



[4910-13]

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 16

[Docket No.: FAA-2012-0176; Notice No. 12-01]

RIN 2120-AJ97

Rules of Practice for Federally-Assisted Airport Enforcement Proceedings (Retrospective Regulatory Review).

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action would update, simplify, and streamline rules of practice and procedure for filing and adjudicating complaints against federally-assisted airports. It would improve efficiency by enabling parties to file submissions with the Federal Aviation Administration (FAA) electronically, and by incorporating modern business practices into how the FAA handles complaints. This amendment is necessary to reflect changes in applicable laws and regulations, and to apply lessons learned since the existing rules were implemented in 1996.

DATES: Send comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Send comments identified by docket number FAA-2012-0176 using any of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov> and follow the online instructions for sending your comments electronically.
- **Mail:** Send comments to Docket Operations, M-30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue, SE., Room W12-140, West Building Ground Floor, Washington, DC 20590-0001.

- Hand Delivery or Courier: Take comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Fax: Fax comments to Docket Operations at 202-493-2251.

Privacy: The FAA will post all comments it receives, without change, to <http://www.regulations.gov>, including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the Federal Register published on April 11, 2000 (65 FR 19477-19478), as well as at <http://DocketsInfo.dot.gov>.

Docket: Background documents or comments received may be read at <http://www.regulations.gov> at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For technical or legal questions concerning this action, contact Jessie Di Gregory, Federal Aviation Administration, Office of the Chief Counsel, Airport Law Branch (AGC-610), 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3199; fax (202) 267-5769; e-mail: Jessie.DiGregory@faa.gov.

SUPPLEMENTARY INFORMATION:

Authority for this Rulemaking

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Sections 46101, "Complaint and Investigations" and 46104, "Evidence," and Part B, Section 47122, "Administrative." Under these sections, Congress provided for the FAA to prescribe regulations for practices, methods, and procedures to hear complaints concerning compliance by federally-assisted airports and carry out investigations and conduct proceedings in a way conducive to justice and the proper dispatch of business. This rulemaking is within the scope of that authority because it would amend rules necessary to investigate, hear, and provide rulings on matters related to federally-assisted airport conduct.

I. Overview of the Proposed Rule

The FAA is required by statute to adjudicate complaints on matters within the agency's authority (49 U.S.C. § 46014). Title 14 CFR part 16, Rules of Practice for Federally-Assisted Airport Enforcement Proceedings (Part 16), provides a process for investigating and adjudicating complaints against sponsors for violation of federal obligations. For this NPRM, a sponsor is a recipient of federal assistance, usually an airport operator. This rulemaking would improve the efficiency of Part 16 proceedings by providing an electronic filing alternative, opportunities for sponsors to seek early disposition of complaints in certain cases, and clarification of processes already described in the rule. It would affect those parties involved in filing and responding to formal complaints. It would also affect the FAA offices involved in investigating and adjudicating those complaints.

The FAA, sponsors, aeronautical users, and other stakeholders have 15 years of experience with Part 16 as implemented in 1996.¹ In general, Part 16 has been a useful process for resolving complaints regarding sponsor compliance. The FAA does not intend to change the basic features of the process. Rather, the FAA has identified updates to Part 16 that could improve the process and reduce time required to address certain cases, based on agency and stakeholder lessons learned.

The FAA believes the agency, sponsors, aeronautical users, and other stakeholders in Part 16 proceedings would benefit from adding the following to the rule:

- Procedures for concluding the investigation by “summary judgment” or dismissal without an answer by the sponsor.
- Termination of complainant standing in certain cases where the FAA finds the sponsor in noncompliance on all issues raised in the complaint.
- Optional electronic filing procedures.
- Procedures for filing complaints under Title 49 CFR part 23, Participation of Disadvantaged Business Enterprises (DBEs) in Airport Concessions, and 49 CFR part 26, Participation by DBEs in Department of Transportation (DOT) Financial Assistance Programs.

In addition, the FAA believes it would be helpful to clarify existing language in Part 16 that addresses²—

- Intervention and other participation.
- The process for ordering corrective action for noncompliant sponsors.
- Processes involving the Director, including procedures for seeking rehearing of Director’s Determinations upon a showing of good cause.

¹ 61 FR 53998, October 16, 1996.

- Standard of Proof and Burden of Proof requirements.
- Standards for raising new issues on appeal to the Associate Administrator.
- Consent Orders.
- Requests for testimony of agency employees.
- Processes involving the Associate Administrator, including procedures for seeking rehearing of Final Agency Decisions upon a showing of good cause.
- Transfer of responsibility for decision-making for civil rights cases.
- Availability of Judicial Review.
- Extension of the time period for filing pleadings by mail.

Finally, the FAA is proposing minor updates to terminology and organization within Part 16 as part of its revision. These changes are necessary to streamline the rule and reflect current practices.

The FAA expects benefits of these proposed changes to include a decrease in both time spent and volume of paper documents required to process Part 16 complaints.

II. Background

A. Current Part 16 Procedures

Part 16 provides a specific procedure for filing and adjudicating formal complaints against sponsors where these complaints involve violations of federal obligations incurred as a condition of receiving federal assistance. Federal assistance is either a grant from the FAA, or transferred surplus or non-surplus federal property received by a sponsor for airport purposes.

Sponsors agree to a list of standard conditions, or grant assurances, when accepting a grant.³ Similar requirements also attach to the transfer of federal surplus property to sponsors and

² This list is one of general introductions. It is not intended to explain each issue in detail.

³ 49 U.S.C. §§ 47101 *et seq.*

are often specified as obligations in surplus property deeds.⁴ Persons directly and substantially affected by an alleged violation of one of these assurances and/or obligations may file a complaint under Part 16 for resolution.⁵ The sponsor must file an answer and may include a motion to dismiss the complaint in the answer. The complainant may then file a reply to the answer. The sponsor may then file a rebuttal. Through this process the complainant and the sponsor each have the opportunity to file written statements with the FAA.

The FAA Administrator has delegated authority to take action and issue orders for airport matters to the FAA Chief Counsel and the Associate Administrator for Airports.⁶ The authority includes the responsibility of investigating and adjudicating complaints against sponsors. In practice, the Airports and Environmental Law Division (AGC-600), the Airports line of business' Office of Airport Compliance and Management Analysis (ACO), and, in cases involving alleged civil rights violations, the FAA Office of Civil Rights (ACR), review the complaint.⁷ The Airports and Environmental Law Division reviews the complaint to ensure it meets the basic filing and docketing requirements of Part 16.⁸ The Airports and Environmental Law Division coordinates its docketing or dismissal with the Office of Airport Compliance and Management Analysis. The Airports and Environmental Law Division also reviews Director's Determinations and Final Agency Decisions for legal sufficiency. A legal sufficiency review assesses legal standards and includes consideration of whether the document substantially satisfies applicable procedural and regulatory requirements.

⁴ 49 U.S.C. §§ 47151-47153.

⁵ A person filing under the authority provided in 49 CFR part 26, Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs, § 26.105(c) need not be directly and substantially affected by the sponsor's alleged violation.

⁶ FAA Order 1100.154A, Delegations of Authority, para. 6.e.(1), June 12, 1990.

⁷ The Airports Line of Business' Office of Airport Safety and Standards (AAS) delegated certain authority involving Part 16 complaints that allege civil rights violations to ACR through a 2002 Memorandum of Understanding (MOU) from the AAS Director to the Deputy Assistant Administrator for Civil Rights. See Albuquerque Valet Service, et al., v. City of Albuquerque, FAA Docket No. 16-01-01, at 3 n.2 (Director's Determination August 2, 2002).

⁸ See 14 CFR part 16, subparts A, B, and C.

The Director of the Office of Airport Compliance and Management Analysis, the Deputy Assistant Administrator for the Office of Civil Rights, or their respective designee (“Director”) either dismisses the complaint, or conducts an investigation and issues a Director’s Determination. If the Director’s Determination includes a finding of noncompliance, it generally requires corrective action to return the sponsor to compliance. A sponsor may be entitled to a hearing on the Director’s Determination. Either party may appeal the Director’s Determination, or, if a hearing is held, the hearing officer’s initial decision. A party makes such an appeal to the Associate Administrator for Airports or the Assistant Administrator for Civil Rights, as appropriate, for issuance of a Final Agency Decision. A party may then file an appeal of the Final Agency Decision to a United States Court of Appeals.

B. History

The FAA published an NPRM in 1994 (the 1994 NPRM) first proposing to set up specific rules of practice for the filing of complaints and adjudication of compliance matters involving federally-assisted airports.⁹ The resulting Final Rule, published in 1996 (the 1996 Final Rule), addressed exclusively airport compliance matters arising under the Airport and Airway Improvement Act (AAIA) of 1982, as amended and recodified; certain airport-related provisions of the Federal Aviation Act of 1958, as amended; the Surplus Property Act, as amended; predecessors to those acts; and rules, grant agreements, and documents of conveyance issued or made under those acts.¹⁰ Before 1996, the FAA handled complaints filed against sponsors under the agency’s general complaint procedures in 14 CFR part 13, Investigative and Enforcement Procedures (Part 13). The FAA had found these processes to be cumbersome and inefficient for addressing complaints against airports involving financial assistance matters. Amending Part 13 and establishing Part 16 provided a dedicated procedure to the airport community for resolution

⁹ 59 FR 29880, June 9, 1994.

of such complaints. The informal complaint procedures of Part 13 (§ 13.1), however, may be utilized to facilitate a Part 16 complainant meeting the pre-complaint resolution requirements of 14 CFR § 16.21. Under that section, potential complainants are required to engage in good faith efforts to resolve the disputed matter informally with potentially responsible respondents before filing a formal Part 16 complaint. Informal resolution may include mediation, arbitration, use of a dispute resolution board, or other form of third party assistance, including assistance from the responsible FAA ADO or regional airports division. When filing a Part 16 complaint, the complainant must certify that good faith efforts have been made to achieve informal resolution. In our experience, the informal resolution process has been effective in bringing both parties together in a timely manner to resolve differences and misunderstandings about the rights and responsibilities of the airport sponsor and the aeronautical user.

In 1999, DOT cited the FAA's Part 16 procedures when it established 49 CFR part 26, Participation by Disadvantaged Business Enterprises (DBEs), in DOT Financial Assistance Programs.¹¹ Title 49 CFR 26.105(c) allows any person who knows of a violation of this part by a recipient of FAA funds to file a complaint under 14 CFR part 16. A person filing a Part 16 complaint under the authority provided in 49 CFR 26.105(c) is accorded the same processes as any party filing under Part 16, but need not be directly and substantially affected by the sponsor's alleged violation.

On July 5, 2001, the Director of Airport Safety and Standards issued a Notice of Limited Delegation in which he transferred authority to the Associate Administrator for Civil Rights to serve as "Director" in accordance with 14 CFR 16.31 for a specific case.¹² The Notice went on to say that most Part 16 complaints address issues within the Director of Airport Safety and

¹⁰ 61 FR 53998, October 16, 1996.

¹¹ 64 FR 5126, February 2, 1999.

¹² See Albuquerque Valet Service, et al., v. City of Albuquerque, FAA Docket No. 16-01-01, at 3 n.2 (Director's Determination August 2, 2002).

Standards' expertise, but that complaints filed by DBEs under 49 CFR parts 23 and 26 are more properly handled by the Office of Civil Rights because of that office's expertise in such matters. The Notice also specifically limited the delegation to the subject case, although it concluded by stating that a final delegation of authority would be included in an upcoming amendment to 14 CFR part 16.

Subsequently, on February 22, 2002, the Director of the Office of Airport Safety and Standards and the Associate Administrator for Airports each issued memoranda delegating blanket authority in civil rights violations to the Deputy Assistant Administrator for Civil Rights and the Assistant Administrator for Civil Rights, respectively. These memoranda delegated authority to prepare and issue Director's Determinations pursuant to 14 CFR 16.31 and final decisions pursuant to 14 CFR 16.33 and 16.241(b) - (f), respectively.

Section 16.3 currently defines "Director" to be the Director of the Office of Airport Safety and Standards. The Director holds primary responsibility for issuing decisions in response to Part 16 complaints. In 2008, the FAA Administrator created the Office of Airport Compliance and Field Operations, and reassigned responsibility for adjudication of complaints filed against sponsors under Part 16 to that organization. The goal of these changes was to allow the Office of Airport Safety and Standards to provide greater emphasis on core safety and engineering mission requirements.¹³ With added changes to the FAA Airports organization in 2011, the Administrator assigned the compliance function to the newly reorganized Office of Airport Compliance and Management Analysis.¹⁴

Various stakeholders with experience filing or responding to Part 16 complaints have expressed opinions to the FAA on how to improve the complaint adjudication process. To obtain initial input early in 2011 as the agency considered pursuing rulemaking, the FAA held

¹³ FAA Notice 1100.318, para. 4, April 29, 2008.

“listening sessions” with stakeholder organizations whose members have been most affected by Part 16 proceedings. The FAA met with representatives from the following associations:

- Airports Council International-North America (ACI-NA), whose member airport operators may be the subject of complaints and therefore be required to respond under Part 16 (February 2011);
- National Air Transportation Association (NATA), whose member aviation service businesses such as fixed base operators (FBOs), charter providers, and aircraft management companies are often involved in Part 16 complaints (March 2011); and
- Aircraft Owners and Pilots Association (AOPA), whose member general aviation operators are also often involved in Part 16 complaints (April 2011).

The FAA has considered stakeholder recommendations as it has developed proposed changes to Part 16, and looks forward to additional input from public comments made in response to this proposed rule.

The intent of Part 16 was to expedite substantially the handling and disposition of airport-related complaints. The FAA’s experience with the use of Part 16 has been positive, in that the rule improved on the process available to complainants under Part 13 before Part 16’s implementation. While decisions sometimes take longer than the basic time frames provided in Part 16 for many reasons, there is no backlog of formal complaints awaiting resolution.

C. Statement of the Problem

Part 16 has not been updated since its original implementation in 1996. As described earlier in this preamble, existing Part 16 processes have worked well but are in need of revision based on agency and stakeholder experience during the past 15 years. The FAA proposes adding new processes and revising existing processes to clarify Part 16 and apply lessons learned to

¹⁴ FAA Notice 1100.333, para. 5, May 6, 2011.

provide for more efficient use of agency and stakeholder time and resources during complaint proceedings.

III. Discussion of the Proposal

A. Motions to Dismiss in Lieu of Answers and Loss of Standing by Prevailing Complainant

1. Motions for Summary Judgment or Dismissal

Current § 16.23(d) requires the respondent to file an answer to any complaint not dismissed by the FAA under § 16.25, within 20 days of the date of service of the FAA notification of docketing. Under the present rule, it is not worthwhile for the respondent to move to dismiss a complaint prior to preparing an answer because the submission of a motion to dismiss does not suspend the 20-day time-limit for filing an answer.¹⁵ The FAA has found that the respondent usually begins the sometimes costly and time-consuming effort of drafting an answer, complete with supporting documentation, at the same time as it drafts the motion to dismiss. The practical result is that, as suggested by current § 16.23(j), the motion to dismiss and the answer are almost always submitted at the same time. This practice is inconsistent with that of other agencies and with the Federal Rules of Civil Procedure.¹⁶ For example, 49 CFR 821.17 of the National Transportation Safety Board's (NTSB) Rules of Practice in Air Safety Proceedings, found at 49 CFR 821.1, *et seq.*, provides an opportunity for the NTSB to make a ruling through a summary judgment or grant a motion to dismiss.¹⁷

In addition to lacking consistency with other agency rules, the FAA believes that the current rule has required the full investigation process for some complaints that clearly lacked sufficient legal basis. The volume of complaints filed under Part 16 (231 through March 2011) creates a significant workload for the agency and for respondents alike.

¹⁵ See § 16.19(a).

¹⁶ Fed. R. Civ. P. 56.

¹⁷ See also National Highway Traffic Safety Administration's Adjudicative Procedures at 49 CFR 511.25(d) – (e), and Federal Trade Commission Rules of Practice for Adjudicative Proceedings at 16 CFR 3.24.

Sponsor representatives in Part 16 actions have indicated to the FAA that the full process under the current rule is burdensome in cases where complaints may be considered frivolous. They have specifically expressed concern about complaints they believe were filed merely to harass, intimidate, or cause financial hardship to a respondent. These stakeholders have suggested that a responsive motion could be used to dispose of frivolous complaints.

The FAA recognizes that “frivolous” is in the eye of the beholder. That said, it is not consistent with the intent of Part 16 or good government to require full response and investigation of clearly frivolous complaints. Although such complaints are clearly subject to dismissal under §§ 16.23, 16.25, and 16.27, the FAA recognizes that there may be differences of opinion about their applicability. Accordingly, the FAA believes it is appropriate to bring the Part 16 processes more in line with the Federal Rules of Civil Procedure¹⁸ and other agencies’ practices and permit respondents’ some recourse and opportunity for “self-help,” consistent with adequate due process. Therefore, the FAA is proposing a new § 16.26, Motions to dismiss and motions for summary judgment. These proposed rules could relieve the respondent and the agency from completing a full investigative process in certain cases by allowing the respondent to file a motion to dismiss or a motion for summary judgment in lieu of preparing an answer. Under proposed § 16.26(e), the time-limits for filing an answer would begin to run after the Director’s decision regarding the motion for dismissal or summary judgment. Under proposed § 16.26(f), the time-limits for filing an answer would begin to run, in cases where the Director does not act on the motion, within 30 days of the date an answer to a motion is due under proposed § 16.26. The proposed change provides the FAA, the complainant, and the respondent an opportunity to narrow the issues, and allows the FAA to conserve resources by investigating only legitimate, non-frivolous grant compliance issues.

¹⁸ Fed. R. Civ. P. 56.

Specifically, proposed § 16.26(a) includes a process for summary judgment whereby the respondent can request, and the FAA can issue, a decision as a matter of law when there are no genuine issues of material fact. Proposed § 16.26(b) includes a process whereby the respondent can file, and the FAA can grant or deny, a motion to dismiss a complaint that fails to state a claim or where the claim is legally inadequate because the facts do not support the claim. Proposed new §§ 16.26(c) - (g) provide more requirements in these cases.

2. Termination of Complainant Standing

The FAA believes that a complainant who has prevailed on all issues at the Director's decision stage has received due process. Therefore, the FAA is proposing to amend § 16.109 so that a complainant may not appeal a Director's Determination that has found a respondent in noncompliance on all issues. Current § 16.109 does not address the continuing participation of a complainant when the Director finds a sponsor in noncompliance on all issues identified in the initial complaint. It is inconsistent with the process for a complainant to appeal an action in which the complainant has prevailed. Such appeals would produce unnecessary workload for the agency and respondents. When a complainant prevails at the Director's Determination level, the objectives of the Part 16 process have been met because the complainant has identified sponsor noncompliance and the FAA has agreed through issuance of a Director's Determination.

In the 1994 NPRM, the FAA proposed that the respondent and the agency would be parties to the hearing and named in the hearing order. The FAA received comments stating that the complainant should also be a party to the hearing. The National Business Aviation Association (NBAA) argued that "the complainant's participation will help develop the record of

the case.”¹⁹ As a result, the final rule allowed the complainant to be a party to the hearing with the respondent and the agency.²⁰ In the preamble to the final rule, the FAA stated:

Under §16.31(d), a case proceeds to a hearing only after the FAA has found against the respondent in an initial determination that proposes the issuance of a compliance order. Thus, at the hearing the FAA has the burden of proof to establish the validity of its initial determination, including the proposed order of compliance under § 16.109. The respondent is a party to the hearing who seeks reversal of the FAA's initial determination. Although, a complainant's status as an airport user alone does not give rise to a sufficient property interests to justify party status as a matter of right, party status for the complainant will permit it to have an opportunity to assist in the development of the factual record as pointed out by NBAA. In addition, providing automatic party status will avoid burdening the hearing officer and parties with routine requests for intervention by complainant. The rule provides the hearing officer with ample powers to control the conduct of the hearing and to assure that complainant's participation does not unduly delay the proceedings.²¹

Since the enactment of Part 16, there has been confusion about the role of the complainant on appeal, given that at the hearing stage, the FAA has identified the noncompliance and taken over the role of complainant. The agency therefore becomes the prosecutor in a proceeding before a hearing officer. The FAA has the burden of proof to establish the validity of its initial determination, including the proposed order of compliance. Therefore, the FAA is clarifying that the role of the complainant at the hearing stage is limited to assisting, as needed, in the development of the factual record.²²

B. Optional Electronic Filing Procedures

The existing Part 16 process does not include provisions for electronic filing. Based on the success of an electronic filing test program that the FAA started in 2010, the effective implementation of such filing programs by other federal agencies, and the DOT's implementation of an electronic Part 16 Docket through regulations.gov, the FAA is proposing a

¹⁹ 61 FR 53998-53999, October 16, 1996.

²⁰ See 61 FR 53998-53999, October 16, 1996 and 14 CFR 16.203(b)(1).

²¹ 61 FR 53998-53999, October 16, 1996.

new § 16.13(h) to add an electronic filing alternative for parties to use when filing pleadings as part of a Part 16 proceeding. In addition, the FAA is proposing new definitions for “electronic filing” and “writing or written,” and amended language for the definition of “mail” in § 16.3.

Use of electronic filing would be an alternative rather than a requirement. In most cases, the electronic filing process would begin at the complaint filing stage for the complainant and at the answer stage for the respondent. The proposed rule would continue to require the complainant to serve the respondent with the initial complaint by personal delivery, facsimile, or mail unless the respondent has previously agreed in writing to electronic filing. Any party that has agreed to file electronically would be able to later opt out of the electronic filing process. In these cases, the proposed rule would require all other parties to then serve the party that has opted out by personal delivery, facsimile, or mail. Finally, unless the FAA provides specific notice that it will not accept electronic service, any party could file pleadings electronically with the FAA docket clerk at any stage of the Part 16 process except the hearing stage. At the hearing stage, a hearing officer could direct the parties to serve pleadings by another means.

The FAA expects that introducing the proposed electronic filing option would save participating parties and the FAA both time and money by foregoing the need to print documents on paper and then send them by delivery or mail. The new electronic filing procedures would expedite the process, reduce paper file storage requirements, and help in document transmittal and routing. The FAA also expects to reduce administrative costs because documents submitted electronically are more easily placed in the FAA’s electronic docket on regulations.gov.

²² See Centennial Express Airlines v. Arapahoe County Public Airport Authority, FAA Docket No. 16-98-05, at 10 (Final Agency Decision, February 18, 1999) (“the [Part 16] Rules of Practice give Complainants party status only to assist the FAA in the development of the factual record.”).

C. Applicability of Part 16 Proceedings for Complaints Initiated under 49 CFR Part 26

The present rule does not reference Disadvantaged Business Enterprises' (DBEs) rights to file complaints under the Part 16 process. As described in section II.B of this preamble, the current rule predates the 1999 implementation of 49 CFR part 26, Participation by Disadvantaged Business Enterprises in DOT Financial Assistance Programs.²³ Present Part 16 does not describe how persons who are eligible to file a complaint in accordance with 49 CFR 26.105(c) may do so under Part 16, nor does it make clear that such a person does not have to be directly and substantially affected by the alleged violation to file a complaint.

To align with 49 CFR part 26, the FAA is proposing to change 14 CFR part 16 by—

- Revising the definition of *Complaint* in § 16.3 to include a document filed by a person under 49 CFR 26.105(c) against a recipient of FAA funds alleged to have violated a provision of 49 CFR parts 23 and/or 26.
- Adding new §§ 16.21(a) and (b) that would relieve persons filing under 49 CFR 26.105(c) from the informal resolution process required by this section.
- Adding language in § 16.23(a) to clarify the complaint procedures for complainants filing under 49 CFR 26.105(c).
- Adding language in § 16.23(b)(4) to exclude a complainant filing under 49 CFR 26.105(c) from the requirement to describe how the respondent directly and substantially affected him or her by “things done or omitted to be done.”

D. Proposals to Streamline and Clarify Existing Processes

1. Intervention and Other Participation

Current § 16.207 addresses third-party intervention and other participation in Part 16 proceedings. This section has been generally effective, but FAA experience has led the agency to

²³ 64 FR 5126, February 2, 1999.

identify several updates that would improve the intervention process and reflect current practices. First, the current rule does not limit third-party participation to the hearing stage, nor does it restrict such participation to the discretion of the hearing officer. The FAA therefore proposes to add a new § 16.207(a) to reflect this. This addition would compel the redesignation of current paragraphs (a) through (d) as newly redesignated paragraphs (b) through (e). The FAA also proposes to recognize specifically the hearing officer's discretion over participation at this stage by replacing "FAA" with "hearing officer" in current § 16.207(d) (which the agency is proposing to redesignate as § 16.207(e)).

The FAA requires, in practice, any party that wishes to intervene in Part 16 proceedings to do so with a written motion. To make this practice transparent, the FAA is proposing to add the word "written" to the language in current § 16.207(a), which it is proposing to also redesignate as § 16.207(b).

Currently, § 16.207(b) states that a person may be granted leave to intervene if that person has a property or financial interest that may not be addressed adequately by the parties. The FAA believes that, as written, parties may infer that the intervenor may use the Part 16 process for monetary gains. This inference would be wrong. In practice, neither an intervenor nor a complainant should expect monetary gains, or, equitable or declaratory relief through the Part 16 process.

The FAA emphasizes that the Part 16 process is not a means of providing compensation to complainants for damages incurred due to alleged sponsor violations. The purpose of the Part 16 process, as established in the 1996 rule, has been to address sponsor noncompliance with federal obligations. Monetary relief, equitable relief, and declaratory judgment have not been available to complainants as remedies. Yet, some complainants have included in their complaints specific requests for monetary or declaratory relief under the current rule. Part 16 findings of

noncompliance cannot and do not result in the award of monetary damages.²⁴ The FAA proposes to clarify this point by amending language in current § 16.207(b) to replace “if the person has a property or financial interest that may not be addressed adequately by the parties” with “if the person has an interest that will benefit the proceedings,” as well as redesignating this paragraph as § 16.207(c).

2. Corrective Action Plans

Presently, Part 16 identifies two remedies available for the FAA to correct a noncompliant sponsor. First, § 16.109 describes procedures to terminate or prohibit federal grants, but does not address corrective action. Second, current §§ 16.241(c) and (f)(3) provide for the Associate Administrator to make a statement of corrective action, if appropriate, and identifies sanctions for continued noncompliance. The FAA has found that corrective action can be effective at the Director/initial decision level, but also could benefit from clarified requirements. The FAA proposes to allow the Director to have the same authority as the Associate Administrator to require submission and completion of a Corrective Action Plan. These changes would expedite the benefits of corrective action.

Proposed new §§ 16.109(c) and 16.245(d)(1) specify that the Director would be able to either enforce a Corrective Action Plan, or begin proceedings to revoke or deny the respondent’s application for federal assistance. If a respondent fails to complete the Corrective Action Plan requirement to the satisfaction of the FAA, proposed § 16.109(d) would allow the FAA to begin proceedings to revoke or deny the sponsor’s application for federal assistance. Proposed § 16.109(f) would give the process finality when a sponsor has fully complied with a Corrective Action Plan and/or the sponsor has corrected the areas of noncompliance by allowing the Director to terminate the proceedings.

²⁴ See, e.g., Davis v. Jackson Municipal Airport, FAA Docket No. 16-10-01, at 17 (Director’s Determination

In addition, the FAA proposes to add language to § 16.33 to address an unusual situation concerning the interaction of a proposed Corrective Action Plan and an appeal of a Director's Determination. This situation occurs when the agency finds against the sponsor in its initial determination and proceeds to work with the sponsor on the Corrective Action Plan, but at the same time the sponsor appeals the Director's Determination to the Associate Administrator for Airports. It results in confusion when on the one hand, the agency is working with the sponsor on correcting its behavior, and on the other hand, the sponsor is challenging the legal basis for the Corrective Action Plan and alleging error on the Director's part. To avoid this situation, the FAA is proposing to hold any Corrective Action Plan in abeyance until the appeal is resolved and/or a final order is issued.

3. Processes Involving the Director

The FAA has seen the need to clarify the role of the Director in certain areas. Section 16.11 states, in part, that the Director will conduct investigations, issue orders, and take such other actions as are necessary to fulfill the purposes of this part. It goes on to address the Director's authority to set time limits. The FAA has experienced situations where a party has continued to file documents with the Director after the issuance of a Director's Determination. Most of these documents challenge the determination and some ask for reconsideration. Some administrative processes used by other agencies allow the official making an initial decision to retain jurisdiction of a case and address the parties' concerns after rendering a decision.²⁵ However, it is the practice for the FAA to terminate the initial stage with the issuance of the Director's Determination and then to allow the Associate Administrator to consider any challenges to the Director's Determination. Part 16 does not presently have a process that specifically allows a party to ask for reconsideration of an initial decision. Allowing the

January 18, 2011).

Associate Administrator to take up any challenges to the Director's Determination starting at the issuance of the Director's Determination would adequately address parties' interests and uphold due process.

Therefore, proposed § 16.11(c) provides that the Director's jurisdiction terminates at the issuance of a Director's Determination, except where the determination contains a Corrective Action Plan and the sponsor does not appeal the determination.

The FAA is also proposing to change the section title to better describe the contents of § 16.11. The authority described in this section is broader than that described by "Expedition and other modification of process," and would be better described by changing this section heading to "General processes."

Additionally, the FAA finds it necessary to clarify whether or not the Director may be petitioned for rehearing after issuing his or her Director's Determination. The 1994 NPRM preamble indicates that the FAA did not intend to make rehearings available to the parties immediately after issuance of the Director's Determination. However, the 1996 Final Rule makes no mention of rehearings at that stage in either the regulatory text or the preamble, which dealt only with the availability of appeals to the Associate Administrator.²⁶ In order to increase clarity and transparency, the FAA is proposing language in new § 16.31(e) to preclude requests for "rehearing, reargument, reconsideration, or modification" at this stage without a showing of "good cause."

Good cause is a "substantial or legally sufficient reason for doing something . . . 'good cause' might include the existence of a fraud, lack of notice to the parties or new evidence."²⁷ It is a strict standard under which rehearing, reargument or reconsideration is not granted lightly.²⁸

²⁵ See, e.g., 49 CFR 821.1 *et seq.*

²⁶ 59 FR 29880, June 9, 1994, and 61 FR 53998, 54002, October 16, 1996.

²⁷ Steven H. Gifis, *Law Dictionary* 91 (1975).

²⁸ See Steven H. Gifis, *Law Dictionary* 91 (1975), see also Black's Law Dictionary (9th ed. 2009).

The FAA believes that full reconsideration after the Director's Determination stage is unnecessary because of the availability of an appeal to the Associate Administrator. This position is consistent with the 1994 NPRM's intent to "[p]rohibit interlocutory appeals and requests for reconsideration, and focus instead on an effective appeals process."²⁹

4. Standard of Proof and Burden of Proof

The present rule addresses Standard of Proof and Burden of Proof only as they relate to hearing officer actions, in §§ 16.227 and 16.229 respectively. The present rule does not provide a Standard of Proof and a Burden of Proof that the Director and Associate Administrator must utilize. However, it has been the practice of the Director and the Associate Administrator to use the same Standard of Proof and Burden of Proof throughout all stages of Part 16 proceedings, even though inconsistent treatment is permitted under the current rules. This inconsistent treatment is neither the intent nor the practice of the agency. In order to apply the same requirements throughout all stages of Part 16 proceedings, the agency proposes to add new § 16.31(b) addressing Standard of Proof, and new §§ 16.23(k) and 16.33(e) addressing Burden of Proof.

5. Limitation of Issues for Consideration upon Appeal

Currently, § 16.33(d) does not prescribe any limitations for the scope of the proceedings, and does not specifically prevent parties from raising new issues at the review stage. Parties in past cases have attempted to introduce new issues, offer additional evidence, and expand the scope of the complaint at the appeal stage. Such practices have delayed the issuance of Final Agency Decisions and have unfairly required parties responding to an appeal to defend extraneous claims.

²⁹ 59 FR 29880, 29882, June 9, 1994.

Other agencies limit the scope of an appeal, presumably for reasons of economy and fairness.³⁰ The FAA recognizes that such limits are useful, and proposes to limit issues for consideration on appeal by adding new sections addressing proceedings with and without hearings. Therefore, under §§ 16.33(e) and 16.245(e), if the Associate Administrator sustains the Director or the hearing officer, the Associate Administrator would limit review to whether or not—

- the findings of fact are each supported by a preponderance of reliable, probative and substantial evidence contained in the record;
- the conclusions are made in accordance with law, precedent, and policy;
- the questions on appeal are substantial; and
- any prejudicial errors have occurred.

Further, under proposed §§ 16.33(f) and 16.245(f), the Associate Administrator would not consider additional issues or evidence without a finding of good cause.

6. Provision for Consent Orders at the Non-Hearing Stage

Present § 16.243 provides an opportunity for parties to settle a case by entering into a consent order at the hearing stage of a proceeding. In practice, parties have entered into consent orders with the approval of the FAA at the non-hearing stage as well. This has proven to be a viable way to settle cases. Therefore, the FAA proposes to add a new § 16.34 to explicitly provide for this practice. The new process for the non-hearing stage in proposed § 16.34 would be consistent with the process in current § 16.243 for the hearing stage.

³⁰ Title 49 CFR part 821, NTSB Rules of Practice in Air Safety Proceedings, include such limitations in § 821.49, Issues on appeal. Title 49 CFR part 1503, Transportation Security Administration Investigative and Enforcement Proceedings, include such limitations in § 1503.657(b), Appeal from Initial Decision, Issues on Appeal.

7. Limitations to the Deposition of FAA Employees

Current § 16.215 addresses the general requirements for depositions at the hearing stage of Part 16 proceedings. It does not specifically consider the deposition of agency employees. The FAA believes that this omission has provided an opportunity for parties to acquire technical data from FAA employees to support their case, rather than obtaining expert witness support. Proposed new § 16.215(e) would remove this opportunity. Specifically, new § 16.215(e)(1) would align Part 16 with the provisions of 49 CFR part 9, Testimony of Employees of the Department and Production of Records in Legal Proceedings. New § 16.215(e)(2) would allow parties to depose agency employees only with the specific written permission of the Chief Counsel.

8. Processes Involving the Associate Administrator

The FAA believes that sections in current Part 16 pertaining to the Associate Administrator's authority and review would benefit from consolidation and clarification, especially with respect to the authority of the Associate Administrator in ordering corrective action after a finding of noncompliance. The FAA is proposing the following changes:

- Add new § 16.33(f) clarifying the requirements for submission of a petition to consider new evidence on appeal to the Associate Administrator to show “good cause.”³¹
- Remove the Subpart G heading label “Initial Decisions, Orders and Appeals” from before §§ 16.241 through 16.243, since these sections relate to the processes concerning hearings and are therefore more fittingly included in Subpart F, Hearings.
- Add a new § 16.245, Associate Administrator Review after a Hearing, to Subpart F, Hearings. New paragraphs would include:

³¹ See Steven H. Gifis, *Law Dictionary* 91 (1975), see also Black's Law Dictionary (9th ed. 2009).

- § 16.245(a), providing for permanent transfer of authority in civil rights cases to the FAA Assistant Administrator for Civil Rights (as described in section III.D.10 of this preamble);
- § 16.245(b), providing a more complete description of the Administrator's Authority to change a hearing officer's initial decision or remand it to the hearing officer if the Associate Administrator finds that the hearing officer erred;
- § 16.245(c), describing the Associate Administrator's authority after a hearing, as adopted from current § 16.241(f) with an increase of the time limit from 30 to 60 days for the Associate Administrator to issue a Final Agency Decision (to reflect current practice and resources);
- § 16.245(d), Orders of Compliance, explaining Associate Administrator authority to impose a Corrective Action Plan when the FAA finds a sponsor in violation (proposed § 16.245(d)(1)), and to remand the case to the Director for enforcement of the Corrective Action Plan (proposed § 16.245(d)(2)) (see also section III.D.2 of this preamble);
- §§ 16.245(e) and (f), limiting issues that the Associate Administrator will consider upon appeal (as described in section III.D.5 of this preamble);
and
- § 16.245(g), providing for appeal of Final Agency Decisions issued by the Associate Administrator in accordance with existing Subpart H, Judicial review (which the FAA proposes to redesignate as Subpart G).

9. Transfer of Responsibility for Civil Rights Cases.

As discussed at several points in this preamble, the present rule predates the 1999 DOT amendment to 49 CFR parts 23 and 26 that provided for DBE filing of complaints under 14 CFR part 16, and does not provide specific direction for complaints involving civil rights issues. 49 CFR part 26 is designed to help ensure that there is a level playing field for socially and economically disadvantaged firms to compete for airport contracting and concession opportunities.

Section III.C of this preamble specifically addresses the process for complainants filing under 49 CFR parts 23 and 26. However, the FAA also believes the new rule should reflect the agency practice of transferring the investigation and adjudication of Part 16 complaints involving civil rights issues to the Office of Civil Rights. The FAA recognizes that its Office of Civil Rights is best suited to issue decisions in Part 16 cases filed under 49 CFR parts 23 and 26.³² The FAA would formalize the authority of the FAA Office of Airports to transfer appropriate complaints, in whole or in part, to the Office of Civil Rights by amending the definitions of Associate Administrator and Director in current § 16.3, and adding new §§ 16.11(d), 16.33(a) and 16.245(a) to address the involvement of the Office of Civil Rights throughout the proceedings.

10. Availability of Judicial Review

Presently, § 16.247(a) provides that a person may seek judicial review of a final decision and order of the Associate Administrator. Section 16.247(b) states the decisions and determinations that do not constitute a final agency order. Although § 16.25 states that complaints may be dismissed with prejudice, in whole or in part for three reasons, the regulatory text is silent about whether such partial dismissals are interlocutory orders or are final orders

³² See Albuquerque Valet Service, et al., v. City of Albuquerque, FAA Docket No. 16-01-01, at 3 n.2 (Director's Determination February 11, 2002).

subject to immediate judicial review. The discussion of dismissals under § 16.25 in the preamble to the 1996 Final Rule states:

[b]esides dismissal of complaints that clearly do not state a cause of action, or those that do not come within the jurisdiction of the Administrator, a complaint may also be dismissed if the complainant lacks standing to file the complaint under §§16.3 and 16.23. As a final order of the agency, a dismissal with prejudice would be appealable to a United States Court of Appeals.³³

Similarly, the discussion in the preamble to the 1994 NPRM states:

[c]omplaints that clearly do not state a cause of action that warrants investigation by the jurisdiction of the Administrator, as well as those that do not come within the jurisdiction of the Administrator under the authorities set forth in this part, would be dismissed with prejudice, within 20 days after receipt of the complaint. As a final order of the agency, a dismissal would be appealable to a United States Court of Appeals.³⁴

An appeal to the Associate Administrator for Airports from an order of dismissal in these circumstances is simply not provided for.

The FAA saves time and resources by permitting direct judicial review of dismissals based upon the types of issues set forth in § 16.25. The parties similarly save time and resources. Moreover, that position is consistent with decisions of United States Courts of Appeals, which have found that certain orders of administrative agencies may be appealed when the claims involved in the order are separable from others in the case at hand and important enough that a decision from the courts, without full agency review, is desirable.³⁵

At this time, the FAA reiterates, consistent with the reasoning in the preamble of the current rule and the 1994 NPRM, the Director has the discretion to issue partial as well as complete dismissals with prejudice. The FAA proposes to amend § 16.247(a) to clarify that such

³³ 61 FR 53998, 540001 October 16, 1996.

³⁴ 59 FR 29,880-01, 29883, June 9, 1994.

³⁵ Finnegan v. Director, Office of Workers' Compensation Programs, 69 F.3d 1039, 1040 (9th Cir. 1996). See also Elkins v. Gober, 229 F.3d 1369, 1373 (Fed. Cir. 2000). C.f. State of New York v. United States, 568 F.2d 887, 893 (2d Cir. 1977).

orders of dismissal with prejudice under § 16.25 are final agency orders subject to judicial review.

11. Adjustment of Time Periods specified for Service by Mail

Presently, § 16.17(c) provides that 3 days shall be added to the prescribed period after the service if the service of a document is by mail. The FAA is proposing to extend this time period to 5 days in the new rule to align it with requirements contained in the agency's Part 13 Rules of Practice found at 14 CFR 13.211(e).

12. Other Updates

The FAA proposes other minor updates to Part 16 that include:

- Replacing the term “Director’s determination” with “Director’s Determination” throughout the rule to reflect what has become a term of art;
- Replacing references to the FAA Office of Airport Safety and Standards in the definition of “Director” (§ 16.3) with the FAA Office of Airport Compliance and Management Analysis, to reflect current FAA Office of Airport organization (as described in section II.B of this preamble);
- Adding reference to "other Federal obligations" to §§ 16.1(a)(3)-(5) to ensure that any special conditions, terms or requirements incorporated in grant agreements are included within the provisions of general applicability to initiate a Part 16 proceeding;
- Removing § 16.301, Definitions, inserting the definitions of “decisional employee” and “ex parte communication” currently in § 16.301 to § 16.3, Definitions, and redesignating §§ 16.303, 16.305, and 16.307 as §§ 16.301, 16.303, and 16.305, respectively;
- Adding citation for 49 U.S.C. 47133, Restriction on use of revenues, which became effective in 1996 after the publication of current Part 16, to the Part 16 List of

Authorities and § 16.1(a)(5) (it is technically necessary to include references to 49 U.S.C. § 47133, Restriction on use of airport revenue, for completeness even though it supplements and parallels 49 U.S.C. § 47107(b));

- Amending the filing address in § 16.13 to reflect that the docket clerk in Part 16 proceedings is now located in AGC-600;
- Adding clarifying instructions for filing motions (§ 16.19);
- Adding § 16.19(e) Extension by motion, requiring that “[a] party shall file a written motion for extension of time no later than 3 days before the document is due,” to ensure clarity and transparency to the process of granting extensions. The day is described as a “business-day” to avoid the 3-day limit encompassing a Saturday, Sunday, or legal holiday; and
- Adding to § 16.21(c) requirements that certifications of a party’s efforts to obtain informal resolution involve descriptions of efforts that are “relatively recent” and “demonstrated by pertinent documentation.”

The FAA believes that these updates would align the rule with current practice and terminology.

IV. Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Public Law 96-354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Public Law 96-39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S.

standards, the Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Public Law 104-4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this proposed rule.

A. Regulatory Evaluation

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this proposed rule.

The reasoning for this determination follows: The FAA's Office of Airport Compliance and Management Analysis handles complaints made against federally-assisted airports. Part 16 provides a process for investigating and adjudicating complaints against airport operators for violation of federal obligations. This proposed rule clarifies, and improves the efficiency of the current Part 16 regulations for adjudicating complaints on matters within the agency's authority. These changes would be cost beneficial as they decrease time spent and volume of paper documents required to process Part 16 complaints. Resource savings would be produced by allowing parties and the government to use the new electronic filing process and allow a respondent to file a motion to dismiss or a motion for summary judgment in lieu of an answer. Once the complainant has prevailed at the Director's Determination, no further positive outcome

can be obtained through FAA action. At this point there is no further purpose to be served by the complainant and further appeals (and participation) are not productive.

The expected outcome will be a minimal impact with positive net benefits, and a regulatory evaluation was not prepared. The FAA requests comments regarding this determination.

FAA has, therefore, determined that this proposed rule is not a “significant regulatory action” as defined in section 3(f) of Executive Order 12866, and is not “significant” as defined in DOT's Regulatory Policies and Procedures.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Public Law 96-354) (RFA) establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.” The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must

include a statement providing the factual basis for this determination, and the reasoning should be clear.

As noted above, the proposed changes to Part 16 are cost relieving. Accordingly, the proposed rule would not have a significant impact on a substantial number of small entities. Therefore, the FAA certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. The FAA requests comments regarding this determination. Specifically, the FAA requests comments on whether the proposed rule creates any specific compliance costs unique to small entities. Please provide detailed economic analysis to support any cost claims.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Public Law 96-39), as amended by the Uruguay Round Agreements Act (Public Law 103-465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this proposed rule and determined that it would have only a domestic impact and therefore create no obstacles to the foreign commerce of the United States.

D. Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a

proposed or final agency rule that may result in an expenditure of \$100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action." The FAA currently uses an inflation-adjusted value of \$143.1 million in lieu of \$100 million. This proposed rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there would be no new requirement for information collection associated with this proposed rule.

F. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

G. Environmental Analysis

FAA Order 1050.1E, Policies and Procedures for Considering Environmental Impacts, identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312d and involves no extraordinary circumstances.

V. Executive Order Determinations

A. Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. The agency has determined that this action would not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, would not have Federalism implications.

B. Executive Order 13211, Regulations that Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this proposed rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it would not be a “significant energy action” under the executive order and would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

VI. Additional Information

A. Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. The agency also invites comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking.

Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The agency may change this proposal in light of the comments it receives.

B. Availability of Rulemaking Documents

An electronic copy of rulemaking documents may be obtained from the Internet by—

1. Searching the Federal eRulemaking Portal (<http://www.regulations.gov>);
2. Visiting the FAA's Regulations and Policies web page at http://www.faa.gov/regulations_policies or
3. Accessing the Government Printing Office's web page at <http://www.gpoaccess.gov/fr/index.html>.

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-9680. Commenters must identify the docket or notice number of this rulemaking.

All documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, may be accessed from the Internet through the Federal eRulemaking Portal referenced in item (1) above.

List of Subjects in 14 CFR part 16

Administrative practice and procedure, Airports, Investigations

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend chapter I of title 14, Code of Federal Regulations as follows:

PART 16-- RULES OF PRACTICE FOR FEDERALLY-ASSISTED AIRPORT ENFORCEMENT PROCEEDINGS

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

Authority: 49 U.S.C. 106(g), 322, 1110, 1111, 1115, 1116, 1718 (a) and (b), 1719, 1723, 1726, 1727, 40103(e), 40113, 40116, 44502(b), 46101, 46104, 46110, 47104, 47106(e), 47107, 47108, 47111(d), 47122, 47123–47125, 47133, 47151–47153, 48103.

2. Amend § 16.1 by revising paragraphs (a) introductory text and (a)(3) through (6) to read as follows:

§ 16.1 Applicability and description of part.

(a) *General.* The provisions of this part govern all Federal Aviation Administration (FAA) proceedings involving Federally-assisted airports, except for complaints or requests for determination filed with the Secretary under 14 CFR part 302, whether the proceedings are instituted by order of the FAA or by filing a complaint with the FAA under the following authorities:

* * * * *

(3) The assurances and other Federal obligations contained in grant-in-aid agreements issued under the Federal Airport Act of 1946, 49 U.S.C. 1101 *et seq* (repealed 1970).

(4) The assurances and other Federal obligations contained in grant-in-aid agreements issued under the Airport and Airway Development Act of 1970, as amended, 49 U.S.C. 1701 *et seq*.

(5) The assurances and other Federal obligations contained in grant-in-aid agreements issued under the Airport and Airway Improvement Act of 1982 (AAIA), as amended, 49 U.S.C. 47101 *et seq.*, specifically section 511(a), 49 U.S.C. 47107, and 49 U.S.C. 47133.

(6) Section 505(d) of the Airport and Airway Improvement Act of 1982, and the requirements concerning civil rights and/or Disadvantaged Business Enterprise (DBE) issues contained in 49

U.S.C. 47107(e) and 49 U.S.C. 47113; 49 U.S.C. 47123; 49 U.S.C. 322, as amended; 49 CFR parts 23 and/or 26; and/or grant assurance 30 and/or grant assurance 37.

* * * * *

3. Amend § 16.3 as follows:

a. Remove the definitions of *Director's determination*, *File*, and *Final decision and order*;

b. Revise the definitions of *Agency employee*, *Associate Administrator*, *Complaint*, *Director*, *Hearing officer*, *Mail*, and *Personal delivery*; and

c. Add definitions for *Administrator*, *Agency*, *Decisional employee*, *Electronic filing*, *Ex parte communication*, and *Writing or written*.

The revisions and additions read as follows:

§ 16.3 Definitions.

* * * * *

Administrator means the Administrator of the FAA;

Agency means the FAA.

* * * * *

Agency employee means any employee of the FAA.

Associate Administrator means the FAA Associate Administrator for Airports or a designee. For the purposes of this part only, Associate Administrator also means the Assistant Administrator for Civil Rights or a designee for complaints that the FAA Associate Administrator for Airports transfers to the Assistant Administrator for Civil Rights.

* * * * *

Complaint means a written document meeting the requirements of this part and filed under this part:

(1) By a person directly and substantially affected by anything allegedly done or omitted to be done by any person in contravention of any provision of any Act, as defined in this section, as to matters within the jurisdiction of the Administrator, or

(2) By a person under 49 CFR 26.105(c) against a recipient of FAA funds alleged to have violated a provision of 49 CFR parts 23 and/or 26.

Decisional employee means the Administrator, Deputy Administrator, Associate Administrator, Director, hearing officer, or other FAA employee who is or who may reasonably be expected to be involved in the decisional process of the proceeding.

Director means the Director of the FAA Office of Airport Compliance and Management Analysis, or a designee. For the purposes of this part only, Director also means the Deputy Assistant Administrator for Civil Rights for complaints that the Director of the FAA Office of Airport Compliance and Management Analysis transfers to the Deputy Assistant Administrator for Civil Rights or designee.

Electronic filing means the process of sending electronic mail (e-mail) to the FAA Part 16 Docket Clerk, with scanned documents attached, as a Portable Document Format (PDF) file.

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this part, or communications between FAA employees who participate as parties to a hearing pursuant to 16.203(b) of this part and other parties to a hearing.

Hearing officer means an attorney designated by the Deputy Chief Counsel in a hearing order to serve as a hearing officer in a hearing under this part. The following are not designated as hearing officers: the Chief Counsel and Deputy Chief Counsel; the Regional or Center Counsel and attorneys in the FAA region or center in which the noncompliance has allegedly occurred or

is occurring; the Assistant Chief Counsel and attorneys in the Airport Law Branch of the FAA Office of the Chief Counsel; and the Assistant Chief Counsel and attorneys in the Litigation Division of the FAA Office of Chief Counsel.

* * * * *

Mail means U.S. first class mail; U.S. certified mail; and U.S. express mail. Unless otherwise noted, mail also means electronic mail containing PDF copies of pleadings or documents required herein.

* * * * *

Personal delivery means same-day hand delivery or overnight express delivery service.

* * * * *

Writing or written includes paper documents that are filed and/or served by mail, personal delivery, facsimile, or e-mail (as attached PDF files).

4. Amend § 16.11 by revising the section heading and paragraphs (a) and (b) introductory text, and adding paragraphs (c) and (d) to read as follows:

§ 16.11 General processes.

(a) Under the authority of 49 U.S.C. 40113 and 47121, the Director may conduct investigations, issue orders, and take such other actions as are necessary to fulfill the purposes of this part. This includes the extension of any time period prescribed, where necessary or appropriate for a fair and complete consideration of matters before the agency, prior to issuance of the Director's Determination.

(b) Notwithstanding any other provision of this part, upon finding that circumstances require expedited handling of a particular case or controversy, the Director may issue an order directing any of the following prior to the issuance of the Director's Determination:

* * * * *

(c) Other than those matters concerning a Corrective Action Plan, the jurisdiction of the Director terminates upon the issuance of the Director's Determination. All matters arising during the appeal period, such as requests for extension of time to make an appeal, will be addressed by the Associate Administrator.

(d) The Director may transfer to the FAA Deputy Assistant Administrator for Civil Rights or Office of Civil Rights designee the authority to prepare and issue Director's Determinations pursuant to § 16.31 for complaints alleging violations of Section 505(d) of the Airport and Airway Improvement Act of 1982, and the requirements concerning civil rights and/or Disadvantaged Business Enterprise (DBE) issues contained in 49 U.S.C. 47107(e) and 49 U.S.C. 47113; 49 U.S.C. 47123; 49 U.S.C. 322, as amended; 49 CFR parts 23 and/or 26; and/or grant assurance 30 and/or grant assurance 37.

5. Amend § 16.13 by revising paragraphs (a), (b), (c), (d), and (f) and adding paragraphs (h) and (i) to read as follows:

§ 16.13 Filing of documents.

* * * * *

(a) *Filing address.* Documents filed under this Part shall be filed with the Office of the Chief Counsel, Attention: FAA Part 16 Docket Clerk, AGC-600, Federal Aviation Administration, 800 Independence Ave., SW., Washington, DC, 20591. Documents to be filed with a hearing officer shall be filed at the address and in the manner stated in the hearing order.

(b) *Date and method of filing.* Filing of any document shall be by personal delivery or mail as defined in this part, by facsimile (when confirmed by filing on the same date by one of the foregoing methods), or electronically as set forth in paragraph (h) of this section. Unless the date is shown to be inaccurate, documents filed with the FAA shall be deemed to be filed on the date of personal delivery, on the mailing date shown on the certificate of service, on the date shown

on the postmark if there is no certificate of service, on the send date shown on the facsimile (provided filing has been confirmed through one of the foregoing methods), or on the mailing date shown by other evidence if there is no certificate of service and no postmark. Unless the date is shown to be inaccurate, documents filed electronically shall be deemed to be filed on the date shown on the certificate of service or, if none, the date of electronic transmission to the last party required to be served.

(c) *Number of copies.* With the exception of electronic filing or unless otherwise specified, an executed original and three copies of each document shall be filed with the FAA Part 16 Docket Clerk. One of the three copies shall not be stapled, bound or hole-punched. Copies need not be signed, but the name of the person signing the original shall be shown. If a hearing order has been issued in the case, one of the three copies shall be filed with the hearing officer unless otherwise prescribed by the hearing officer. A facsimile neither constitutes an executed original nor one of the three copies required directly above.

(d) *Form.* Documents filed under this part shall:

(1) Be typewritten or legibly printed;

(2) Include, in the case of docketed proceedings, the docket number of the proceeding on the front page; and

(3) Be marked to identify personal, privileged or proprietary information. Decisions for the publication and release of these documents will be made in accordance with 5 U.S.C. 552 and 49 CFR part 7.

* * * * *

(f) *Designation of person to receive service.* The initial document filed by any person shall state on the first page the name, post office address, telephone number, facsimile number, if any, and e-mail address, if filing electronically, of the person(s) to be served with documents in the

proceeding. If any of these items change during the proceeding, the person shall promptly file notice of the change with the FAA Part 16 Docket Clerk and the hearing officer and shall serve the notice on all parties.

* * * * *

(h) *Electronic filing.* (1) The initial complaint may be served electronically upon the respondent only if the respondent has previously agreed with the complainant in writing to participate in electronic filing. Documents may be filed under this Part electronically by sending an e-mail containing (an) attachment(s) of (a) PDF file(s) of the required pleading to the FAA Docket Clerk, and the person designated in paragraph (h)(3) of this section.

(2) The subject line of the e-mail must contain the names of the complainant and respondent, and must contain the FAA docket number (if assigned). The size of each e-mail must be less than 10 MB. E-mail attachments containing executable files (e.g., .exe and .vbs files) will not be accepted.

(3) The e-mail address at which the parties may file the documents described in this section is 9-AWA-AGC-Part-16@faa.gov. No acknowledgement or receipt will be provided by the FAA to parties using this method. A party filing electronically as described in this section must provide to the FAA Part 16 Docket Clerk and the opposing party an e-mail address of the person designated by the party to receive pleadings.

(4) By filing a pleading or document electronically as described in this section, a party waives the rights under this part for service by the opposing party and the FAA by methods other than e-mail. If a party subsequently decides to “opt-out” of electronic filing, that party must so notify the FAA Part 16 Docket Clerk and the other party in writing, from which time the FAA and the parties will begin serving the opting-out party in accordance with §§ 16.13 and 16.15. This subsection only exempts the parties from the filing and service requirements in § 16.13(a) (with

the exception that “Documents to be filed with a hearing officer shall be filed at the address stated in the hearing order.”), the method of filing requirements in § 16.13(b), and the number of documents requirements in § 16.13(c).

(i) *Internet accessibility of documents filed in the Hearing Docket.* (1) Unless protected from public disclosure, all documents filed in the Hearing Docket are accessible through the Federal Docket Management System (FDMS): <http://www.regulations.gov>. To access a particular case file, use the FDMS number assigned to the case.

(2) Determinations issued by the Director and Associate Administrator in Part 16 cases, indexes of decisions, contact information for the FAA Hearing Docket, the rules of practice, and other information are available on the FAA Office of Airport’s web site at:

<http://part16.airports.faa.gov/index.cfm>.

6. Amend § 16.15 by revising paragraphs (a), (b), (d)(1) and (d)(2), and adding paragraph (d)(3) to read as follows:

§ 16.15 Service of documents on the parties and the agency.

* * * * *

(a) *Who must be served.* Copies of all documents filed with the FAA Part 16 Docket Clerk shall be served by the persons filing them on all parties to the proceeding. A certificate of service shall accompany all documents when they are tendered for filing and shall certify concurrent service on the FAA and all parties. Certificates of service shall be in substantially the following form:

I hereby certify that I have this day served the foregoing [name of document] on the following persons at the following addresses, facsimile numbers (if also served by facsimile), or e-mail address (if served electronically in accordance with § 16.13(h)), by [specify method of service]:

[list persons, addresses, facsimile numbers, e-mail addresses (as applicable)]

Dated this ___ day of ___, 20__.

[signature], for [party]

(b) Method of service. Except as otherwise agreed by the parties and, if applicable, the hearing officer, the method of service is the same as set forth in § 16.13(b) for filing documents.

* * * * *

(d) * * *

(1) When acknowledgment of receipt is by a person who customarily or in the ordinary course of business receives mail at the address of the party or of the person designated under § 16.13(f);

(2) When a properly addressed envelope, sent to the most current address submitted under § 16.13(f), has been returned as undeliverable, unclaimed, or refused; or

(3) When the party serving the document electronically has a confirmation statement demonstrating that the e-mail was properly sent to a party correctly addressed.

* * * * *

7. Amend § 16.17 by revising paragraph (c) to read as follows:

§ 16.17 Computation of time.

* * * * *

(c) Whenever a party has the right or is required to do some act within a prescribed period after service of a document upon the party, and the document is served on the party by first class mail or certified mail, 5 days shall be added to the prescribed period.

8. Amend § 16.19 by adding paragraphs (d) and (e) to read as follows:

§ 16.19 Motions.

* * * * *

(d) *Deferred actions on motions.* A ruling on a motion made before the time set for the issuance of the Director's Determination may be deferred to and included with the Director's Determination.

(e) *Extension by motion.* A party shall file a written motion for an extension of time not later than 3 business days before the document is due unless good cause for the late filing is shown. A party filing a motion for extension should attempt to obtain the concurrence of the opposing party. A party filing a written motion for an extension of time shall file the motion as required under § 16.13, and serve a copy of the motion on all parties and the docket clerk as required under § 16.15.

9. Revise § 16.21 to read as follows:

§ 16.21 Pre-complaint resolution.

(a) Except for those persons filing under 49 CFR 26.105(c), prior to filing a complaint under this part, a person directly and substantially affected by the alleged noncompliance shall initiate and engage in good faith efforts to resolve the disputed matter informally with those individuals or entities believed responsible for the noncompliance. These efforts at informal resolution may include, without limitation, at the parties' expense, mediation, arbitration, or the use of a dispute resolution board, or other form of third party assistance. The FAA Airports District Office, FAA Airports Field Office, FAA Regional Airports Division responsible for administering financial assistance to the sponsor, or the FAA Office of Civil Rights will be available upon request to assist the parties with informal resolution.

(b) Except for complaints filed under 49 CFR 26.105(c), a complaint will be dismissed under § 16.27 unless the person or authorized representative filing the complaint certifies that:

(1) The complainant has made substantial and reasonable good faith efforts to resolve the disputed matter informally prior to filing the complaint; and

(2) There is no reasonable prospect for practical and timely resolution of the dispute.

(c) The certification required under paragraph (b) of this section, shall include a brief description of the party's efforts to obtain informal resolution but shall not include information on monetary or other settlement offers made but not agreed upon in writing by all parties. Such efforts to resolve informally should be relatively recent and be demonstrated by pertinent documentation.

There is no required form or process for informal resolution, but in each case the requirements to resolve the matter informally must meet the requirements of this paragraph.

10. Amend § 16.23 by revising the section heading; revising paragraphs (a), (b)(2), (b)(4), (c), (d), and (j); and adding paragraphs (k) and (l) to read as follows:

§ 16.23 Pleadings.

(a) A person directly and substantially affected by any alleged noncompliance or a person qualified under 49 CFR 26.105(c) may file a complaint under this Part. A person doing business with an airport and paying fees or rentals to the airport shall be considered directly and substantially affected by alleged revenue diversion as defined in 49 U.S.C. 47107(b).

(b) * * *

(2) Include all documents then available in the exercise of reasonable diligence, to be offered in support of the complaint, and to be served upon all persons named in the complaint as persons responsible for the alleged action(s) or omission(s) upon which the complaint is based;

* * * * *

(4) Except for complaints filed under 49 CFR 26.105(c), describe how the complainant was directly and substantially affected by the things done or omitted to be done by the respondents.

(c) Unless the complaint is dismissed pursuant to § 16.25 or § 16.27, the FAA notifies the complainant and respondent in writing within 20 days after the date the FAA receives the complaint that the complaint has been docketed.

(d) The respondent shall file an answer within 20 days of the date of service of the FAA notification or, if a motion is filed under § 16.26, within 20 days of the date of service of an FAA order denying all or part of that motion.

* * * * *

(j) Amendments or supplements to the pleadings described in this section will not be allowed without showing good cause through a motion and supporting documents.

(k) *Burden of Proof*. Except as used in subpart F of this part,

(1) The burden of proof is on the complainant to show noncompliance with an Act or any regulation, order, agreement or document of conveyance issued under the authority of an Act.

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

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

(l) Except for good cause shown through motion and supporting documents, discovery is not permitted except as provided in §§ 16.213 and 16.215.

11. Revise § 16.25 to read as follows:

§ 16.25 Dismissals.

(a) Within 20 days after the receipt of the complaint, unless a motion has been filed under § 16.26, the Director will dismiss a complaint, or any claim made in a complaint, with prejudice if:

(1) It appears on its face to be outside the jurisdiction of the Administrator under the Acts listed in § 16.1;

(2) On its face it does not state a claim that warrants an investigation or further action by the FAA; or

(3) The complainant lacks standing to file a complaint under §§ 16.3 and 16.23.

(b) A dismissal under this section will include the reasons for the dismissal.

12. Add § 16.26 as follows:

§ 16.26 Motions to dismiss and motions for summary judgment.

(a) In lieu of an answer, the respondent may file a motion to dismiss the complaint or a motion for summary judgment on the complaint. The respondent may move for dismissal of the entire complaint or move for dismissal of particular issues from adjudication. The motion must be filed within 20 days after the date the FAA receives the complaint.

(b) A motion to dismiss or a motion for summary judgment may be based on the grounds that there is no genuine issue of material fact for adjudication and that the complaint, when viewed in the light most favorable to the complainant, should be dismissed as a matter of law because it:

(1) Fails to state a claim that the respondent has violated any obligation subject to adjudication under this part;

(2) Fails to state a claim within the jurisdiction of the FAA; or

(3) Fails to meet the requirements for filing a complaint under this part.

(c) A motion to dismiss or a motion for summary judgment shall be accompanied by a concise statement of the material facts as to which the respondent contends there is no genuine issue of material fact. The motion may include affidavits and documentary evidence in support of the contention that there is no genuine issue of fact in dispute.

(d) A complainant may file an answer to the motion within 10 days of the date the motion is served on the complainant, or within any other period set by the Director. The answer shall be accompanied by a concise statement of the material facts the complainant contends are and are not in dispute, and may be accompanied by affidavits and other documentary evidence in support of that contention.

(e) Within 30 days of the date an answer to a motion is due under this section, the Director may issue an order granting the motion, in whole or in part. If the Director denies the motion in whole or in part, then within 20 days of when the order is served on the respondent, the respondent shall file an answer to the complaint.

(f) If the Director does not act on the motion within 30 days of the date an answer to a motion is due under this section, the respondent shall file an answer to the complaint within the next 20 days.

13. Revise § 16.27 to read as follows:

§ 16.27 Incomplete complaints.

(a) If a complaint is not dismissed pursuant to § 16.25 of this part, but is deficient as to one or more of the requirements set forth in § 16.21 or § 16.23(b), the Director will dismiss the complaint within 20 days after receiving it. Dismissal will be without prejudice to the refileing of the complaint after amendment to correct the deficiency. The Director's dismissal will include the reasons for the dismissal.

(b) Dismissals under this section are not initial determinations, and appeals from decisions under this section will not be permitted.

14. In § 16.29 , revise the first sentence of paragraph (b)(2) to read as follows:

§ 16.29 Investigations.

* * * * *

(b) * * *

(2) Obtaining additional oral and documentary evidence by use of the agency's authority to compel production of such evidence under section 313 of the Federal Aviation Act of 1958 as amended by 49 U.S.C. 40113 and 46104, and section 519 of the Airport and Airway Improvement Act, 49 U.S.C. 47122. * * *

* * * * *

15. Revise § 16.31 to read as follows:

§ 16.31 Director's Determinations after investigations.

(a) After consideration of the pleadings and other information obtained by the FAA after investigation, the Director will render an initial determination and serve it upon each party within 120 days of the date the last pleading specified in § 16.23 was due.

(b)(1) The Director's Determination shall include findings of fact and conclusions of law, accompanied by explanations and based upon all material issues of fact, credibility of the evidence, law and discretion presented on the record, together with a statement of the reasons therefor.

(2) The Director shall issue a determination or rule in a party's favor only if the determination or ruling is in accordance with law and supported by a preponderance of the reliable, probative, and substantial evidence contained in the record.

(c) A party adversely affected by the Director's Determination may appeal the initial determination as provided in § 16.33. However, if the Director's Determination that is appealed contains a Corrective Action Plan, the Director has the discretion to suspend the Corrective Action Plan until the appeal is resolved.

(d) If the Director's Determination finds the respondent in noncompliance and proposes the issuance of a compliance order, the initial determination will include notice of opportunity for a hearing under subpart F of this part if a hearing is required by statute or otherwise provided by the FAA. A hearing may be required by statute if the FAA determination would terminate eligibility for grants under 49 U.S.C. 47114(c) or (e), or terminate payments on a grant agreement under 49 U.S.C. subchapter 471. The respondent may elect or waive a hearing, as provided in subpart E of this part.

(e) The Director will not consider requests for rehearing, reargument, reconsideration, or modification of a Director's Determination without a finding of good cause.

16. Revise § 16.33 to read as follows:

§ 16.33 Final decisions without hearing.

(a) The Associate Administrator may transfer to the FAA Assistant Administrator for Civil Rights the responsibility to prepare and issue Final Agency Decisions pursuant to this section for appeals with issues concerning civil rights.

(b) The Associate Administrator will issue a final decision on appeal from the Director's Determination, without a hearing, where—

(1) The complaint is dismissed after investigation;

(2) A hearing is not required by statute and is not otherwise made available by the FAA; or

(3) The FAA provides opportunity for a hearing to the respondent and the respondent waives the opportunity for a hearing as provided in subpart E of this part.

(c) In the cases described in paragraph (a) of this section, within 30 days after the date of service of the initial determination, a party adversely affected by the Director's Determination may file in accordance with § 16.13 and serve in accordance with § 16.15 a simultaneous Notice of Appeal and Brief.

(d) A reply to an appeal brief may be filed within 20 days after the date of service of the appeal.

(e) On appeal, the Associate Administrator will consider the issues addressed in any order on a motion to dismiss or motion for summary judgment and any issues accepted in the Director's Determination using the following analysis:

(1) Are the findings of fact each supported by a preponderance of reliable, probative, and substantial evidence contained in the record?

(2) Are conclusions made in accordance with law, precedent and policy?

(3) Are the questions on appeal substantial?

(4) Have any prejudicial errors occurred?

(f) Any new issues or evidence presented in an appeal or reply will not be considered unless accompanied by a petition and good cause found as to why the new issue or evidence was not presented to the Director. Such a petition must:

(1) Set forth the new matter;

(2) Contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and

(3) Contain a statement explaining why such new issue or evidence could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed.

(g) The Associate Administrator will issue a final decision and order within 60 days after the due date of the reply.

(h) If no appeal is filed within the time period specified in paragraph (c) of this section, the Director's Determination becomes the final decision and order of the FAA without further action. A Director's Determination that becomes final, because there is no administrative appeal, is not judicially reviewable.

(i) No requests for rehearing, reargument, reconsideration, or modification of a final order will be considered without a finding of good cause.

17. Add § 16.34 to read as follows:

§ 16.34 Consent orders.

(a) The parties may agree at any time before the issuance of a final agency decision to dispose of the case by issuance of a consent order. Good faith efforts to resolve a complaint through issuance of a consent order may continue throughout the administrative process. However,

except as provided in § 16.11(a), such efforts may not serve as the basis for extensions of the times set forth in this part.

(b) A proposal for a consent order, specified in paragraph (a) of this section, shall include:

(1) A proposed consent order;

(2) An admission of all jurisdictional facts; and

(3) An express waiver of the right to further procedural steps and of all rights of judicial review.

(c) If the parties agree to dispose of a case by issuance of a consent order before the FAA issues a Director's Determination, the proposal for a consent order is submitted jointly by the parties to the Director, together with a request to adopt the consent order and dismiss the case. The Director issues the consent order as an order of the FAA and terminates the proceeding.

§ 16.105 [Amended]

18. Amend § 16.105 by removing "determination" and adding "Determination" in its place.

19. Revise § 16.109 to read as follows:

§ 16.109 Orders terminating eligibility for grants, cease and desist orders, and other compliance orders.

(a) The agency will provide the opportunity for a hearing if, in the Director's determination, the agency issues or proposes to issue an order terminating eligibility for grants pursuant to 49 U.S.C. 47106(d), an order suspending the payment of grant funds pursuant to 49 U.S.C. 47111(d), an order withholding approval of any new application to impose a passenger facility charge pursuant to 49 U.S.C. 47111(e), a cease and desist order, an order directing the refund of fees unlawfully collected, or any other compliance order issued by the Administrator to carry out the provisions of the Acts, and required to be issued after notice and opportunity for a hearing. In cases in which a hearing is not required by statute, the FAA may provide opportunity for a hearing at its discretion.

(b) In a case in which the agency provides the opportunity for a hearing, the Director's Determination issued under § 16.31 will include a statement of the availability of a hearing under subpart F of this part.

(1) Within 20 days after service of a Director's Determination under § 16.31 that provides an opportunity for a hearing a person subject to the proposed compliance order may—

(i) Request a hearing under subpart F of this part;

(ii) Waive hearing and appeal the Director's Determination in writing, as provided in § 16.33;

(iii) File, jointly with a complainant, a motion to withdraw the complaint and to dismiss the proposed compliance action; or

(iv) Submit, jointly with the agency, a proposed consent order under § 16.34(c).

(2) If the respondent fails to file an appeal in writing within the time periods provided in paragraph (c) of this section, the Director's Determination becomes final.

(c) The Director may either direct the respondent to submit a Corrective Action Plan or initiate proceedings to revoke and/or deny the respondent's application for Airport Improvement Program discretionary grants under 49 U.S.C. 47115 and general aviation airport grants under 49 U.S.C. 47114(d) when a Director's Determination finds a respondent in noncompliance and does not provide for a hearing.

(d) In the event that the respondent fails to submit, in accordance with a Director's Determination, a Corrective Action Plan acceptable to the FAA within the time provided, unless extended by the FAA for good cause, and/or if the respondent fails to complete the Corrective Action Plan as specified therein, the Director may initiate action to revoke and/or deny applications for Airport Improvement Program discretionary grants under 49 U.S.C. 47115 and general aviation airport grants under 49 U.S.C. 47114(d).

(e) For those violations that cannot be remedied through corrective action the Director may initiate action to revoke and/or deny the respondent's applications for Airport Improvement Program discretionary grants under 49 U.S.C. 47115 and general aviation airport grants under 49 U.S.C. 47114(d).

(f) When the Director concludes that the respondent has fully complied with the Corrective Action Plan and/or when the Director determines that the respondent has corrected the areas of noncompliance, the Director will terminate the proceeding.

(g) A complainant's standing terminates upon the issuance of a Director's Determination that finds a respondent in noncompliance on all identified issues. The complainant may not appeal the Director's Determination if the Director finds noncompliance on all identified issues.

20. Amend § 16.201 by revising paragraph (b) to read as follows:

§ 16.201 Notice and order of hearing.

* * * * *

(b) Where there are no genuine issues of material fact requiring oral examination of witnesses, the hearing order may contain a direction to the hearing officer to conduct a hearing by submission of briefs and oral argument without the presentation of testimony or other evidence.

21. Amend § 16.203 by revising paragraphs (a)(1), (b)(1), and (b)(2) to read as follows:

§ 16.203 Appearances, parties, and rights of parties.

(a) * * *

(1) Any party may be accompanied, represented, or advised by an attorney 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, or by another person authorized by the hearing officer to be the party's representative.

* * * * *

(b) * * *

(1) The parties to the hearing are the complainant(s) and respondent(s) named in the hearing order, and the agency. The style of any pleadings filed under this Subpart shall name the respondent as the Appellant, and the Federal Aviation Administration as the Agency.

(2) Unless otherwise specified in the hearing order, the agency attorney will serve as prosecutor for the agency from the date of issuance of the Director's Determination providing an opportunity for hearing.

22. Revise § 16.207 to read as follows:

§ 16.207 Intervention and other participation.

(a) Intervention and participation by other persons are permitted only at the hearing stage of the complaint process and with the written approval of the hearing officer.

(b) A person may submit a written motion for leave to intervene as a party. Except for good cause shown, a motion for leave to intervene shall be submitted not later than 10 days after the notice of hearing and hearing order.

(c) If the hearing officer finds that intervention will not unduly broaden the issues or delay the proceedings and, if the person has an interest that will benefit the proceedings, the hearing officer may grant a motion for leave to intervene. The hearing officer may determine the extent to which an intervenor may participate in the proceedings.

(d) Other persons may petition the hearing officer for leave to participate in the hearing.

Participation is limited to the filing of a posthearing brief and reply to the hearing officer and the Associate Administrator. Such a brief shall be filed and served on all parties in the same manner as the parties' posthearing briefs are filed.

(e) Participation under this section is at the discretion of the hearing officer, and no decision permitting participation shall be deemed to constitute an expression that the participant has such a substantial interest in the proceeding as would entitle it to judicial review of such decision.

23. In § 16.211, revise the last sentence in paragraph (c) to read as follows:

§ 16.211 Prehearing conference.

* * * * *

(c) * * * In addition, the hearing officer establishes the schedule, which shall provide for the issuance of an initial decision not later than 110 days after issuance of the Director's Determination order unless otherwise provided in the hearing order.

24. Amend § 16.215 by adding paragraph (e) to read as follows:

§ 16.215 Depositions.

* * * * *

(e) *Depositions of agency employees.* (1) Depositions of Agency Employees will not be allowed except under the provisions of 49 CFR part 9.

(2) Such depositions will be allowed only with the specific written permission of the Chief Counsel or his designee.

25. Revise § 16.227 by to read as follows:

§ 16.227 Standard of proof.

The hearing officer shall issue an initial decision or rule in a party's favor only if the decision or ruling is in accordance with law and supported by a preponderance of the reliable, probative, and substantial evidence contained in the record.

26. Amend § 16.229 by adding introductory text to read as follows:

§ 16.229 Burden of proof.

As used in this subpart, the burden of proof is as follows:

* * * * *

27. Revise § 16.233 to read as follows:

§ 16.233 Record.

(a) *Exclusive record.* The transcript of all testimony in the hearing, all exhibits received into evidence, all motions, applications requests and rulings, all documents included in the hearing record and the Director's Determination shall constitute the exclusive record for decision in the proceedings and the basis for the issuance of any orders.

(b) *Examination and copy of record.* A copy of the record will be filed by the FAA Part 16 Docket Clerk in the Federal Docket Management System (FDMS). Any person desiring to review the record may then do so at <http://www.regulations.gov>.

28. Amend § 16.235 by revising paragraph (b) to read as follows:

§ 16.235 Argument before the hearing officer.

* * * * *

(b) *Posthearing Briefs.* The hearing officer may request or permit the parties to submit posthearing briefs. The hearing officer may provide for the filing of simultaneous reply briefs as well, if such filing will not unduly delay the issuance of the hearing officer's initial decision. Posthearing briefs shall include proposed findings of fact and conclusions of law; exceptions to rulings of the hearing officer; references to the record in support of the findings of fact; and supporting arguments for the proposed findings, proposed conclusions, and exceptions.

§§ 16.241 and 16.243 [Transferred to Subpart F]

29. Sections 16.241 and 16.243 are transferred from subpart G to subpart F.

Subpart G—[Removed and Reserved]

30. Remove and reserve subpart G.

31. Amend § 16.241 by revising paragraphs (a) and (c) and removing paragraph (f).

The revisions read as follows:

§ 16.241 Initial decisions, order, and appeals.

(a) The hearing officer shall issue an initial decision based on the record developed during the proceeding and shall send the initial decision to the parties not later than 110 days after the Director's Determination unless otherwise provided in the hearing order.

* * * * *

(c) If an appeal is filed, the Associate Administrator reviews the entire record and issues a final agency decision and order within 60 days of the due date of the reply. If no appeal is filed, the Associate Administrator may take review of the case on his or her own motion. If the Associate Administrator finds that the respondent is not in compliance with any Act or any regulation, agreement, or document of conveyance issued or made under such Act, the final agency order includes, in accordance with § 16.245(d), a statement of corrective action, if appropriate, and identifies sanctions for continued noncompliance.

* * * * *

32. Add § 16.245 to subpart F to read as follows:

§ 16.245 Associate Administrator review after a hearing.

(a) The Associate Administrator may transfer to the FAA Assistant Administrator for Civil Rights the authority to prepare and issue Final Agency Decisions pursuant to § 16.241 for appeals from a hearing concerning civil rights issues.

(b) After a hearing is held, and, after considering the issues as set forth in § 16.245(e), if the Associate Administrator determines that the hearing officer's initial decision or order should be changed, the Associate Administrator may:

(1) Make any necessary findings and issue an order in lieu of the hearing officer's initial decision or order, or

(2) Remand the proceeding for any such purpose as the Associate Administrator may deem necessary.

(c) If the Associate Administrator takes review of the hearing officer's initial decision on the Associate Administrator's own motion, the Associate Administrator issues a notice of review within 20 days of the actual date the initial decision is issued.

(1) The notice sets forth the specific findings of fact and conclusions of law in the initial decision that are subject to review by the Associate Administrator.

(2) Parties may file one brief on review to the Associate Administrator or rely on their posthearing brief to the hearing officer. A brief on review shall be filed not later than 10 days after service of the notice of review. Filing and service of a brief on review shall be by personal delivery.

(3) The Associate Administrator issues a final agency decision and order within 30 days of the due date of the brief. If the Associate Administrator finds that the respondent is not in compliance with any Act or any regulation, agreement or document of conveyance issued under such Act, the final agency order includes a statement of corrective action, if appropriate.

(d) When the final agency decision finds a respondent in noncompliance, and where a respondent fails to properly appeal the final agency decision as set forth in subpart G, of this part, the Associate Administrator will issue an order remanding the case to the Director for the following action:

(1) In the event that the respondent fails to submit, in accordance with the final agency decision, a Corrective Action Plan acceptable to the FAA within the time provided, unless extended by the FAA for good cause, and/or if the respondent fails to complete the Corrective Action Plan as

specified therein, the Director may initiate action to revoke and/or deny applications for Airport Improvement Program grants under 49 U.S.C. 47114(c)-(e) and 47115. When the Director concludes that the respondent has fully complied with the Corrective Action Plan, the Director will issue an Order terminating the proceeding.

(2) For those violations that cannot be remedied through corrective action the Director may initiate action to revoke and/or deny the respondent's applications for Airport Improvement Program grants under 49 U.S.C. 47114(c)-(e) and 47115.

(e) On appeal from a hearing officer's initial decision, the Associate Administrator will consider the following issues:

(1) Are the findings of fact each supported by a preponderance of reliable, probative and substantial evidence.

(2) Are conclusions made in accordance with law, precedent and policy.

(3) Are the questions on appeal substantial.

(4) Have any prejudicial errors occurred.

(f) Any new issues or evidence presented in an appeal or reply will not be allowed unless accompanied by a certified petition and good cause found as to why the new matter was not presented to the Director. Such a petition must:

(1) Set forth the new matter;

(2) Contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and

(3) Contain a statement explaining why such new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed.

(g) A Final Agency Decision may be appealed in accordance with subpart G of this part.

Subparts H and I [Redesignated as Subparts G and H]

33. Redesignate subpart H, consisting of § 16.247, and subpart I, consisting of §§ 16.301, 16.303, 16.305, and 16.307, as subparts G and H, respectively.

34. In § 16.247, revise paragraphs (a), (b)(2), and (b)(4) to read as follows:

§ 16.247 Judicial review of a final decision and order.

(a) A person may seek judicial review, in a United States Court of Appeals, of a final decision and order of the Associate Administrator, and of an order of dismissal with prejudice issued by the Director, as provided in 49 U.S.C. 46110 or section 519(b)(4) of the Airport and Airway Improvement Act of 1982 (AAIA), as amended and recodified, 49 U.S.C. 47106(d) and 47111(d). A party seeking judicial review shall file a petition for review with the Court not later than 60 days after the order has been served on the party or within 60 days after the entry of an order under 49 U.S.C. 40101 et seq.

(b) * * *

(2) A Director's Determination;

* * * * *

(4) A Director's Determination or an initial decision of a hearing officer that becomes the final decision of the Associate Administrator because it was not appealed within the applicable time periods provided under §§ 16.33(c) and 16.241(b).

§ 16.301 [Removed]

35. Remove § 16.301 from newly redesignated subpart H.

§§ 16.303, 16.305, and 16.307 [Redesignated as §§ 16.301, 16.303, and 16.305]

36. In newly redesignated subpart H, redesignate §§ 16.303, 16.305, and 16.307 as §§ 16.301, 16.303, and 16.305, respectively.

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