The FAA's Civil Penalty Assessment Demonstration Program - An Enforcement Experiment Gone Astray

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THE FAA'S CIVIL PENALTY ASSESSMENT DEMONSTRATION PROGRAM — AN ENFORCEMENT EXPERIMENT GONE ASTRAY?

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I. INTRODUCTION

IN 1987, Congress created the Civil Penalty Assessment Demonstration Program1 to permit the Federal Aviation

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1 49 U.S.C. app. § 1475 (Supp. V 1987). Section 1475 provides as follows:
(a) The Administrator [of the Federal Aviation Administration (FAA)], or his delegate, may assess a civil penalty for a violation arising under this chapter or a rule, regulation, or order issued thereunder, upon written notice and finding of violation by the Administrator. (b) In the case of a civil penalty assessed by the Administrator in accordance with this section, the issue of liability or amount of civil penalty shall not be reexamined in any subsequent suit for collection of such civil penalty. (c) Notwithstanding subsection (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. (d)(1) A civil penalty may be assessed under this section only after notice and opportunity for a hearing on the record in accordance with section 554 of title 5. (2) This section only applies to civil penalties initiated by the Administrator after December 30, 1987. (3) The maximum amount of a civil penalty which may be assessed under this section in any case may not exceed $50,000. (4) The provisions of this section shall only be in effect for the 2-year period beginning on December 30, 1987.

Id. (subheadings omitted).
Administration (FAA) to assess certain civil penalties for violations of the Federal Aviation Act of 1958 or its related rules. The FAA may assess civil penalties after giving written notice of its action, an opportunity for a hearing on the record, and a finding of violation by the Administrator of the FAA (Administrator). Although

3 See Aeronautics and Space, 14 C.F.R. §§ 1-1265 (1989) (FAA and Department of Transportation aviation regulations).
4 49 U.S.C. app. § 1475(d)(1) (Supp. V 1987). The FAA must afford notice and opportunity for a hearing in accordance with § 554 of the Administrative Procedure Act (APA). Id.; see supra note 1 for the text of § 1475(d)(1); see also Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1988) (portions of the APA are also included in other scattered sections of 5 U.S.C.). Section 554 of the APA provides for notice and a hearing on the record as follows:
   (a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . . .
   (b) Persons entitled to notice of an agency hearing shall be timely informed of — (1) the time, place, and nature of the hearings; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading.
6 49 U.S.C. app. § 1475(c) (Supp. V 1987). Congress explicitly retained exclusive jurisdiction in the United States district courts over any civil penalty action initiated by the Administrator involving a 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 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. Id.; see supra note 1 for the text of § 1475(c). For the regulatory equivalent of § 1475, see 14 C.F.R. § 13.16 (1989). Section 13.16 provides for notice, informal procedures, hearings, and appeals. 14 C.F.R. § 13.16 (1989).

Previously, the FAA had to refer most violations to the United States Attorney for prosecution in a federal district court, which was a complex and lengthy process. The United States Attorney was not able to pursue many cases due to higher priorities. Federal Aviation Admin., Dep't of Transp., Report to Congress, Report on the $10,000 Maximum Civil Penalty and the Civil Penalty Assessment Demonstration Program 15 (1989) [hereinafter Report to Congress] (many FAA documents and publications are available at federal government depositories; to obtain copies of FAA publications, request the free pamphlet titled "Guide to Federal Aviation Administrative Publication" from the U.S. Department of Transportation, M-443.2, Washington D.C. 20590 and request ten or fewer copies of FAA-APA-PG-10; outdated FAA Orders may be ordered from the FAA pursuant to the Freedom of Information Act, 49 C.F.R. pt. 7, app. C (1988)). Out of 1,223 cases referred to the United States Attorney between September 7,
Congress passed this legislation out of a concern about air carrier maintenance, the FAA's enforcement efforts under the new program have centered on violations of 49 U.S.C. app. § 1471(d), which prohibits carrying handguns aboard air carriers. In addition, the FAA adopted a pol-

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It is the Congress' responsibility to ensure that the Federal Aviation Administration has the tools that it needs to prosecute commercial airlines and the general aviation community for violating its maintenance and other safety rules. We as passengers do not see the myriad of hoses, switches, other equipment which must work perfectly for the planes to get off the ground, to perform flawlessly in flight, and then to land safely. This amendment provides an incentive for airlines to ensure that these systems are maintained at the highest of standards.

Id.; see infra notes 14-19 and accompanying text for further discussion of the legislative history of the program.

Except for law enforcement officers of any municipal or State government or officers or employees of the Federal Government, who are authorized or required within their official capacities to carry arms, or other persons who may be so authorized under regulations issued by the Administrator, whoever while aboard, or while attempting to board, any aircraft in, or intended for operation in, air transportation or intrastate air transportation, has on or about his person or his property a concealed deadly or dangerous weapon, which is, or would be, accessible to such person in flight, shall be subject to a civil penalty of not more than $10,000 which shall be recoverable in a civil action brought in the name of the United States.

Id.; see also infra note 83 and accompanying text.

Violations of § 1471(d) may also be criminal violations under 49 U.S.C. app. § 1472(l), which specifies a maximum penalty of a $10,000 fine and one year of imprisonment for carrying or attempting to carry a weapon, loaded firearm, explosive or incendiary device aboard an aircraft. See 49 U.S.C. app. § 1472(l)(1) (1982 & Supp. V 1987). If the violation was willful and without regard for the safety of human life, or with reckless disregard for the safety of human life, the maximum penalty increases to a $25,000 fine and five years of imprisonment. 49 U.S.C. § 1472(l)(2) (Supp. V 1987). Persons involved in such incidents may also be in violation of a state statute or local ordinance dealing with the carriage of
icy setting civil penalty levels against violators of section 1471(d) that may be more harsh than intended by Congress.\(^8\)

The experimental program's authorization, initially set to expire on December 30, 1989\(^9\) and extended for four months just as Congress was recessing for its Christmas break,\(^10\) expires on May 1, 1990, unless further extended by Congress. On July 30, 1989, the FAA requested that Congress continue the program\(^11\) which the Agency believes to be effective, efficient, and fair.\(^12\)

The aviation industry has vigorously opposed this request. At a Congressional hearing held on November 15, 1989, eight witnesses representing a wide range of aviation interests testified against any reauthorization of the program on grounds including charges that the FAA failed to separate its prosecutorial and adjudicative functions and implemented the demonstration program regulations without prior notice or opportunity for comment in violation of the requirements of the Administrative Procedure Act (APA).\(^13\) Only Anthony J. Broderick, the Assistant Secretary for Public Affairs, U.S. Dep't of Transp., FAA News Release 17-89 (1989) [hereinafter FAA News Release 17-89]. The news release is available from the Department of Transportation, see supra note 5.

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\(^8\) See infra notes 91-92 and 102 and accompanying text.

\(^9\) 49 U.S.C. app. § 1475(d)(4) (Supp. V 1987). The program's authority was effective for an initial two-year period beginning December 30, 1987. Id.

\(^10\) H.R. 3671, a bill to extend the program for four months, was passed by the House of Representatives on November 17, 1989, and the Senate on November 21, 1989. 135 CONG. REC. H8,917 (daily ed. Nov. 17, 1989); 135 CONG. REC. S16,934 (daily ed. Nov. 21, 1989).

\(^11\) REPORT TO CONGRESS, supra note 8, at 26.

\(^12\) Id. at 19, 22-23. However, as of June 22, 1989, the FAA had held hearings in only two out of the 2,941 civil penalty actions initiated under the program. Id. at 19, 21.

\(^13\) Hearing Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation on the Civil Penalty Assessment Demonstration Program of the FAA, 102d Cong., 1st Sess. (1989). The procedural rules implement-
ciate Administrator for Regulation and Certification of the FAA, spoke in favor of continuing the program. The Acting Chairman of the National Transportation Safety Board (NTSB), James Kolstad, discussed the Board’s potential ability to handle the adjudication of civil penalty actions if Congress moved responsibility for the program from the FAA to the NTSB which has been suggested as an alternative to discontinuing the program completely.

Faced with the imminent expiration of the program’s authorization before Congress reconvened in January, Congress voted to continue the program’s authority for four months. Congress will further consider reauthorization after it receives the results of an independent study of the program’s effectiveness commissioned by the FAA through the Administrative Conference of the United States.

A decision by Congress not to further extend the program’s authorization or to transfer it to the NTSB would come as no surprise to those familiar with the controversial program. However, if Congress does reauthorize the program in its present form, the FAA should immediately evaluate its enforcement priorities in light of the Congressional and public concern about air carrier maintenance.

This Article will describe (1) Congress’ creation of the demonstration program, (2) the new regulations governing hearings under the program, and (3) the FAA’s application of these rules specifically to violators of section 1471(d).

II. CONGRESSIONAL PASSAGE OF 49 U.S.C. APP. § 1475

Congress created the Civil Penalty Assessment Demonstration Program as part of the Airport and Airway Safety and Capacity Expansion Act of 1987. At the FAA’s re-

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Footnote:

4 Air Transp. Assoc. of Am. v. Department of Transp., No. 89-1195 (D.C. Cir.).

quest, Senator Pete Wilson introduced an amendment to the Senate's version of the Act, Senate Bill 1184, which authorized the program and, inter alia, increased the maximum civil penalty from $1,000 to $10,000 for air carrier violations of federal aviation safety laws. Although the amendment gave the demonstration program authority to enforce violations of most federal aviation laws, including section 1471(d), its principal purpose was to encourage better air carrier maintenance. The amendment stressed the joint responsibility of Congress and the FAA to provide safe and dependable equipment for innocent passengers. Congress subsequently approved the House of Representatives' companion measure with a substitute to Senator Wilson's amendment from the House and Senate Conference Committee, which reduced the ceiling of the program's authority for civil penalties from $100,000 to its present level of $50,000.

III. THE FAA'S NEW CIVIL PENALTY ACTION PROCEDURES

The FAA issued regulations for the prosecution of civil penalty cases under the demonstration program on Sep-

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tember 7, 1988. After the FAA's Office of Civil Aviation Security investigates a possible violation, a regional office of the FAA initiates a civil penalty action by issuing a notice of proposed civil penalty. The notice includes an information sheet advising the alleged violator of the alternatives available in response to the notice: (1) pay the proposed penalty; (2) submit information in answer to the charges; (3) propose to reduce the civil penalty for specified reasons; (4) request an informal conference with legal counsel; (5) claim entitlement to waiver of the penalty under the aviation safety program; or (6) request a hearing.

Under the new procedures, an alleged violator who chooses not to accept the proposed penalty has the right to a hearing before a United States Department of

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20 Amendments to FAA Investigative and Enforcement Procedures, Rules of Practice for FAA Civil Penalty Actions, 53 Fed. Reg. 34,646, 34,655-65 (1988) (codified at 14 C.F.R. §§ 313.201-.235). The FAA adopted the procedural rules without following the notice or public comment requirements because of the "emergency need" for the rules. This "emergency need" constituted good cause for the FAA's finding that notice and public comment were impracticable, unnecessary, and contrary to the public interest pursuant to APA § 533. Id. at 34,652-53; see 5 U.S.C. § 533(b)-(c) (1988) (§ 533(b) lists notice requirements; § 533(c) gives the public comment requirements; and § 533(b)(B) states that notice and hearing requirements, when not required by statute, may be waived if "the agency for good cause finds . . . that notice and public procedures thereon are impracticable, unnecessary, or contrary to the public interest").

21 14 C.F.R. § 13.16(d) (1989). The notice includes a statement of the charges and the amount of the proposed civil penalty. Id.

22 FAA ORDER No. 2150.3A, supra note 7, § 1205(b)(2). An order assessing a civil penalty is issued when the person charged with the violation: (1) submits the proposed penalty; (2) does not respond within 30 days of receipt of the notice; (3) does not respond within 10 days of receipt of an interim reply from legal counsel or (b) after an informal conference if no agreement is reached at the conference; (4) does not comply with any agreement reached between the parties during the informal conference; or (5) does not file an answer to the order of civil penalty or a motion pursuant to 14 C.F.R. § 13.218(f)(1)-(4) (1989) within 30 days of service of the order. FAA ORDER No. 2150.3A, supra note 7, § 1205(f). The regulations define an order assessing civil penalty as an order that contains a finding or determination of violation arising under the Federal Aviation Act, 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. 14 C.F.R. § 13.202 (1989).

23 14 C.F.R. § 13.204(a) (1989). A party may be represented or advised by an attorney or other representative, and may be examined by that attorney or repre-
Transportation Administrative Law Judge (ALJ). Upon receipt of a written request for a hearing, the FAA files an order of civil penalty as the complaint in the proceedings. Within thirty days of service of the complaint, the respondent must file either a written answer to the complaint or a prehearing motion to dismiss, to strike, or for a more definite statement.27

sentative. Id. § 13.204(b). The attorney or representative is not required to, but may, file a notice of appearance in the action. Id.

Amendments to FAA Investigative and Enforcement Procedures, Rules of Practice for FAA Civil Penalty Actions, 53 Fed. Reg. 34,646, 34,651 (1988) (discussion of procedural rules). The ALJs are empowered (1) to give notice of and hold prehearing conferences and hearings; (2) administer oaths and affirmations; (3) issue subpoenas and notices of depositions; (4) rule on offers of proof; (5) receive relevant and material evidence; (6) regulate the course of the hearings; (7) dispose of procedural motions and requests; (8) make findings of fact and conclusions of law; (9) issue initial decisions; and (10) bar persons from a proceeding based on a finding of obstreperous or disruptive behavior in that proceeding. 14 C.F.R. § 13.205(a) (1989). The ALJs, however, may not issue orders of contempt, award costs to any party, or impose sanctions not specified in the regulations. Id. § 13.205(b).

14 C.F.R. § 13.16(e)(3) (1989). The request may be in the form of a letter, but must be dated and signed by the person requesting the hearing and include a suggested location for the hearing. Id. § 13.16(i).

The regulations define an order of civil penalty as "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 [FAA hearing] docket clerk as the complaint in the proceedings." Id. § 13.202. The agency attorney must file the complaint within 20 days of receipt of the request for a hearing. Id. § 13.208(b).

The answer may be in the form of a letter but must be dated and signed by the respondent. Id. The answer must include a brief statement of the relief requested and any affirmative defense intended to be asserted at the hearing, and must admit, deny, or state that the person is without sufficient knowledge or information to admit or deny each allegation in each numbered paragraph of the complaint. Id. § 13.209(c), (d). A general denial is deemed a failure to file an answer, which without good cause will result in the issuance of an order assessing a civil penalty. Id. § 13.209(d), (f). The FAA intentionally assigned this severe penalty for failure to file an answer to discourage spurious or dilatory requests for hearings. Amendments to FAA Investigative and Enforcement Procedures, Rules of Practice for FAA Civil Penalty Actions, 53 Fed. Reg. 34,646, 34,649 (1988) (discussion of procedural rules). The regulations allow for amendments of complaints or answers up to 15 days before a scheduled hearing. 14 C.F.R. § 13.214(b)(1) (1989). If good cause is shown in a motion to amend, the ALJ has discretion to allow an amendment. Id. § 13.214(b)(2).

Instead of an answer, the alleged violator may file one or more of the following motions: (1) motion to dismiss for insufficiency; (2) motion to dismiss, specifying the grounds for dismissal; (3) motion for more definite statement; and (4) motion to strike. Id. §§ 13.209(a) (providing for the option to make a motion instead of
The regulations allow the parties to determine much of the prehearing schedule and procedures themselves. For example, if the parties agree, the ALJ must grant one extension of time to each party for filing a document, and may also grant additional oral requests for extensions of time. Discovery may be initiated by any party at any time after the FAA files the complaint. The discovery rules are similar to those permitted under the Federal Rules of Civil Procedure. The parties may conduct discovery with depositions on oral examination or written questions, written interrogatories, requests for pro-

an answer), 13.218(f)(1)-(4) (discussing the prehearing motions that may be filed instead of an answer).


29 14 C.F.R. § 13.213(a) (1989). The regulations also provide for extensions of time upon the filing of a written motion at least seven days before the document is due. The ALJ may grant the extension of time if good cause for the extension is shown. Id. § 13.213(b).

The parties may also agree to a schedule for filing prehearing motions or conducting discovery. Id. § 13.217(a). The ALJ shall approve the joint schedule. Id. § 13.217(d). If a party fails to comply with the ALJ's order establishing the joint schedule, the ALJ may direct compliance or, limited to the extent of the party's failure to comply, may strike that portion of a party's pleadings, preclude prehearing or discovery motions by that party, preclude admission of that portion of a party's evidence, or preclude that portion of the testimony of that party's witnesses at the hearing. Id. § 13.217(f).

In addition, at any time before or after a hearing and without the ALJ's consent, the agency attorney may withdraw a complaint or the respondent may withdraw a request for a hearing. The withdrawal results in a dismissal of the proceedings with prejudice. Id. § 13.215.

30 Id. § 13.220(a).


32 14 C.F.R. § 13.220(j) (1989). A notice of deposition must be served on the person to be deposed, the ALJ, the hearing docket clerk, and each party at least seven days before the deposition, unless the ALJ consents to fewer than seven days notice. Id. § 13.220(j)(3). A party may use any part or all of a deposition at a hearing 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. Id. § 13.220(j)(4).

33 Id. § 13.220(k). The regulations limit the number of interrogatories to 30, including subparts. Id. Additional interrogatories may not be served without the consent of the ALJ. They will be allowed only if the party shows good cause for failure to inquire previously about the information and that the information can-
duction of documents or tangible items, and requests for admissions. A response to a discovery request is due within thirty days of service of the request, including filing any objections to the request.

The ALJ may limit the frequency and extent of discovery requests if appropriate. Discovery will be limited if a party shows any of the following: (1) the requested information is cumulative or repetitious; (2) the information can be obtained from another source that is more convenient and less burdensome; (3) the requesting party has had ample opportunity to use other discovery methods to obtain the desired information; or (4) the scope of the discovery is unduly burdensome or expensive. The ALJ may also grant confidential orders, protective orders, and orders to compel discovery.

Motions usually must be filed at least thirty days before

not reasonably be obtained using less burdensome discovery methods or from other sources. Id. § 13.220(k)(2).

34 Id. § 13.220(b).

35 Id. § 13.220(f). The regulations do not limit the number of requests for admission that a party may serve on another party. Failure to respond in some manner to such a request is deemed an admission of the truth of the statement. Id. § 13.220(f)(1).

36 Id. § 13.220(d).

37 Id. § 13.220(f).

38 Id.

39 Id. § 13.220(g). The regulations allow for a confidential order when a party receives 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. Id. The party making the motion must demonstrate that the order is necessary to protect the information from being disclosed to the public. Id. § 13.220(g)(1). The ALJ must preclude inquiry into the matter if he determines that the requested material is not necessary to decide the case. Id. § 13.220(g)(2). If the ALJ determines that the material may be disclosed, he may order that discovery be made under limited conditions or the material be used only under certain conditions. Id. § 13.220(g)(3). If a confidential order is warranted, the ALJ shall (1) provide an opportunity for review of the document off the record; (2) provide procedures for excluding the information from the record; and (3) order the parties not to disclose the information or use it in other proceedings. Id. § 13.220(g)(4).

40 Id. § 13.220(h). The regulations provide for protective orders when necessary to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Id.

41 Id. § 13.220(m), (n).
the hearing,\textsuperscript{42} but may be introduced orally during the hearing unless the ALJ directs otherwise.\textsuperscript{43} The regulations specifically allow for the filing of motions to dismiss the order of civil penalty;\textsuperscript{44} motions for a more definite statement of any pleading which requires a response;\textsuperscript{45} motions to strike any insufficient allegation, defense, or any redundant, irrelevant, or immaterial matter in a pleading;\textsuperscript{46} motions for decision;\textsuperscript{47} and motions for disqualification of the ALJ.\textsuperscript{48}

In an effort to avoid frivolous pleadings, the regulations

\textsuperscript{42} Id. § 13.218(c). This requirement may be waived by the parties or by the ALJ for good cause. \textit{Id.} A party has 10 days after service to reply to a motion with affidavits or other evidence in support. \textit{Id.} § 13.220(d). The ALJ must resolve all pending prehearing motions at least seven days before the hearing. \textit{Id.} § 13.220(e)(2). All pending discovery motions must be resolved at least 10 days before the hearing. \textit{Id.} § 13.218(e)(1).

\textsuperscript{43} Id. § 13.218(c). When a motion is made during a hearing, the answer may be made orally at the hearing or in writing within a reasonable time as determined by the ALJ. \textit{Id.} § 13.218(d). If the ALJ issues a ruling orally, he or she must serve a written copy of the ruling on each party within three days. \textit{Id.} § 13.218(e)(2).

\textsuperscript{44} Id. § 13.218(f)(2). If the ALJ denies a motion to dismiss, the respondent must file an answer within 10 days of service of the denial. \textit{Id.} § 13.218(f)(2)(i). If the ALJ grants the motion, the agency attorney may file an appeal pursuant to 14 C.F.R. § 13.233. \textit{Id.} § 13.218(f)(2)(ii).

\textsuperscript{45} Id. § 13.218(f)(3). If the ALJ grants a motion requesting a more definite statement, the agency attorney must supply a more definite statement within 15 days of service of the order granting the motion or the ALJ will strike the allegations to which the motion is directed. \textit{Id.} § 13.218(f)(3)(i). If the ALJ denies the motion, the respondent must file an answer within 10 days of service of the order of denial. \textit{Id.} A party may also file a motion for a more definite statement if an answer fails to respond clearly to the allegations in the order of civil penalty. \textit{Id.} § 13.218(f)(3)(ii).

\textsuperscript{46} Id. § 13.218(f)(4). Motions to strike must be filed before a response is required or, if a response is not required, within 10 days of service of the pleading. \textit{Id.}

\textsuperscript{47} Id. § 13.218(f)(5). At any time before the ALJ issues an initial decision, a party may make a motion for a decision regarding all or any part of the proceedings. The ALJ must grant the motion if the record shows 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 has the burden of showing that no genuine issue of material fact is disputed by the parties. \textit{Id.}

\textsuperscript{48} Id. § 13.218(f)(6). An ALJ must render a decision on a motion for disqualification within 15 days of the filing of the motion. \textit{Id.} § 13.218(f)(6)(iii). The ALJ must withdraw from the proceedings immediately if he finds that the motion and supporting affidavit show a basis for disqualification. If the ALJ fails to issue a ruling within 15 days of the filing of the motion, the motion is deemed granted. \textit{Id.}
provide that the signature required on each document filed or served on a party certifies that, inter alia, to the best of the attorney's or party's knowledge, information, and belief:49 (1) the document complies with the rules;50 (2) is warranted by existing law;51 (3) is not unreasonable, unduly burdensome or expensive;52 and (4) is not made to cause unnecessary delay or any other improper purpose.53

In response to a violation of this requirement, the ALJ may strike the pleading, preclude further discovery by the party, exclude the document from the record, or take other appropriate action.54

The ALJ's rulings must be supported by and in accordance with the reliable, probative, and substantial evidence contained in the record.55 Except for interlocutory appeals for cause56 and appeals of right,57 a party may not

49 Id. § 13.207(b).
50 Id. § 13.207(b)(1).
51 Id. § 13.207(b)(2). The certification is also satisfied when a good faith argument exists for extension, modification, or reversal of existing law. Id.
52 Id. § 13.207(b)(3).
53 Id.
54 Id. § 13.207(c). This sanction also applies to pleadings filed on appeals to the Administrator. Id. § 13.207(c)(5)-(6).
55 Id. § 13.223. The party with the burden of proof must prove its case or defense by a preponderance of reliable, probative, and substantial evidence. Id. The burden of proof is on the agency, except in the case of an affirmative defense. Id. § 13.224(a). In addition, the proponent of a motion, request, or order has the burden of proof. Id. § 13.224(b). With regard to affirmative defenses, the party asserting the defense has the burden of proving it. Id. § 13.224(c).
56 Id. § 13.219(b). Section 13.219(b) provides:

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.

Id.
57 Id. § 13.219(c). When a party notifies the ALJ of an interlocutory appeal of right, the proceedings are stayed until the FAA decisionmaker issues a decision on the appeal. Id. Appeals of right are allowed in the following instances: (1) a ruling or order barring a person from the proceedings; (2) a failure to dismiss the pro-
appeal an ALJ's ruling to the FAA decisionmaker until the initial decision has been entered. Notice of interlocutory appeal must be filed within three days of the ALJ’s decision forming the basis of the appeal. The FAA decisionmaker must render a decision on the record on the interlocutory appeal within a reasonable time after receiving the appeal.

The ALJ must give each party at least sixty days notice of the date and time of the hearing. The rules place very few restrictions on the type of evidence a party may submit at the hearing. The parties may present oral, documentary, or demonstrative evidence; submit rebuttal evidence; and conduct cross-examination. Hearsay evidence is specifically included as admissible evidence in the proceedings in accordance with 14 C.F.R. § 13.215 if the agency attorney withdraws a complaint or a party withdraws a request for a hearing; (3) a ruling in violation of 14 C.F.R. § 13.205(b), which prohibits the ALJ from granting an order of contempt, award of costs, or imposition of a sanction not specified in the regulations; and (4) a ruling granting in part a respondent's motion to dismiss pursuant to § 13.218(f)(2)(ii) [the text of the rule incorrectly refers to § 13.218(f)(2)(B)]. Id. The regulations also provide that "[i]f the FAA decisionmaker does not issue a decision on the interlocutory appeal or seek additional information within 10 days of the filing of the appeal, the stay of the proceeding is dissolved." Id. § 13.219(d).

Id. § 13.202. The regulations define the FAA decisionmaker as follows: “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.

Id. § 13.219(a). A reply brief may be filed with the FAA decisionmaker within 10 days of service of the notice of appeal. Id. § 13.219(d). With the consent of the ALJ, the parties may agree to hold the hearing on a date earlier than the date specified in the notice of hearing. Id. § 13.221(d).


14 C.F.R. § 13.222(a) (1989). A party may compel the attendance of a witness at a deposition or hearing by subpoena or require the production of documents or tangible items by subpoena duces tecum. Id. § 13.228(a).
proceedings. 65

After the submission of all evidence, the parties may submit oral proposed findings of fact and conclusions of law; exceptions to rulings; and supporting arguments for the findings, conclusions, or exceptions. 66 A party may waive its final oral argument, 67 but the ALJ may allow the submission of written posthearing briefs in lieu of final oral argument only in a clearly complex or unusual case. 68

At the conclusion of the hearing, the ALJ issues an initial decision which may affirm, modify, or reverse the order of civil penalty. 69 The ALJ’s decision must include findings of fact and conclusions of law, with supporting grounds, and also must specifically address the reasonableness of any imposed sanction. 70 The ALJ must provide a basis for any reduction of the penalty contained in the order of civil penalty. 71

A party may appeal the initial decision, or any decision not previously appealed as an interlocutory matter, by filing a notice of appeal with the FAA decisionmaker within ten days of either the entry of the oral initial decision on the record or the service of the written initial decision on the parties. 72 An initial decision that affirms or modifies

67 Id.
68 Id. § 13.231(c).
69 Id. § 13.232(a). In a clearly complex or unusual case, the ALJ may issue a written initial decision within 30 days of the conclusion of the hearing or submission of the last posthearing brief. Id. § 13.232(c).
72 Id. § 13.233(a). A party may only appeal whether (1) each finding of fact is supported by a preponderance of evidence; (2) each conclusion of law is made in accordance with applicable law, precedent, and public policy; and (3) the ALJ
the order of civil penalty becomes an order assessing civil penalty if the decision is not appealed. On appeal, the FAA decisionmaker reviews the hearing record and issues a written final decision and order of the Administrator. A final decision may be used as precedent in any other civil penalty action, unlike rulings by an ALJ. A party may petition the FAA decisionmaker to reconsider or modify a final decision and order. In addition, a party committed any prejudicial errors supporting the appeal. Within 50 days of entry of the oral initial decision on the record or service of the written initial decision on the parties, the appellant must file an appeal brief with the FAA decisionmaker unless otherwise agreed by the parties. The brief must set out in detail the appellant's specific objections to the decision or rulings, the basis for the appeal, the reasons supporting the appeal, and the relief requested. The failure to timely file an appeal brief may result in dismissal of the appeal. A party may file a reply brief within 35 days of service of the appeal brief. Oral argument may be permitted at the discretion of the FAA decisionmaker. The initial decision is stayed on appeal until the Administrator issues the final decision and order.

The Agency's Chief Counsel, or a delegate of the Chief Counsel, advises the FAA decisionmaker regarding initial decisions and appeals. The Chief Counsel, therefore, does not perform prosecutorial functions in civil penalty actions or supervise the agency attorneys after notices of proposed civil penalties have been issued. The Chief Counsel is assisted by the Assistant Chief Counsel for Litigation and his staff. Separation of Functions, Civil Penalty Demonstration Program, 54 Fed. Reg. 1335, 1336 (1989) (announcement and notice of separation of functions relevant to 14 C.F.R. § 13.203(d)). Prosecutorial functions are performed by other agency attorneys, supervised by the Assistant Chief Counsel for Regulations and Enforcement, the Assistant Chief Counsel for the Regions and Centers, and the Deputy Chief Counsel. (announcement and notice of separation of functions relevant to 14 C.F.R. §§ 13.202, 13.203(a)).

The final decision and order may affirm, modify, or reverse the initial decision, make any necessary findings, or remand the case for any proceedings the FAA decisionmaker determines may be necessary. The decisionmaker may not assess a penalty greater than the amount stated in the order of civil penalty. The regulations do not require an ALJ or FAA decisionmaker 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. However, an ALJ is not precluded from using similar reasoning or analysis in similar civil penalty actions. Amendments to FAA Investigative and Enforcement Procedures, Rules of Practice for FAA Civil Penalty Actions, 53 Fed. Reg. 34,646, 34,652 (1988) (discussion of procedural rules).
may seek judicial review of a final decision by filing a petition for review with a United States court of appeals within sixty days of service of the final decision on the party.\textsuperscript{78}

If a person subject to an order assessing civil penalty does not pay the penalty within sixty days of service of the order, the Administrator may refer the matter to the United States Attorney General for collection proceedings in a federal district court.\textsuperscript{79} The Administrator has authority to compromise a penalty assessed before referring the matter to the Attorney General.\textsuperscript{80}

IV. ENFORCEMENT OF SECTION 1471(d) UNDER THE NEW PROCEDURES

Civil penalty actions in the demonstration program involve maintenance, operations, handgun, and other-than-handgun security violations.\textsuperscript{81} Congress' primary concern at the time it created the program was air carrier mainte-
As of June 22, 1989, however, eighty-two of the program's 192 pending cases involved handgun violations and only ten involved maintenance violations. A review of those actions indicates that the FAA is not focusing on maintenance cases; moreover, in some handgun cases it may be seeking to assess penalties more forcefully than Congress intended.

A. Screening at Airports Continues to be Necessary

Mandatory screening procedures have been in effect in United States airports since the passage of the Air Transportation Security Act of 1974. As a result, a high number of firearms have been detected at airport screening points, for example, 2,773 in 1988 alone. The benefits of screening are invaluable; between 1973 and 1988, airline and airport security measures prevented possibly 118 hijackings or related crimes. Notably, no one has hijacked a United States air carrier since June 1987. 

82 **See supra** notes 6 and 17 and accompanying text for further discussion of Congress' initial focus on maintenance.

83 In addition, the docket included 70 other security cases and 30 operations cases.

84 49 U.S.C. app. §§ 1301, 1356, 1357, 1472, 1511, 1516 (1982 & Supp. V 1987). Section 1356(a) provides that all passengers and property intended to be carried in an aircraft cabin must "be screened by weapon-detecting procedures or facilities employed or operated by employees or agents of the air carrier, intrastate air carrier, or foreign air carrier prior to boarding the aircraft for such transportation." 49 U.S.C. app. § 1356(a) (Supp. V 1987). For the regulatory equivalent of § 1356(a), see 14 C.F.R. §§ 108.9, 108.11(a) (1989). With the inception of the FAA's Security Research and Development Program in 1976, the development of automated detection equipment to screen passengers, baggage, and cargo for concealed deadly or dangerous weapons and explosives became an FAA priority. *Federal Aviation Admin., Dep't of Transp., Semiannual Report to Congress on the Effectiveness of the Civil Aviation Security Program, January 1, 1988-June 30, 1988, at 15* (Nov. 1988) [hereinafter Semiannual Report].

85 *FAA News Release 17-89, supra* note 7. These incidents led to 1,493 arrests by local authorities. *Id.* Since 1973, air carriers have screened more than 9.5 billion persons and inspected more than 10 billion carryon items, resulting in the detection of more than 41,400 firearms and nearly 19,000 related arrests. *Semiannual Report, supra* note 84, app. at exhibit 6.

86 *Semiannual Report, supra* note 84, app. at exhibit 6.

87 *Id.* at 3. The number of United States hijackings has decreased markedly in the last five years. A man was arrested on March 4, 1988 at the Delta Airlines
between 1973 and the 1987 enactment of the demonstration program, however, criminal acts still resulted in 140 deaths involving United States civil aviation and more than 1,500 deaths worldwide.88

B. The FAA Has Not Consistently Followed the Penalty Levels It Established for Handgun Violations

In past cases involving violations of 49 U.S.C. app. § 1471(d),89 the FAA region with jurisdictional responsibility had the authority to pursue mild enforcement actions, such as the issuance of warning notices or imposition of small civil penalties, as opposed to actions seeking larger fines.90 In 1988, however, the FAA announced that all violators of section 1471(d) would be assessed more than a nominal civil penalty, reasoning that a fine of only "several hundred dollars" would not have a sufficient impact on a violator, would not sufficiently reflect the potential seriousness of the offense, and might not comport with Congress' intent in changing the statutory maximum penalty from $1,000 to $10,000.91

The passenger screening checkpoint of the Hartsfield Atlanta International Airport after he set off the metal detector and refused a police officer's request to submit to a search. He was armed with a .25 caliber pistol. This incident was documented as a possible prevented hijacking. Id.

The most recent terrorist hijacking of a United States air carrier occurred on September 5, 1986, when Pan Am Flight 73 was hijacked in Karashi, Pakistan. Id.

Recent hijacking statistics are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>U.S.</th>
<th>Foreign</th>
<th>Year</th>
<th>U.S.</th>
<th>Foreign</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>8</td>
<td>17</td>
<td>1984</td>
<td>5</td>
<td>20</td>
</tr>
<tr>
<td>1979</td>
<td>11</td>
<td>12</td>
<td>1985</td>
<td>4</td>
<td>22</td>
</tr>
<tr>
<td>1980</td>
<td>21</td>
<td>17</td>
<td>1986</td>
<td>4</td>
<td>9</td>
</tr>
<tr>
<td>1981</td>
<td>7</td>
<td>22</td>
<td>1987</td>
<td>4</td>
<td>9</td>
</tr>
<tr>
<td>1982</td>
<td>18</td>
<td>15</td>
<td>To 6/88</td>
<td>0</td>
<td>8</td>
</tr>
</tbody>
</table>

Id. at exhibit 1.

The commercial, diplomatic, and military interests of the United States continue to be a primary target of many such attacks. Id. at 3, 18.


89 49 U.S.C. app. § 1471(d) (Supp. V 1987); see supra note 7 for the text of § 1471(d).

90 FAA Order No. 2150.3A, supra note 7, § 1001.

91 FAA COMPLIANCE/ENFORCEMENT BULLETIN No. 88-5, reprinted in FAA ORDER
FAA established the following proposed penalties for violations of section 1471(d): (1) firearm unloaded and no ammunition accessible ($1,000); (2) firearm unloaded and ammunition accessible ($2,000); (3) firearm loaded ($2,500); (4) effort to conceal to avoid detection ($5,000 to $10,000); and (5) threat or overt act ($10,000 and criminal prosecution).92

A review of the 119 handgun cases filed with the FAA hearing docket clerk as of August 25, 1989, however, reveals that the FAA has not consistently proposed penalty amounts according to the table. For example, in many cases involving a loaded firearm, the FAA proposed a penalty of $2,500.93 In other similar cases, however, the FAA proposed smaller fines94 and, in at least one instance, proposed a larger fine without alleging the existence of extraordinary circumstances.95 In addition, the FAA often deviates from the table's prescribed penalties of $1,000 for situations involving an unloaded firearm without accessible ammunition96 and $2,000 for situations involving...
an unloaded firearm with accessible ammunition.\textsuperscript{97}

Moreover, the proposed penalties are being reduced in almost every case by the ALJ who hears the matter, often based on a finding of financial hardship.\textsuperscript{98} FAA records indicate that as of August 25, 1989, the ALJ affirmed the proposed penalties in only two out of eighteen cases that reached the hearing stage.\textsuperscript{99} In two cases, the ALJ fashioned a unique penalty by decreasing the proposed $2,500 fines by $750 for every letter (up to two) describing the violation that the respondents published in specified local newspapers. The ALJ imposed these penalties as an effort to publicize the law and to deter violations.

\footnotesize{stances in which the FAA proposed a $1000 fine, see Case Nos. 88CE730002, 88AL720070 and 88GL730172.}

\footnotesize{\textsuperscript{97} See, e.g., Case Nos. 88SO730284 ($600 proposed), 88WP710174 ($500 proposed), 88AL720087 ($1000 proposed), 88AL720089 ($1000 proposed, even though individual possessed an unloaded automatic pistol, a magazine loaded with seven rounds, and a box containing 43 rounds of ammunition). Compare these cases with Case Nos. 88NM720091 ($2000 proposed) and 88NM720133 ($2000 proposed).}

\footnotesize{\textsuperscript{98} See Case Nos. 88NM710178 ($750 proposed fine reduced to $250 payable in 10 installments of $25 each, based on a finding of financial hardship), 88NM720062 ($2500 proposed fine for violation involving two loaded handguns reduced to $1000, representing $500 per handgun, based on a finding of financial hardship), 88NM720133 ($2000 proposed fine reduced to $500 based on a finding of financial hardship), 88WP710215 ($1000 proposed fine reduced to $200, recognizing that the individual had already paid the state of California a fine of $300 and based on a finding of financial hardship), 88WP750008 ($2500 proposed fine reduced to $500 based on a finding of financial hardship), 88NM720091 ($2000 proposed fine reduced to $1500), 88NM720142 ($2500 proposed fine reduced to $2000, respondent's appeal to the Administrator pending as of Aug. 25, 1989), 88NM710161 ($550 proposed fine reduced to $250, FAA's appeal to the Administrator pending as of Aug. 25, 1989) and 88NM720144 ($500 proposed fine reduced to $250 based on facts that the unloaded firearm was in a locked container and the individual was not a ticketed passenger but was just accompanying a ticketed friend).}

\footnotesize{\textsuperscript{99} Case Nos. 88NM710136 ($650 proposed and affirmed, respondent's appeal to the Administrator pending as of Aug. 25, 1989) and 88NM720097 ($2,500 proposed and affirmed) (the same ALJ affirmed both proposed penalties). Hearings have been held in FAA Case Nos. 88NM710136, 88NM710161, 88NM710178, 88NM710241, 88NM720062, 88NM720091, 88NM720097, 88NM720133, 88NM720135, 88NM720142, 88NM720144, 88SO730284, 88SO730343, 88SO730344, 88WP710215, 88WP750008, 88WP750168 and 88WP750223. The ALJ reduced the proposed penalties in 11 cases. \textit{See supra} note 98 and \textit{infra} notes 100 and 101. Initial decisions are unavailable in Case Nos. 88SO730284, 88SO730343, 88SO730344, 88WP750168 and 88WP750223.
One of these cases involved a briefcase containing a loaded revolver and six rounds of ammunition, including one round in the firing chamber. The other violation involved a loaded pistol inside a briefcase.

C. The Table's Penalty Levels Are Based on a Misinterpretation of Congressional Intent and Conflict with the FAA's Own Internal Policies

The FAA based its decision to set strict penalty levels for handgun violations in part on its belief that a nominal fine might not coincide with Congress' intent in increasing the maximum civil penalty from $1,000 to $10,000 in the Airport and Airway Safety and Capacity Expansion Act of 1987. In that legislation, however, Congress increased only the maximum penalty for violations of 49 U.S.C. app. ch. 20, subchapters III, VI and XII, which primarily involve air carrier maintenance laws. Section 1471(d) is a part of subchapter IX. Congress has not increased the maximum penalty for section 1471(d) violations beyond the $10,000 amount set in 1984.

Moreover, these strict penalty levels seem to conflict with FAA policies favoring enforcement flexibility, as well as an FAA admission that the "typical passenger appears to be one who simply forgets to declare his/her

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100 Case No. 88NM720135 (hearing held Aug. 1, 1989; FAA's appeal to the Administrator pending as of Aug. 25, 1989).
101 Case No. 88NM710241 (hearing held Aug. 7, 1989).
103 49 U.S.C. app. ch. 20 (titled Federal Aviation Program) includes §§ 1301-1552; subchapter III (titled Organization of Administration, Powers and Duties of Administrator) includes §§ 1341-1359; subchapter IV (titled Air Carrier Economic Regulation) includes §§ 1371-1389; subchapter XII (titled Security Provisions) includes §§ 1521-1523.
104 49 U.S.C. app. ch. 20, subchapter IX (titled Penalties) includes §§ 1471-1475.
105 See infra notes 109-114 and accompanying text.
weapon and presumably has no intention of hijacking or sabotaging an aircraft, or committing any other crime of violence.”107 The FAA’s enforcement guidelines urge the assessment of civil penalties in accordance with its table of proposed penalties,108 but also provide for the consideration of mitigating factors.109 The guidelines emphasize the discretionary element in enforcement decisions,110 acknowledging an alleged violator’s right to objective, even-handed consideration of all circumstances surrounding the allegations, and discouraging “rigid adherence to precedent, without due regard to unusual circumstances.”111

107 FAA Compliance/Enforcement Bulletin No. 88-5, reprinted in FAA Order No. 2150.3A, supra note 7, app. 1. The Administrator also recognized that “[i]n the average case, it is neither necessary nor realistic to collect a maximum range penalty to ensure future compliance by an air traveler who is a first time offender and has no criminal purpose in carrying the weapon.” Id.

108 See supra text accompanying note 92.

109 FAA Order No. 2150.3A, supra note 7, § 207(b). Factors in selecting the level of sanction include the degree of foreseeable safety hazard created by the alleged violation, the nature of the violation, past violations, the alleged violator’s level of experience and attitude, and the alleged violator’s ability to absorb the sanction. The fact that a violation was inadvertent will not normally preclude legal enforcement action. Id.

110 Id. § 100 (“[T]here will be cases where deviation from the guidance is warranted.”). Even the language accompanying the sanction table encourages the use of discretion. The table first states that its purpose is to assure greater national enforcement consistency, but then cautions that the table “is only intended to provide general guidance for the exercise of the agency’s prosecutorial discretion, it is sufficiently broad and flexible to permit full consideration of all mitigating and aggravating factors.” Id. § 203(e)(2). The table’s general guidelines state:

[J]udgment should be exercised in determining the seriousness of the violations and applying a sanction that will serve to deter future violations by the violator and others similarly situated; i.e., the totality of the circumstances surrounding the case should be considered, including past violations. . . . (which should be considered only to assess the need for a greater than normal sanction).

Id.

111 Id. § 201(e). The FAA Order also states that this policy does not imply an unwillingness to apply the full force of statutory sanctions if warranted. Id.

The guidelines’ discussion of the informal conference also emphasizes the consideration of individual circumstances:

[I]n many instances, the informal conference will disclose facts not revealed in the violation report, which may mitigate the sanction or cause withdrawal of the charges. The conference provides an opportunity to evaluate the attitude of the alleged violator. At such a conference, the FAA attorney handling the case has an opportunity
In addition, the guidelines provide that the FAA's goal of consistency112 "should not imply blind adherence to a fixed penalty for every violation."113 The guidelines also emphasize that "[w]hile agency directives providing guidance on sanctions must be observed, each case requires an individual determination of appropriate enforcement action."114

V. Conclusion

The demonstration program in its present form will in all likelihood be a victim, though perhaps a deserving one, of the criticism with which it has been barraged. If Congress extends the program's authorization—over the strenuous objections of the aviation industry—it may want to keep a watchful eye on whether the FAA is haphazardly seeking to assess fines against some unthinking violators of section 1471(d). The FAA has offered to "make adjustments in the [demonstration program's] process and procedures if warranted and where appropriate."115 Given the FAA's commitment to flexibility,116 acknowledgement that most passengers who violate section 1471(d) do so inadvertently,117 and seeming misunderstanding of Congressional intent,118 revoking the policy of seeking to impose large fines against at least some unintentional

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112 Id. § 203(e)(2). One of the objectives of the enforcement program is fairness: similar violations under similar circumstances should result in the same type of sanction. Id.

113 Id. § 201(g).

114 Id. This policy of flexibility seems consistent with the FAA's two-tiered approach to determining the appropriate type of legal enforcement action and sanction as a joint responsibility of the appropriate regional division and legal counsel. The Assistant Chief Counsel makes an independent determination of the appropriate sanction type and amount, giving due consideration to the sanction recommended by the regional division. Id. §§ 1002(b)(8), 1201.

115 Report to Congress, supra note 5, at 31.

116 See supra notes 109-114 and accompanying text.

117 See supra text accompanying note 107.

118 See supra note 102 and accompanying text.
violators of that law may be one warranted adjustment. Otherwise, the FAA may find that all alleged violators will begin demanding hearings, where the record so far indicates that the ALJs will probably reduce the imposed penalties. Such a development would only add unnecessarily to the backlog of cases the program has already developed.