record.

(f) *Specific motions.* A party may file the following motions with the administrative law judge:

(1) *Motion to dismiss for insufficiency.* A party may file a motion to dismiss the order of civil penalty for insufficiency instead of an answer. If the administrative law judge denies the motion to dismiss the order of civil penalty for insufficiency, the party who received the order of civil penalty shall file an answer not later than 10 days of service of the administrative law judge's denial of the motion. A motion to dismiss the order of civil penalty for insufficiency must show that the order of civil penalty 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 an order of civil penalty instead of an answer, specifying the grounds for dismissal.

(i) If a motion to dismiss is not granted, 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 administrative law judge's ruling or order on the motion to dismiss.

(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 order of civil penalty 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 an order of civil penalty or response to any pleading and shall submit the details that the party believes would would make the allegation or response definite and certain.

(i) *Order of civil penalty.* A party may file a motion requesting a more definite statement of the allegations contained in the order of civil penalty 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 order of civil penalty 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 order of civil penalty. 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 order of civil penalty are deemed admitted.

(4) *Motion to strike.* Any party may make a motion to strike any insufficient allegation or defense, or any redundant, immaterial, or irrelevant matter in a pleading. A party shall file a motion to strike with the administrative law judge and shall serve a copy on each party before a response is required under this subpart or, if a response is not required, not later than 10 days after service of the pleading.

(5) *Motion for decision.* A party may make a motion for decision, regarding all or any part of the proceedings, at any time before the administrative law judge has issued an initial decision in the proceedings. The administrative law judge shall grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, matters that the administrative law judge has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law. The party making the motion for decision has the burden of showing that there is no genuine issue of material fact disputed by the parties.

(6) *Motion for disqualification.* A party may file a motion for disqualification with the administrative law judge and shall serve a copy on each party. A party may file the motion at any time after the administrative law judge has been assigned to the proceedings but shall make the motion before the administrative law judge files an initial decision in the proceedings.

(i) *Motion and supporting affidavit.* A party shall state the grounds for disqualification, including, but not limited to, personal bias, pecuniary interest, or other factors showing disqualification, in the motion for disqualification. A party shall submit an affidavit with the motion for disqualification that sets forth, in detail, the matters alleged to constitute grounds for disqualification.

(ii) *Answer.* A party shall respond to the motion for disqualification not later than 5 days after service of the motion for disqualification.

(iii) *Decision on motion for disqualification.* The administrative law judge shall render a decision on the motion for disqualification not later than 15 days after the motion has been filed. If the administrative law judge finds that the motion for disqualification and supporting affidavit show a basis for disqualification, the administrative law judge shall withdraw from the proceedings immediately. If the administrative law judge finds that disqualification is not warranted, the administrative law judge shall deny the motion and state the grounds for the denial on the record. If the administrative law judge fails to rule on a party's motion for disqualification within 15 days after the motion has been filed, the motion is deemed granted.

(iv) *Appeal.* A party may appeal the administrative law judge's denial of the motion for disqualification in accordance with § 13.219 of this subpart.

§ 13.219 Interlocutory appeals.

(a) *General.* Unless otherwise provided in this subpart, a party may not appeal a ruling or decision of the administrative law judge to the FAA decisionmaker until the initial decision has been entered on the record. A decision or order of the FAA decisionmaker on the interlocutory appeal does not constitute a final order of the Administrator for the purposes of judicial appellate review under section 1006 of the Federal Aviation Act of 1958, as amended.

(b) *Interlocutory appeal for cause.* If a party files a written request for an interlocutory appeal for cause with the administrative law judge, or orally requests an interlocutory appeal for cause, the proceedings are stayed until the administrative law judge issues a decision on the request. If the administrative law judge grants the request, the proceedings are stayed until the FAA decisionmaker issues a decision on the interlocutory appeal. The administrative law judge shall grant an interlocutory appeal for cause if a party shows that delay of the appeal would be detrimental to the public interest or would result in undue prejudice to any party.

(c) *Interlocutory appeals of right.* If a party notifies the administrative law judge of an interlocutory appeal of right, the proceedings are stayed until the FAA decisionmaker issues a decision on the interlocutory appeal. A party may file an interlocutory appeal with the FAA decisionmaker, without the consent of the administrative law judge, before an initial decision has been entered in the case of—

(1) A ruling or order by the administrative law judge barring a person from the proceedings;

(2) Failure of the administrative law judge to dismiss the proceedings in accordance with § 13.215 of this subpart;

(3) A ruling or order by the administrative law judge in violation of § 13.205(b) of this subpart; and

(4) A ruling by the administrative law judge granting, in part, a respondent's motion to dismiss an order of civil penalty pursuant to § 13.218(f)(2)(B).

(d) *Procedure.* A party shall file a notice of interlocutory appeal, with supporting documents, with the FAA decisionmaker and the hearing docket clerk, and shall serve a copy of the notice and supporting documents on each party and the administrative law judge, not later than 3 days after the administrative law judge's decision forming the basis of the appeal. A party shall file a reply brief, if any, with the FAA decisionmaker and serve a copy of the reply brief on each party, not later than 10 days after service of the appeal brief. If the FAA decisionmaker does not issue a decision on the interlocutory appeal or does not seek additional information within 10 days of the filing of the appeal, the stay of the proceeding is dissolved. The FAA decisionmaker shall render a decision on the interlocutory appeal, on the record and as a part of the decision in the proceedings, within a reasonable time after receipt of the interlocutory appeal.

(e) The FAA decisionmaker may reject frivolous, repetitive, or dilatory appeals, and may issue an order precluding one or more parties from making further interlocutory appeals in a proceeding in which there have been frivolous, repetitive, or dilatory interlocutory appeals.

§ 13.220 Discovery.

(a) *Initiation of discovery.* Any party may initiate discovery described in this section, without the consent or approval of the administrative law judge, at any time after a complaint has been filed in the proceedings.

(b) *Methods of discovery.* The following methods of discovery are permitted under this section: Depositions on oral examination or written questions of any person; written interrogatories directed to a party; requests for production of documents or tangible items to any person; and requests for admission by a party. A

party is not required to file written interrogatories and responses, requests for production of documents or tangible items and responses, and requests for admission and responses with the administrative law judge or the hearing docket clerk. In the event of a discovery dispute, a party shall attach a copy of these documents in support of a motion made under this section.

(c) *Service on the agency.* A party shall serve each discovery request directed to the agency or an agency employee on the agency attorney of record.

(d) *Time for responses to discovery requests.* Unless otherwise directed by this subpart or agreed by the parties, a party shall respond to a request for discovery, including filing objections to a request for discovery, not later than 30 days of service of the request.

(e) *Scope of discovery.* Subject to the limits on discovery set forth paragraph (f) of this section, a party may discover any matter that is not privileged and that is relevant to the subject matter of the proceeding. A party may discover information that relates to the claim or defense of any party including the existence, description, nature, custody, condition, and location of any document or other tangible item and the identity and location of any person having knowledge of discoverable matter. A party may discover facts known, or opinions held, by an expert who any other party expects to call to testify at the hearing. A party has no ground to object to a discovery request on the basis that the information sought would not be admissible at the hearing if the information sought during discovery is reasonably calculated to lead to the discovery of admissible evidence.

(f) *Limiting discovery.* The administrative law judge shall limit the frequency and extent of discovery permitted by this section if a party shows that—

(1) The information requested is cumulative or repetitious;

(2) The information requested can be obtained from another less burdensome and more convenient source;

(3) The party requesting the information has had ample opportunity to obtain the information through other discovery methods permitted under this section;

(4) The method or scope of discovery requested by the party is unduly burdensome or expensive.

(g) *Confidential orders.* A party or person who has received a discovery request for information that is related to a trade secret, confidential or sensitive material, competitive or commercial information, proprietary data, or information on research and development, may file a motion for a confidential order with the administrative law judge and shall serve a copy of the motion for a confidential order on each party.

(1) The party or person making the motion must show that the confidential order is necessary to protect the information from disclosure to the public.

(2) If the administrative law judge determines that the requested material is not necessary to decide the case, the administrative law judge shall preclude any inquiry into the matter by any party.

(3) If the administrative law judge determines that the requested material may be disclosed during discovery, the administrative law judge may order that the material may be discovered and disclosed under limited conditions or may be used only under certain terms and conditions.

(4) If the administrative law judge determines that the requested material is necessary to decide the case and that a confidential order is warranted, the administrative law judge shall provide—

(i) An opportunity for review of the document by the parties off the record;

(ii) Procedures for excluding the information from the record; and

(iii) Order that the parties shall not disclose the information in any manner and the parties shall not use the information in any other proceeding.

(h) *Protective orders.* A party or a person who has received a request for discovery may file a motion for protective order with the administrative law judge and shall serve a copy of the motion for protective order on each party. The party or person making the motion must show that the protective order is necessary to protect the party or the person from annoyance, embarrassment, oppression, or undue burden or expense. As part of the protective order, the administrative law judge may—

(1) Deny the discovery request;

(2) Order that discovery be conducted only on specified terms and conditions, including a designation of the time or place for discovery or a determination of the method of discovery; or

(3) Limit the scope of discovery or preclude any inquiry into certain matters during discovery.

(i) *Duty to supplement or amend responses.* A party who has responded to a discovery request has a duty to supplement or amend the response, as soon as the information is known, as follows:

(1) A party shall supplement or amend any response to a question requesting the identity and location of any person having knowledge of discoverable matters.

(2) A party shall supplement or amend any response to a question requesting the identity of each person who will be called to testify at the hearing as an expert witness' the subject matter and substance of that witness, testimony.

(3) A party shall supplement or amend any response that was incorrect when made or any response that was correct when made but is no longer correct, accurate, or complete.

(j) *Depositions.* The following rules apply to depositions taken pursuant to this section:

(1) *Form.* A deposition shall be taken on the record and reduced to writing. The person being deposed shall sign the deposition unless the parties agree to waive the requirement of a signature.

(2) *Administration of oaths.* Within the United States, or a territory or possession subject to the jurisdiction of the United States, a party shall take a deposition before a person authorized to administer oaths by the laws of the United States or authorized by the law of the place where the examination is held. In foreign countries, a party shall take a deposition in any manner allowed by the *Federal Rules of Civil Procedure.*

(3) *Notice of deposition.* A party shall serve a notice of deposition, stating the time and place of the deposition and the name and address of each person to be examined, on the person to be deposed, on the administrative law judge, on the hearing docket clerk, and on each party not later than 7 days before the deposition. A party may serve a notice of deposition less than 7 days before the deposition only with consent of the administrative law judge. If a subpoena *duces tecum* is to be served on the person to be examined, the party shall attach a copy of the subpoena *duces tecum,* that describes the materials to be produced at the deposition, to the notice of deposition.

(4) *Use of depositions.* A party may use any part or all of a deposition at a hearing authorized under this subpart only upon a showing of good cause. The deposition may be used against any party who was present or represented at the deposition or who had reasonable notice of the deposition.

(k) *Interrogatories.* A party shall not serve more than 30 interrogatories to each other party. Each subpart of an interrogatory shall be counted as a separate interrogatory.

(1) A party shall answer each interrogatory separately and completely in writing and under oath. A party's attorney may sign the response to the

interrogatories if the attorney has verification of authority to sign from the party. If a party objects to an interrogatory, the party shall state the objection and the reasons for the objection.

(2) A party shall file a motion for leave to serve additional interrogatories on a party with the administrative law judge before serving additional interrogatories on a party. The administrative law judge shall grant the motion only if the party shows good cause for the party's failure to inquire about the information previously and that the information can not reasonably be obtained using less burdensome discovery methods or be obtained from other sources.

(l) *Requests for admission.* A party may serve a written request for admission of the truth of any matter within the scope of discovery under this section or the authenticity of any document described in the request. A party shall set forth each request for admission separately. A party shall serve copies of documents referenced in the request for admission unless the documents have been provided or are reasonably available for inspection and copying.

(1) *Time.* A party's failure to respond to a request for admission, in writing and signed by the attorney or the party, not later than 30 days after service of the request, is deemed an admission of the truth of the statement or statements contained in the request for admission. The administrative law judge may determine that a failure to respond to a request for admission is not deemed an admission of the truth if a party shows that the failure was due to circumstances beyond the control of the party or the party's attorney.

(2) *Response.* A party may object to a request for admission and shall state the reasons for objection. A party may specifically deny the truth of the matter or describe the reasons why the party is unable to truthfully deny or admit the matter. If a party is unable to deny or admit the truth of the matter, the party shall show that the party has made reasonable inquiry into the matter or that the information known to, or readily-obtainable by, the party is insufficient to enable the party to admit or deny the matter. A party may admit or deny any part of the request for admission. If the administrative law judge determines that a response does not comply with the requirements of this rule or that the response is insufficient, the matter is deemed admitted.

(3) *Effect of admission.* Any matter admitted or deemed admitted under this section is conclusively established for the purpose of the hearing and appeal. Any matter admitted or deemed admitted under this section that results in a finding of violation may be used by the Administrator in a subsequent enforcement proceeding.

(m) *Motion to compel discovery.* A party may make a motion to compel discovery if a person refuses to answer a question during a deposition, a party fails or refuses to answer an interrogatory, if a person gives an evasive or incomplete answer during a deposition or when responding to an interrogatory, or a party fails or refuses to produce documents or tangible items. During a deposition, the proponent of a question may complete the deposition or may adjourn the examination before making a motion to compel if a person refuses to answer.

(n) *Failure to comply with a discovery order or order to compel.* If a party fails to comply with a discovery order or an order to compel, the administrative law judge, limited to the extent of the party's failure to comply with the discovery order or motion to compel, may—

(1) Strike that portion of a party's pleadings;

(2) Preclude prehearing or discovery motions by that party;

(3) Preclude admission of that portion of a party's evidence at the hearing; or

(4) Preclude that portion of the testimony of that party's witnesses at the hearing.

§ 13.221 Notice of hearing.

(a) *Notice.* The administrative law judge shall give each party at least 60 days notice of the date and time of the hearing.

(b) *Date and time of the hearing.* The administrative law judge to whom the proceedings have been assigned shall set a reasonable date and time for the hearing. The administrative law judge shall consider the need for discovery and any joint procedural or discovery schedule submitted by the parties when determining the hearing date.

(c) *Location of the hearing.* After assignment of an administrative law judge to the proceedings, a party may file a motion to change the location of the hearing or the administrative law judge on his own motion may change the location of the hearing. The administrative law judge shall give 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.

(d) *Earlier hearing.* With the consent of the administrative law judge, the parties may agree to hold the hearing on an earlier date than the date specified in the notice of hearing.

§ 13.222 Evidence.

(a) *General.* A party is entitled to present the party's case or defense by oral, documentary, or demonstrative evidence, to submit rebuttal evidence, and to conduct any cross-examination that may be required for a full and true disclosure of the facts.

(b) *Admissibility.* A party may introduce any oral, documentary, or demonstrative evidence in support of the party's case or defense. The administrative law judge shall admit any oral, documentary, or demonstrative evidence introduced by a party but shall exclude irrelevant, immaterial, or unduly repetitious evidence.

(c) *Hearsay evidence.* Hearsay evidence is admissible in proceedings governed by this subpart. The fact that evidence submitted by a party is hearsay goes only to the weight of the evidence and does not affect its admissibility.

§ 13.223 Standard of proof.

The administrative law judge shall issue an initial decision or shall rule in a party's favor only if the decision or ruling is supported by, and in accordance with, the reliable, probative, and substantial evidence contained in the record. In order to prevail, the party with the burden of proof shall prove the party's case or defense by a preponderance of reliable, probative, and substantial evidence.

§ 13.224 Burden of proof.

(a) Except in the case of an affirmative defense, the burden of proof is on the agency.

(b) Except as otherwise provided by statute or rule, the proponent of a motion, request, or order has the burden of proof.

(c) A party who has asserted an affirmative defense has the burden of proving the affirmative defense.

§ 13.225 Offer of proof.

A party whose evidence has been excluded by a ruling of the administrative law judge may offer the evidence for the record on appeal.

§ 13.226 Public disclosure of evidence.

(a) The administrative law judge may order that any information contained in the record be withheld from public disclosure. Any person may object to disclosure of information in the record by filing a written motion to withhold specific information with the administrative law judge and serving a copy of the motion on each party. The

party shall state the specific grounds for nondisclosure in the motion.

(b) The administrative law judge shall grant the motion to withhold information in the record if, based on the motion and any response to the motion, the administrative law judge determines that disclosure would be detrimental to aviation safety, disclosure would not be in the public interest, or that the information is not otherwise required to be made available to the public.

§ 13.227 Testimony by agency employees.

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. 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.

§ 13.228 Subpoenas.

(a) *Request for subpoena.* A party may obtain a subpoena to compel the attendance of a witness at a deposition or hearing or to require the production of documents or tangible items from the hearing docket clerk. The hearing docket clerk shall deliver the subpoena, signed by the hearing docket clerk or an administrative law judge but otherwise in blank, to the party. The party shall complete the subpoena, stating the title of the action and the date and time for the witness' attendance or production of documents or items. The party who obtained the subpoena shall serve the subpoena on the witness.

(b) *Motion to quash or modify the subpoena.* Any person upon whom a subpoena has been served may file a motion to quash or modify the subpoena with the administrative law judge at or before the time specified in the subpoena for compliance. The applicant shall describe, in detail, the basis for the application to quash or modify the subpoena including, but not limited to, a statement that the testimony or the documents or tangible evidence is not relevant to the proceeding, that that subpoena is not reasonably tailored to the scope of the proceeding, or that the subpoena is unreasonable and oppressive. A motion to quash or modify the subpoena will stay the effect of the subpoena pending a decision by the administrative law judge on the motion.

(c) *Enforcement of subpoena.* Upon a showing that a person has failed or refused to comply with a subpoena, a party may apply to the local Federal district court to seek judicial enforcement of the subpoena in accordance with section 1004 of the Federal Aviation Act of 1958, as amended.

§ 13.229 Witness fees.

(a) *General.* Unless otherwise authorized by the administrative law judge, the party who applies for a subpoena to compel the attendance of a witness at a deposition or hearing, or the party at whose request a witness appears at a deposition or hearing, shall pay the witness fees described in this section.

(b) *Amount.* Except for an FAA employee who appears at the direction of the agency, a witness who appears at a disposition or hearing is entitled to the same fees and mileage expenses as are paid to a witness in a court of the United States in comparable circumstances.

§ 13.230 Record.

(a) *Exclusive record.* The transcript of all testimony in the hearing, all exhibits received into evidence, and all motions, applications, requests, and rulings shall constitute the exclusive record for decision of the proceedings and the basis for the issuance of any orders in the proceeding. Any proceedings regarding the disqualification of an administrative law judge shall be included in the record.

(b) *Examination and copying of record.* Any person may examine the record at the Hearing Docket, Federal Aviation Administration, 800 Independence Avenue SW., Room 914E, Washington, DC 20591. Any person may have a copy of the record after payment of reasonable costs to copy the record.

§ 13.231 Argument before the administrative law judge.

(a) *Arguments during the hearing.* During the hearing, the administrative law judge shall give the parties a reasonable opportunity to present oral arguments on the record supporting or opposing motions, objections, and rulings if the parties request an opportunity for argument. Only 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.

(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.* Only in a clearly complex or unusual case, the administrative law judge may request or the parties may agree to file written posthearing briefs, instead of final oral argument, before the administrative law judge issues an initial decision in the proceedings. If a party files a written posthearing brief, the party shall include proposed findings of fact and conclusions of law, exceptions to rulings of the administrative law judge, and supporting arguments for the findings, conclusions, or exceptions. The administrative law judge shall give the parties a reasonable opportunity, not more than 30 days after receipt of the transcript, to prepare and submit the briefs.

§ 13.232 Initial decision.

(a) *Contents.* The administrative law judge shall issue an initial decision at the conclusion of the hearing and may affirm, modify, or reverse the order of civil penalty. 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 reasonableness of any sanction contained in the order of civil penalty, 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 reduces the civil penalty contained in the order of civil penalty, the administrative law judge shall provide a basis supporting the reduction in civil penalty. 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 the 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.* Only in a clearly complex or unusual case, 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. The administrative law judge shall serve a copy of the written initial decision on each party.

(d) *Order assessing civil penalty.* If the administrative law judge affirms or modifies the order of civil penalty, the order shall become an order assessing civil penalty.

§ 13.233 Appeals from initial decisions.

(a) *Notice of appeal.* A party may appeal the initial decision, and any decision not previously appealed pursuant to § 13.219, by filing a notice of appeal with the FAA decisionmaker. A party shall file the notice of appeal with the Federal Aviation Administration, 800 Independence Avenue SW., Room 914E, Washington, DC 20591, Attn: Appellate Docket Clerk. A party shall file the notice of appeal not later than 10 days after entry of the oral initial decision on the record or service of the written initial decision on the parties and shall serve a copy of the notice of appeal on each party.

(b) *Issues on appeal.* A party may appeal only the following issues:

(1) Whether each filing of fact is supported by a preponderance of reliable, probative, and substantial evidence;

(2) Whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and

(3) Whether the administrative law judge committed any prejudicial errors during the hearing that support the appeal.

(c) *Perfecting an appeal.* Unless otherwise agreed by the parties, a party shall perfect an appeal, not later than 50 days after entry of the oral initial decision on the record or service of the written initial decision on the party, by filing an appeal brief with the FAA decisionmaker.

(1) *Extension of time by agreement of the parties.* The parties may agree to extend the time for perfecting the appeal with the consent of the FAA decisionmaker. If the FAA decisionmaker grants an extension of time to perfect the appeal, the appellate docket clerk shall serve a letter confirming the extension of time on each party.

(2) *Written motion for extension.* If the parties do not agree to an extension of time for perfecting an appeal, a party desiring an extension of time may file a written motion for an extension with the FAA decisionmaker and shall serve a copy of the motion on each party. The FAA decisionmaker may grant an extension if good cause for the extension is shown in the motion.

(d) *Appeal briefs.* A party shall file the appeal brief with the FAA decisionmaker and shall serve a copy of the appeal brief on each party.

(1) A party shall set forth, in detail, the party's specific objections to the initial decision or rulings in the appeal brief. A party also shall set forth, in detail, the basis for the appeal, the reasons supporting the appeal, and the relief requested in the appeal. If the party relies on evidence contained in the record for the appeal, the party shall specifically refer to the pertinent evidence contained in the transcript in the appeal brief.

(2) The FAA decisionmaker may dismiss an appeal, on the FAA decisionmaker's own initiative or upon motion of any other party, where a party has filed a notice of appeal but fails to perfect the appeal by timely filing of an appeal brief with the FAA decisionmaker.

(e) *Reply brief.* Unless otherwise agreed by the parties, any party may file a reply brief with the FAA decisionmaker not later than 35 days after the appeal brief has been served on that party. The party filing the reply brief shall serve a copy of the reply brief on each party. If the party relies on evidence contained in the record for the reply, the party shall specifically refer to the pertinent evidence contained in the transcript in the reply brief.

(1) *Extension of time by agreement of the parties.* The parties may agree to extend the time for filing a reply brief with the consent of the FAA decisionmaker. If the FAA decisionmaker grants an extension of time to file the reply brief, the appellate docket clerk shall serve a letter confirming the extension of time on each party.

(2) *Written motion for extension.* If the parties do not agree to an extension of time for filing a reply brief, a party desiring an extension of time may file a written motion for an extension with the FAA decisionmaker and shall serve a copy of the motion on each party. The FAA decisionmaker may grant an extension if good cause for the extension is shown in the motion.

(f) *Other briefs.* The FAA decisionmaker may allow any person to submit an *amicus curiae* brief in an appeal of an initial decision. A party may not file more than one appeal brief or reply brief. A party may petition the FAA decisionmaker, in writing, for leave to file an additional brief and shall serve a copy of the petition on each party. The party may not file the additional brief with the petition. The FAA decisionmaker may grant leave to file an additional brief if the party demonstrates good cause for allowing additional argument on the appeal. The FAA decisionmaker will allow a reasonable time for the party to file the additional brief.

(g) *Number of copies.* A party shall file the original appeal brief or the original reply brief, and 2 copies of the brief, with the FAA decisionmaker.

(h) *Oral argument.* The FAA decisionmaker has sole discretion to permit oral argument on the appeal. On the FAA decisionmaker's own initiative or upon written motion by any party, the FAA decisionmaker may find that oral argument will contribute substantially to the development of the issues on appeal and may grant the parties an opportunity for oral argument.

(i) *Waiver of objections on appeal.* If a party fails to object to any alleged error regarding the proceedings in an appeal or a reply brief, the party waives any objection to the alleged error. The FAA decisionmaker is not required to consider any objection in an appeal brief or any argument in the reply brief if a party's objection is based on evidence contained on the record and the party does not specifically refer to the pertinent evidence from the record in the brief.

(j) *FAA decisionmaker's decision on appeal.* The FAA decisionmaker will review the briefs on appeal and the oral argument, if any, to determine if the administrative law judge committed prejudicial error in the proceedings or that the order should be affirmed, modified, or reversed. The FAA decisionmaker may affirm, modify, or reverse the initial decision, make any necessary findings, or may remand the case for any proceedings that the FAA decisionmaker determines may be necessary.

(1) The FAA decisionmaker may raise any issue, on the FAA decisionmaker's own initiative, that is required for proper disposition of the proceedings. The FAA decisionmaker will give the parties a reasonable opportunity to submit arguments on the new issues before making a decision on appeal.

(2) The FAA decisionmaker will issue the final decision and order of the Administrator on appeal in writing and will serve a copy of the decision and order on each party.

(3) A final decision and order of the Administrator after appeal is precedent in any other civil penalty action. Any issue, finding or conclusion, order, ruling, or initial decision of an administrative law judge that has not been appealed to the FAA decisionmaker is not precedent in any other civil penalty action.

§ 13.234 Petitions to reconsider or modify a final decision and order of the FAA decisionmaker on appeal.

(a) *General.* Any party may petition the FAA decisionmaker to reconsider or modify a final decision and order issued by the FAA decisionmaker on appeal from an initial decision. A party shall file a petition to reconsider or modify with the FAA decisionmaker not later than 30 days after service of the FAA decisionmaker's final decision and order on appeal and shall serve a copy of the petition on each party. The FAA decisionmaker will not reconsider or modify an initial decision and order issued by an administrative law judge that has not been appealed by any party to the FAA descisionmaker.

(b) *Form and number of copies.* A party shall file a petition to reconsider or modify in writing with the FAA decisionmaker. The party shall file the original petition with the FAA decisionmaker and shall serve a copy of the petition on each party.

(c) *Contents.* A party shall state briefly and specifically the alleged errors in the final decision and order on appeal, the relief sought by the party, and the grounds that support the petition to reconsider or modify.

(1) If the petition is based, in whole or in part, on allegations regarding the consequences of the FAA decisionmaker's decision, the party shall describe these allegations and shall describe, and support, the basis for the allegations.

(2) If the petition is based, in whole or in part, on new material not previously raised in the proceedings, the party shall set forth the new material and include affidavits of prospective witnesses and authenticated documents that would be introduced in support of the new material. The party shall explain, in detail, why the new material was not discovered through due diligence prior to the hearing.

(d) *Repetitious and frivolous petitions.* The FAA decisionmaker will not consider repetitious or frivolous petitions. The FAA decisionmaker may summarily dismiss repetitious or frivolous petitions to reconsider or modify.

(e) *Reply petitions.* Any other party may reply to a petition to reconsider or modify, not later than 10 days after service of the petition on that party, by filing a reply with the FAA decisionmaker. A party shall serve a copy of the reply on each party.

(f) *Effect of filing petition.* Unless otherwise ordered by the FAA decisionmaker, filing of a petition pursuant to this section will not stay or delay the effective date of the FAA decisionmaker's final decision and order on appeal and shall not toll the time allowed for judicial review.

(g) *FAA decisionmaker's decision on petition.* The FAA decisionmaker has sole discretion to grant or deny a petition to reconsider or modify. The FAA decisionmaker will grant or deny a petition to reconsider or modify within a reasonable time after receipt of the petition or receipt of the reply petition, if any. The FAA decisionmaker may affirm, modify, or reverse the final decision and order on appeal, or may remand the case for any proceedings that the FAA decisionmaker determines may be necessary.

§ 13.235 Judicial review of final decision and order.

A person may seek judicial review of a final decision and order of the Administrator as provided in § 1006 of the Federal Aviation Act of 1958, as amended. A party seeking judicial review of a final decision and order shall file a petition for review not later than 60 days after the final decision and order has been served on the party.

Issued in Washington, DC, on August 31, 1988.

T. Allan McArtor,

Administrator.

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