



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Recommendation 90-1

Civil Money Penalties for Federal Aviation Violations

(Adopted June 7, 1990)

In late 1987, Congress enacted an administrative civil money penalty program for violations of the Federal Aviation Act and its implementing safety regulations. The Civil Penalty Assessment Demonstration Program, a 2-year temporary program, was originally due to expire December 31, 1989. It was extended for 4 months in anticipation of the completion of a study of the program undertaken by the Administrative Conference of the United States at the request of the Department of Transportation. Congress extended the program an additional ninety days, after receiving a draft of this recommendation from the Conference's Committee on Adjudication.

The demonstration program currently authorizes administratively imposed civil money penalties of amounts of up to \$50,000. The cases are initiated by the Federal Aviation Administration (FAA), an agency within the Department of Transportation (DOT). The cases are heard by DOT administrative law judges (ALJs), with appeal to the FAA Administrator. Judicial review is available in the federal court of appeals.

The FAA has substantive regulatory authority under the Federal Aviation Act. It promulgates regulations to promote aviation safety, conducts investigations to ensure compliance, and brings enforcement actions. It also has responsibility for issuing certificates for most aviation businesses and functions.

The civil money penalty program supplements previously available sanctions, which include judicially-imposed civil money penalties and FAA administrative actions to suspend or revoke certificates. FAA certificate actions, if appealed, are adjudicated by the National Transportation Safety Board (NTSB). The NTSB is an independent agency that has as its primary responsibilities investigating accidents and issuing air safety recommendations, in addition to adjudicating certificate cases.

The civil money penalty program has been in operation since September 1988, when the FAA promulgated its procedural regulations as final rules with opportunity for subsequent comment. In March 1989, the FAA addressed the comments received, but made no changes in the regulations. The FAA recently announced revisions in its policy on some issues relating to its



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rules of practice for the civil penalty program, and in April 1990, the FAA published a notice of proposed rulemaking on its civil penalty program rules of practice.¹ These proposed rules substantially incorporate the recommendations presented below in paragraph 4.

The Administrative Conference believes that administrative assessment of aviation civil money penalties should be made permanent, but that the changes presented below would improve the program's operation and enhance perceptions of fairness.

The Conference has long advocated the administrative imposition of civil money penalties as an alternative to reliance on judicial enforcement.² Administratively imposed sanctions are generally faster, less expensive, and more effective in enforcing regulatory schemes than is reliance on judicial enforcement, and the FAA experience appears consistent with this view. Therefore, the Conference recommends that administrative assessment of civil money penalties be made a permanent feature of federal regulation of aviation safety.

Administrative imposition of civil money penalties for violations of safety regulations is at present limited by statute to penalties not in excess of \$50,000. The Conference notes that many agencies do in fact—and without untoward consequences—exercise power to impose far heavier monetary penalties than those now authorized in the civil aviation area. The Conference recognizes the severity of possible sanctions for violations of law is a matter for Congressional choice, but the Conference believes, in this instance, expanding the scope of money penalties following appropriate administrative hearings would enhance efficient administration without risking loss of fairness.

The Conference takes no position at this time on whether the adjudication of civil penalty actions under this program should remain a function of the DOT, or whether it should be shifted to the NTSB. There are arguments on both sides. Such a determination should respond to interests of administrative simplicity and efficiency, fairness and the appearance of fairness, and accountability for aviation safety. The NTSB currently adjudicates violations of federal

¹ The FAA's rulemaking has been in two steps. In early March 1990, the FAA issued a notice of proposed rulemaking on a number of specific issues in the civil penalty procedural rules that had been particularly controversial. In mid-April, the FAA issued a final rule in this rulemaking, with a delayed effective date. At the same time the FAA put out its entire set of procedural rules, incorporating these changes, for notice and comment. 55 FR 15110, 15111, 15134, 15135 (April 20, 1990). At the time this recommendation was adopted, June 7, 1990, the comment period in the second proceeding had closed, but a final rule had not been issued.

² See Recommendation 72-6, "Civil Money Penalties as a Sanction," 1 CFR 305.72-6; Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties," 1 CFR 305.79-3. Many statutes have since incorporated the administrative penalty system recommended by the Conference.



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aviation law in the context of certificate proceedings, so it already has experience in the substantive area, as well as established and respected adjudicatory procedures. A transfer of these proceedings to the NTSB would place almost all administrative sanctions for aviation safety violations in one forum. Moreover, the independence of the NTSB from the prosecuting agency would promote the appearance of fairness, by formally separating the agency prosecuting the case from the one adjudicating it.³

On the other hand, any transfer of civil penalty adjudicative responsibility to the NTSB would entail legislative consideration of whether and to what degree deference should be given by the Board to FAA policies and whether the FAA Administrator should be entitled to seek judicial review of adverse NTSB decisions. Moreover, retaining the adjudicative function in the FAA would allow for coordinated regulatory and enforcement policy in one agency, a model that is used by most federal agencies. If it is important to have hearings in both certificate and money penalty cases heard in the same forum, theoretically the former function could be transferred to the FAA. Although there has been criticism of the FAA's rules of practice, the agency is about to complete a rulemaking in which it has proposed significant changes in its rules. Finally, aviation safety and related enforcement are the chief missions of the FAA.

The better choice between the two is not self-evident. Factors that could not be adequately studied in the available time include the relative capacities of DOT and the NTSB to adjudicate cases promptly and fairly, any effect that the location of adjudicative authority might have on aviation safety, and the two agencies' respective capabilities to procure necessary resources. If Congress extends the aviation civil penalty program either permanently or for a substantial period, it is the Conference's intention to study the issue of the more appropriate location for adjudicatory authority.

As long as the adjudicatory authority is lodged in the DOT, the Conference recommends some procedural changes that would improve the program's operation. The FAA previously interpreted its statutory authority as contemplating a formal finding of a violation (order assessing civil penalty) as a prerequisite to compromising a disputed civil money penalty case. As a result, fewer cases settled than under former agency practice, and a substantial backlog developed. As part of the ongoing rulemaking proceeding, the FAA has been reconsidering its position and has concluded the enabling law does not preclude compromising cases without a finding of a violation. In any event, Congress should make explicit that the FAA has the discretion to compromise disputed cases without a formal finding of a violation.

³ See Recommendation 86-4, "The Split-Enforcement Model for Agency Adjudication," 1 CFR 305.86-4.



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It is important that rules of practice governing adjudication of civil money penalty cases be fair, and that they appear fair. In most cases, the regulations that the FAA previously adopted were adequate, but several provisions led to some misunderstanding and perceptions of unfairness. The rules of practice should be therefore be revised to eliminate existing ambiguities, pursuant to the ongoing notice and comment rulemaking.⁴

Recommendation

1. Congress should authorize on a permanent basis the administrative imposition of civil money penalties for violations of the Federal Aviation Act (Act) and its implementing safety regulations.

2. Congress should eliminate the current ceiling of \$50,000 applicable to administratively imposed civil money penalties for violations of the Act and its implementing safety regulations.

3. Legislation providing for continued administrative imposition of civil money penalties should make explicit that the Federal Aviation Administration (FAA) has administrative discretion to compromise disputed cases without requiring a formal finding of a violation.

4. As long as adjudicatory responsibility is lodged at the Department of Transportation, the Department should adopt revised rules of practice governing adjudication of civil money penalty cases following notice-and-comment procedures. Such rules should address the following issues:

a. *Separation of functions*: The regulations should make clear that employees with investigatory or prosecutorial responsibilities in a case in this program will not communicate with the administrative law judge or agency decision maker in that case or a factually related case, except as counsel or a witness in the public proceedings.

b. *Testimony of FAA employees*:

1. The regulations should permit FAA employees to testify as to facts relevant to any disputed issue. Within the scope of this rule, hearsay testimony from FAA employees should be treated the same as other hearsay testimony.

⁴ As noted earlier, the proposed rule in the rulemaking ongoing at the time this recommendation was adopted substantially incorporates the provisions of paragraph 4 of the recommendation.



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2. FAA employees testifying as experts should be subject to full cross examination.

c. *Designation of documents*: The regulations should avoid denominating the document used to commence formal civil penalty proceedings as an "order," and should use a term such as "complaint."

d. *Use of briefs*: The regulations should permit the filing of post-hearing briefs whenever, in the ALJ's view, the interests of justice so require.

e. *Explanation of basis for sanctions imposed*: The regulations should establish a uniform standard for explanation of sanctions imposed in initial decisions, regardless of whether the ALJ affirms or modifies the proposed sanction.

Citations:

55 FR 34209 (August 22, 1990)

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