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(iii) *The contribution to an understanding of the subject by the public likely to result from disclosure—whether disclosure of the requested information will contribute to public understanding.* The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject as opposed to the individual understanding of the requester. A requester's ability and expertise in the subject area as well as the requester's intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) *The significance of the contribution to public understanding—whether the disclosure is likely to contribute significantly to public understanding of Amtrak operations or activities.* The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent.

(4) To determine whether the fee waiver requirement in paragraph (k)(2)(ii) of this section is met, Amtrak will consider the following factors:

(i) *The existence and magnitude of a commercial interest—whether the requesting party has a commercial interest that would be furthered by the requested disclosure.* Amtrak shall consider any commercial interest of the requesting party (with reference to the definition of "commercial use" in paragraph (c)(1) of this section), or any person on whose behalf the requesting party may be acting that would be furthered by the requested disclosure. Requesters shall be given an opportunity to provide explanatory information regarding this consideration.

(ii) *The primary interest in disclosure—whether the magnitude of the identified commercial interest of the requester is sufficiently large in comparison with the*

public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and public interest is greater in magnitude than any identified commercial interest in disclosure.

(5) Requests for a fee waiver will be considered on a case-by-case basis, based upon the merits of the information provided. Where it is difficult to determine whether the request is commercial in nature, Amtrak may draw inference from the requester's identity and the circumstances of the request.

(6) Requests for a waiver or reduction of fees must address the factors listed in paragraphs (k) (3) and (4) of this section. In all cases, the burden shall be on the requesting party to present evidence of information in support of a request for a waiver of fees.

(1) *Aggregating requests.* A requester may not file multiple requests at the same time in order to avoid payment of fees. Where Amtrak reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a request into a series of requests for the purpose of avoiding fees, Amtrak may aggregate those requests and charge accordingly. Amtrak may presume that multiple requests of this type made within a thirty-day period have been made in order to avoid fees. Where requests are separated by a longer period, Amtrak may aggregate them only when there exists a solid basis for determining that aggregation is warranted. Multiple requests involving unrelated matters may not be aggregated.

§ 701.12 Other rights and services.

Nothing in this part shall be construed as entitling any person, as of right, to any service or the disclosure of any record to which such person is not entitled under the FOIA.

CHAPTER VIII—NATIONAL TRANSPORTATION SAFETY BOARD

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PART 800—ORGANIZATION AND FUNCTIONS OF THE BOARD AND DELEGATIONS OF AUTHORITY

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APPENDIX TO PART 800—REQUEST TO THE SECRETARY OF THE DEPARTMENT OF TRANSPORTATION TO INVESTIGATE CERTAIN AIRCRAFT ACCIDENTS

AUTHORITY: Independent Safety Board Act of 1974, as amended (49 U.S.C. 1101 *et seq.*); Federal Aviation Act of 1958, as amended (49 U.S.C. 40101 *et seq.*).

SOURCE: 49 FR 26232, June 27, 1984, unless otherwise noted.

Subpart A—Organization and Functions

§ 800.1 Purpose.

This part describes the organization, functions, and operation of the National Transportation Safety Board (Board).

§ 800.2 Organization.

The Board consists of five Members appointed by the President with the advice and consent of the Senate. One of the Members is designated by the President as Chairman with the advice and consent of the Senate and one as

Vice Chairman. The Members exercise various functions, powers, and duties set forth in the Federal Aviation Act of 1958, as amended (49 U.S.C. 40101 *et seq.*), and the Independent Safety Board Act of 1974, as amended (49 U.S.C. 1101 *et seq.*). The Board is an independent agency of the United States. More detailed descriptions of the Board and its work are contained in other parts of this chapter VIII, notably parts 825, 830 through 835, and 840 through 850. Various special delegations of authority from the Board and the Chairman to the staff are set forth in subpart B of this part. The Board's staff is comprised of the following principal components:

(a) The Office of the Managing Director, which assists the Chairman in the discharge of his functions as executive and administrative head of the Board; coordinates and directs the activities of the staff; is responsible for the day-to-day operation of the Board; and recommends and develops plans to achieve the Board's program objectives. The Office of the Managing Director also provides executive secretariat services to the Board.

(b) The Office of Government, Public, and Family Affairs, which supplies the Congress and Federal, State, and local government agencies with information regarding the Safety Board's activities, programs and objectives; supplies the public, the transportation industry and the news media with current, accurate information concerning the work, programs, and objectives of the Board; coordinates public and private responsibilities, including aid to survivors and families of accident victims, in the wake of transportation disasters. This Office maintains the 24-hour Communications Center, which assists in coordinating accident notification and launch operations for all modes and provides an off-hour base for family assistance functions during accident investigations.

(c) The Office of the General Counsel, which provides legal advice and assistance to the Board and its staff; prepares Board rules, opinions and/or orders, and advice to all offices on matters of legal significance; and represents the Board in judicial matters

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to which the Board is a party or in which the Board is interested.

(d) The Office of Administrative Law Judges, which conducts all formal proceedings arising under the Federal Aviation Act of 1958, as amended, including proceedings involving civil penalties and suspension or revocation of certificates, and appeals from actions of the Federal Aviation Administrator in refusing to issue airman certificates.

(e) The Office of Aviation Safety, which conducts investigations of all aviation accidents within the Board's jurisdiction; prepares reports for submission to the Board and release to the public setting forth the facts and circumstances of such accidents, including a recommendation as to the probable cause(s); determines the probable cause(s) of accidents when delegated authority to do so by the Board; initiates safety recommendations to prevent future aviation accidents; participates in the investigation of accidents that occur in foreign countries and involve U.S.-registered and/or U.S.-manufactured aircraft; and conducts special investigations into selected aviation accidents involving safety issues of concern to the Board.

(f) The Office of Railroad Safety, which conducts investigations of railroad accidents within the Board's jurisdiction; prepares reports for submission to the Board and release to the public setting forth the facts and circumstances of such accidents, including a recommendation as to the probable cause(s); determines the probable cause(s) of accidents when delegated authority to do so by the Board; initiates safety recommendations to prevent future railroad accidents; and conducts special investigations into selected rail accidents involving safety issues of concern to the Board.

(g) The Office of Highway Safety, which conducts investigations of highway accidents, including railroad grade-crossing accidents, within the Board's jurisdiction; prepares reports for submission to the Board and release to the public setting forth the facts and circumstances of such accidents, including a recommendation as to the probable cause(s); determines the probable cause(s) of accidents when dele-

gated authority to do so by the Board; initiates safety recommendations to prevent future highway accidents; and conducts special investigations into selected highway accidents involving safety issues of concern to the Board.

(h) The Office of Marine Safety, which conducts investigations of marine accidents within the Board's jurisdiction; prepares reports for submission to the Board and release to the public setting forth the facts and circumstances of such accidents, including a recommendation as to the probable cause(s); determines the probable cause(s) of accidents when delegated authority to do so by the Board; initiates safety recommendations to prevent future marine accidents; participates in the investigation of accidents that occur in foreign countries and that involve U.S.-registered vessels; and conducts special investigations into selected marine accidents involving safety issues of concern to the Board.

(i) The Office of Pipeline and Hazardous Materials Safety, which conducts investigations of pipeline and hazardous materials accidents within the Board's jurisdiction; prepares reports for submission to the Board and release to the public setting forth the facts and circumstances of such accidents, including a recommendation as to the probable cause(s); determines the probable causes of accidents when delegated authority to do so by the Board; initiates safety recommendations to prevent future pipeline and hazardous materials accidents; and conducts special investigations into selected pipeline and hazardous materials accidents involving safety issues of concern to the Board.

(j) The Office of Research and Engineering, which conducts research and carries out analytical studies and tests involving all modes, including readouts of voice and data recorders, flight path analysis and computer simulation/animation, component examination and material failure analysis; conducts safety studies of specific safety issues; performs statistical analyses of transportation accident and incident data; maintains archival records of the Board's accident investigation and

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safety promotion activities and supports public access to these records; and administers the Board's information technology infrastructure, including computer systems, networks, databases, and application software.

(k) The Office of Safety Recommendations & Accomplishments, which oversees the Board's safety recommendations program, including the Board's "MOST WANTED" recommendations, and the Board's safety accomplishment program.

[60 FR 61488, Nov. 30, 1996, as amended at 61 FR 14521, April 2, 1996; 63 FR 71605, Dec. 29, 1998; 64 FR 5621, Feb. 4, 1999]

§ 800.3 Functions.

(a) The primary function of the Board is to promote safety in transportation. The Board is responsible for the investigation, determination of facts, conditions, and circumstances and the cause or probable cause or causes of: all accidents involving civil aircraft, and certain public aircraft; highway accidents, including railroad grade-crossing accidents, the investigation of which is selected in cooperation with the States; railroad accidents in which there is a fatality, substantial property damage, or which involve a passenger train; pipeline accidents in which there is a fatality, significant injury to the environment, or substantial property damage; and major marine casualties and marine accidents involving a public and a non-public vessel or involving Coast Guard functions. The Board makes transportation safety recommendations to Federal, State, and local agencies and private organizations to reduce the likelihood of recurrences of transportation accidents. It initiates and conducts safety studies and special investigations on matters pertaining to safety in transportation, assesses techniques and methods of accident investigation, evaluates the effectiveness of transportation safety consciousness and efficacy in preventing accidents of other Government agencies, and evaluates the adequacy of safeguards and procedures concerning the transportation of hazardous materials.

(b) Upon application of affected parties, the Board reviews in quasijudicial proceedings, conducted pursuant to the

provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, denials by the Administrator of the Federal Aviation Administrator of applications for airman certificates and orders of the Administrator modifying, amending, suspending, or revoking certificates or imposing civil penalties. The Board also reviews on appeal the decisions of the Commandant, U.S. Coast Guard, on appeals from orders of administrative law judges suspending, revoking, or denying seamen licenses, certificates, or documents.

(c) The Board, as provided in Part 801 of this chapter, issues reports and orders pursuant to its duties to determine the cause or probable cause or causes of transportation accidents and to report the facts, conditions and circumstances relating to such accidents; issues opinions and/or orders after reviewing on appeal the imposition of a civil penalty or the suspension, amendment, modification, revocation, or denial of any certificate or license issued by the Secretary of the Department of Transportation (who acts through the Administrator of the Federal Aviation Administration or the Commandant of the United States Coast Guard); and issues and makes available to the public safety recommendations, safety studies, and reports of special investigations.

[60 FR 61488, Nov. 30, 1995]

§ 800.4 Operation.

In exercising its functions, duties, and responsibilities, the Board utilizes:

(a) The Board's staff, consisting of specialized offices dealing with particular areas of transportation safety and performing administrative and technical work for the Board. The staff advises the Board and performs duties for the Board that are inherent in the staff's position in the organizational structure or that the Board has delegated to it. The staff is described more fully in § 800.2.

(b) Rules published in the FEDERAL REGISTER and codified in this Title 49 of the Code of Federal Regulations. These rules may be inspected in the Board's public reference room, or purchased from the Superintendent of Documents, Government Printing Office.

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(c) Procedures and policies set forth in the agency's internal directives system which govern the activities of employees and organizational components of the Board. The internal directives system is designated as the NTSB Manual and consists of instructions which are called NTSB Orders and NTSB Notices.

(d) Meetings of the Board Members conducted pursuant to the Government in the Sunshine Act.

(e) Public hearings in connection with transportation accident investigations and public hearings and oral arguments in proceedings concerned with certificates or licenses issued by the Secretary or an Administrator of the Department of Transportation. They are held at the time and place announced in the notices thereof which are served on the parties to the proceedings or published in the FEDERAL REGISTER.

[49 FR 26232, June 27, 1984, as amended at 60 FR 61489, Nov. 30, 1995]

§ 800.5 Office locations.

The principal offices of the National Transportation Safety Board are located at 490 L'Enfant Plaza East, SW., Washington, DC 20594. The Board maintains field offices in selected cities throughout the United States.

[60 FR 61489, Nov. 30, 1995]

§ 800.6 Availability of information and materials.

Part 801 of this chapter provides detailed information concerning the availability of Board documents and records. That part also provides a fee schedule and information concerning inspection and copying.

Subpart B—Delegations of Authority to Staff Members

§ 800.21 Purpose.

The purpose of this Subpart B is to publish special delegations of authority to staff members.

[60 FR 61489, Nov. 30, 1995]

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§ 800.22 Delegation to the Managing Director.

(a) The Board delegates to the Managing Director the authority to:

(1) Make the final determination, on appeal, as to whether to withhold a Board record from inspection or copying, pursuant to Part 801 of this chapter.

(2) Approve for publication in the FEDERAL REGISTER notices concerning issuance of accident reports and safety recommendations and responses to safety recommendations, as required by sections 304(a)(2) and 307 of the Independent Safety Board Act of 1974 (49 U.S.C. 1131(d) and 1135(c)).

(b) The Chairman delegates to the Managing Director the authority to exercise and carry out, subject to the direction and supervision of the Chairman, the following functions vested in the Chairman:

(1) The appointment and supervision of personnel employed by the Board;

(2) The distribution of business among such personnel and among organizational components of the Board; and

(3) The use and expenditure of funds.

[60 FR 61489, Nov. 30, 1995]

§ 800.23 Delegation to the administrative law judges, Office of Administrative Law Judges.

The Board delegates to the administrative law judges the authority generally detailed in its procedural regulations at Part 821 of this chapter.

[60 FR 61489, Nov. 30, 1995]

§ 800.24 Delegation to the General Counsel.

The Board delegates to the General Counsel the authority to:

(a) Approve, disapprove, request more information, or otherwise handle requests for testimony of Board employees with respect to their participation in the investigation of accidents, and, upon receipt of notice that an employee has been subpoenaed, to make arrangements with the court either to have the employee excused from testifying or to give the employee permission to testify in accordance with the provisions of Part 835 of this Chapter.

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(b) Approve or disapprove in safety enforcement proceedings, for good cause shown, requests for extensions of time or for other changes in procedural requirements subsequent to the initial decision, grant or deny requests to file additional and/or *amicus* briefs pursuant to §§ 821.9 and 821.48 of this Chapter, and raise on appeal any issue the resolution of which he deems important to the proper disposition of proceedings under § 821.49 of this Chapter.

(c) Approve or disapprove, for good cause shown, requests to extend the time for filing comments on proposed new or amended regulations.

(d) Issue regulations for the purpose of making editorial changes or corrections in the Board's rules and regulations.

(e) Issue orders staying or declining to stay, pending judicial review, orders of the Board suspending or revoking certificates, and consent to the entry of judicial stays with respect to such orders.

(f) Compromise civil penalties in the case of violations arising under The Independent Safety Board Act of 1974, as amended, or any rule, regulation, or order issued thereunder.

(g) Issue orders dismissing appeals from initial decisions of Board administrative law judges pursuant to the request of the appellant or, where the request is consensual, at the request of any party.

(h) Correct Board orders by eliminating typographical, grammatical, and similar errors, and make editorial changes therein not involving matters of substance.

(i) Take such action as appropriate or necessary adequately to compromise, settle, or otherwise represent the Board's interest in judicial or administrative actions to which the Board is a party or in which the Board is interested.

(j) Dismiss late filed notices of appeal and appeal briefs for lack of good cause.

[60 FR 61489, Nov. 30, 1995, as amended at 63 FR 71606, Dec. 29, 1998]

§ 800.25 Delegation to the Directors of Office of Aviation Safety, Office of Railroad Safety, Office of Highway Safety, Office of Marine Safety, and Office of Pipeline and Hazardous Materials Safety.

The Board delegates to the Directors of the Offices of Aviation, Railroad, Highway, Marine, and Pipeline and Hazardous Materials Safety, the authority to:

(a) Order an investigation into the facts, conditions, and circumstances of accidents that the Board has authority to investigate.

(b) Disclose factual information pertinent to all accidents or incidents as provided for in Part 801 of this chapter.

(c) Determine the probable cause(s) of accidents in which the determination is issued in the "Brief of Accident" format, except that the Office Director will submit the findings of the accident investigation to the Board for determination of the probable cause(s) when (1) any Board Member so requests, (2) it appears to the Office Director that, because of significant public interest, a policy issue, or a safety issue of other matter, the determination of the probable cause(s) should be made by the Board, or (3) the accident investigation will be used to support findings in a special investigation or study. Provided, that a petition for reconsideration or modification of a determination of the probable cause(s) made under § 845.41 of this Chapter shall be acted on by the Board.

(d) Consistent with Board resources, investigate accidents as provided under § 304(a) of the Independent Safety Board Act of 1974, as amended (49 U.S.C. 1131(a)) and the Appendix to this Part.

[60 FR 61489, Nov. 30, 1995, as amended at 63 FR 71606, Dec. 29, 1998]

§ 800.26 Delegation to the Chief, Public Inquiries Branch.

The Board delegates to the Chief, Public Inquiries Branch, the authority to determine, initially, the withholding of a board record from inspection or copying, pursuant to part 801 of this chapter.

[63 FR 71606, Dec. 29, 1998]

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§ 800.27 Delegation to investigative officers and employees of the Board.

The Board delegates to any officer or employee of the Board designated by the Chairman of the Safety Board the authority to sign and issue subpoenas, and administer oaths and affirmations, and to take depositions or cause them to be taken in connection with the investigation of transportation accidents or incidents.

[60 FR 61490, Nov. 30, 1995]

§ 800.28 Delegation to the Chief Financial Officer.

The Board delegates to the Chief Financial Officer the authority to settle claims for money damages of \$2,500 or less against the United States arising under Section 2672 of 28 United States Code (the Federal Tort Claims Act) because of acts or omissions of Board employees.

[63 FR 71606, Dec. 29, 1998]

APPENDIX TO PART 800—REQUEST TO THE SECRETARY OF THE DEPARTMENT OF TRANSPORTATION TO INVESTIGATE CERTAIN AIRCRAFT ACCIDENTS

(a) Acting pursuant to the authority vested in it by Title VII of the Federal Aviation Act of 1958 (49 U.S.C. 1441) and section 304(a)(1) of the Independent Safety Board Act of 1974, the National Transportation Safety Board (Board) hereby requests the Secretary of the Department of Transportation (Secretary) to exercise his authority subject to the terms, conditions, and limitations of Title VII and section 304(a)(1) of the Independent Safety Board Act of 1974, and as set forth below to investigate the facts, conditions, and circumstances surrounding certain fixed-wing and rotorcraft aircraft accidents and to submit a report to the Board from which the Board may make a determination of the probable cause.

(b) The authority to be exercised hereunder shall include the investigation of all civil aircraft accidents involving rotorcraft, aerial application, amateur-built aircraft, restricted category aircraft, and all fixed-wing aircraft which have a certificated maximum gross takeoff weight of 12,500 pounds or less except:

(1) Accidents in which fatal injuries have occurred to an occupant of such aircraft, but shall include accidents involving fatalities incurred as a result of aerial application operations, amateur-built aircraft operations, or restricted category aircraft operations.

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(2) Accidents involving aircraft operated in accordance with the provisions of Part 135 of the Federal Air Regulations entitled “Air Taxi Operators and Commercial Operators of Small Aircraft.”

(3) Accidents involving aircraft operated by an air carrier authorized by certificate of public convenience and necessity to engage in air transportation.

(4) Accidents involving midair collisions.

(c) *Provided*, That the Board may, through the chiefs of its field offices, or their designees who receive the initial notifications, advise the Secretary, through his appropriate designee, that the Board will assume the full responsibility for the investigation of an accident included in this request in the same manner as an accident not so included; and *Provided further*, That the Board, through the chiefs of its field offices, or their designees who receive initial notifications may request the Secretary, through his appropriate designee, to investigate an accident not included in this request, which would normally be investigated by the Board under section (b) (1) through (4) above, and in the same manner as an accident so included.

(d) *Provided*, That this authority shall not be construed to authorize the Secretary to hold public hearings or to determine the probable cause of the accident; and *Provided further*, That the Secretary will report to the Board in a form acceptable to the Board the facts, conditions, and circumstances surrounding each accident from which the Board may determine the probable cause.

(e) *And provided further*, That this request includes authority to conduct autopsies and such other tests of the remains of deceased persons aboard the aircraft at the time of the accident, who die as a result of the accident, necessary to the investigations requested hereunder and such authority may be delegated and redelegated to any official or employee of the Federal Aviation Administration (FAA). For the purpose of this provision, designated aviation examiners are not deemed to be officials or employees of the FAA.

(f) Invoking the provisions of section 701(f) of the Federal Aviation Act of 1958, and section 304(a)(1) of the Independent Safety Board Act of 1974, is necessary inasmuch as sufficient funds have not been made available to the Board to provide adequate facilities and personnel to investigate all accidents involving civil aircraft. This request, therefore, is considered to be temporary in nature and may be modified or terminated by written notice to the Secretary.

[49 FR 26232, June 27, 1984, as amended at 63 FR 71606, Dec. 29, 1998]

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PART 801—PUBLIC AVAILABILITY OF INFORMATION

Subpart A—Applicability and Policy

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Subpart B—Administration

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Subpart G—Fee Schedule

- 801.60 Fee schedule.
- 801.61 Appeals of fee determinations.

AUTHORITY: Independent Safety Board Act of 1974, as amended (49 U.S.C. 1101–1155); 5 U.S.C. 551(2); Freedom of Information Act (5 U.S.C. 552); 18 U.S.C. 641 and 2071; 31 U.S.C. 3717 and 9701; Federal Records Act, 44 U.S.C. Chapters 21, 29, 31, and 33.

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SOURCE: 72 FR 18915, Apr. 16, 2007, unless otherwise noted.

Subpart A—Applicability and Policy

§ 801.1 Applicability.

(a) This part contains the rules that the National Transportation Safety Board (NTSB) follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. These rules should be read together with the FOIA, which provides additional information about public access to records maintained by the NTSB.

(b) This part also provides for document services and the fees for such services, pursuant to 31 U.S.C. 9701.

(c) This part applies only to records existing when the request for the information is made. The NTSB is not required to create records for the sole purpose of responding to a FOIA request.

(d) Sections 801.51 through 801.59 of this chapter describe records that are exempt from public disclosure.

§ 801.2 Policy.

(a) In implementing 5 U.S.C. 552, it is the policy of the NTSB to make information available to the public to the greatest extent possible, consistent with the mission of the NTSB. Information the NTSB routinely provides to the public as part of a regular NTSB activity (such as press releases and information disclosed on the NTSB's public Web site) may be provided to the public without compliance with this part. In addition, as a matter of policy, the NTSB may make discretionary disclosures of records or information otherwise exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption; however, this policy does not create any right enforceable in court.

(b) Given the NTSB's stated policy of providing as much information as possible regarding general NTSB operations and releasing documents involving investigations, the NTSB strongly encourages requesters seeking information to check the NTSB's Web site for such information before submitting a FOIA request. For every investigation

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in which the NTSB has determined the probable cause of an accident, the NTSB's docket management system will include a "public docket" containing documentation that the investigator-in-charge deemed pertinent to the investigation. Requesters may obtain these public dockets without submitting a FOIA request. The NTSB encourages all requesters to review the public docket materials *before* submitting a FOIA request.

§ 801.3 Definitions.

The following definitions shall apply in this part:

(a) "Record" includes any writing, drawing, map, recording, tape, film, photo, or other documentary material by which information is preserved. In this part, "document" and "record" shall have the same meaning.

(b) "Redact" refers to the act of making a portion of text illegible by placing a black mark on top of the text.

(c) "Public Docket" includes a collection of records from an accident investigation that the investigator who oversaw the investigation of that accident has deemed pertinent to determining the probable cause of the accident.

(d) "Non-docket" items include other records from an accident that the investigator who oversaw the investigation of that accident has deemed irrelevant or not directly pertinent to determining the probable cause of the accident.

(e) "Chairman" means the Chairman of the NTSB.

(f) "Managing Director" means the Managing Director of the NTSB.

(g) "Requester" means any person, as defined in 5 U.S.C. 551(2), who submits a request pursuant to the FOIA.

Subpart B—Administration

§ 801.10 General.

(a) The NTSB's Chief, Records Management Division, is responsible for the custody and control of all NTSB records required to be preserved under the Federal Records Act, 44 U.S.C. Chapters 21, 29, 31, and 33.

(b) The NTSB's FOIA Officer shall be responsible for the initial determina-

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tion of whether to release records within the 20-working-day time limit, or the extension specified in the Freedom of Information Act.

(c) The NTSB's Chief, Records Management Division, shall:

(1) Maintain for public access and commercial reproduction all accident files containing aviation and surface investigators' reports, factual accident reports or group chairman reports, documentation and accident correspondence files, transcripts of public hearings, if any, and exhibits; and

(2) Maintain a public reference room, also known as a "Reading Room," in accordance with 5 U.S.C. 552(a)(2). The NTSB's public reference room is located at 490 East L'Enfant Plaza, SW., Washington, DC. Other records may be available in the NTSB's Electronic Reading Room, which is located on the NTSB's Web site, found at <http://www.nts.gov>.

(d) Requests for documents must be made in writing to: National Transportation Safety Board, Attention: FOIA Officer CIO-40, 490 L'Enfant Plaza, SW., Washington, DC 20594-2000. All requests:

(1) Must reasonably identify the record requested. For requests regarding an investigation of a particular accident, requesters should include the date and location of the accident, as well as the NTSB investigation number. In response to broad requests for records regarding a particular investigation, the FOIA Office will notify the requester of the existence of a public docket, and state that other non-docket items may be available, or may become available, at a later date. After receiving this letter and reviewing the items in the public docket, requesters should notify the FOIA office if the items contained in the public docket suffice to fulfill their request.

(2) Must be accompanied by the fee or agreement (if any) to pay the reproduction costs shown in the fee schedule at § 801.60 of this title, and

(3) Must contain the name, address, and telephone number of the person making the request. Requesters must update their address and telephone number in writing should this information change.

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(e) The envelope in which the requester submits the request should be marked prominently with the letters "FOIA." If a request fails to include a citation to the FOIA, the NTSB FOIA Office will attempt to contact the requester immediately to rectify the omission and/or clarify the request. However, the 20-working-day time limit for processing shall not commence until the FOIA Office receives a complete request.

(f) The field offices of the NTSB shall not maintain, for public access, records maintained by the Chief, Records Management Division. Requests mailed to NTSB field offices will not satisfy the NTSB's requirements for submitting a FOIA request.

(g) The NTSB may work with a commercial reproduction firm to accommodate requests for reproduction of accident records from the public docket. The reproduction charges may be subject to change. The NTSB will update its FOIA Web site to reflect any such changes. Section 801.60 of this title contains a current fee schedule.

(h) The NTSB will not release records originally generated by other agencies or entities. Instead, the NTSB will refer such requests for other agencies' records to the appropriate agency, which will make a release determination upon receiving and processing the referred request.

(i) Where a requester seeks a record on behalf of another person, and the record contains that person's personal information protected by Exemption 6 of the FOIA (see section 801.56 of this title), the NTSB requires the requester to submit a notarized statement of consent from the person whose personal information is contained in the record, before the NTSB releases the record.

(j) In general, the NTSB will deny requests for records concerning a pending investigation, pursuant to appropriate exemptions under the FOIA. The FOIA Office will notify the requester of this denial, and will provide the requester with information regarding how the requester may receive information on the investigation once the investigation is complete. The NTSB discourages requesters from submitting multiple FOIA requests in a continuing effort to

obtain records before an investigation is complete.

§ 801.11 Segregability of records.

The initial decision of the FOIA Officer will include a determination of segregability. If it is reasonable to do so, the exempt portions of a record will be segregated and, where necessary, redacted, and the nonexempt portions will be sent to the requester.

§ 801.12 Protection of records.

(a) No person may, without permission, remove from the place where it is made available any record made available for inspection or copying under § 801.10(c)(2) of this part. Stealing, altering, mutilating, obliterating, or destroying, in whole or in part, such a record shall be deemed a criminal offense.

(b) Section 641 of title 18 of the United States Code provides, in pertinent part, as follows:

"Whoever * * * steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record * * * or thing of value of the United States or of any department or agency thereof * * * shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of \$1,000, he shall be fined under this title or imprisoned not more than one year, or both."

(c) Section 2071(a) of title 18 of the United States Code provides, in pertinent part, as follows:

Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited * * * in any public office, or with any * * * public officer of the United States, shall be fined under this title or imprisoned not more than three years, or both.

Subpart C—Time Limits

§ 801.20 Processing of requests.

(a) The NTSB processes FOIA requests upon receipt. The NTSB FOIA Office may notify the requester that the NTSB has received the request. The

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FOIA Office will then place each request on one of three tracks:

(1) Track 1: Requests for which there are no records, requests that meet the criteria for expedited processing, or requests that seek records that have been produced in response to a prior request.

(2) Track 2: Requests that do not involve voluminous records or lengthy consultations with other entities.

(3) Track 3: Requests that involve voluminous records and for which lengthy or numerous consultations are required, or those requests which may involve sensitive records.

(b) Regarding expedited processing, if a requester states that he or she has a compelling need for the expedited treatment of their request, then the NTSB FOIA Office will determine whether to expedite the request and, where appropriate, do so.

§ 801.21 Initial determination.

The NTSB FOIA Officer will make an initial determination as to whether to release a record within 20 working days (excluding Saturdays, Sundays, and legal public holidays) after the request is received. This time limit may be extended up to 10 additional working days in accordance with § 801.23 of this part. The person making the request will be notified immediately in writing of such determination. If a determination is made to release the requested record(s), such record(s) will be made available promptly. If the FOIA Officer determines not to release the record(s), the person making the request will, when he or she is notified of such determination, be advised of:

- (a) The reason for the determination,
- (b) the right to appeal the determination, and
- (c) the name and title or positions of each person responsible for the denial of the request.

§ 801.22 Final determination.

Requesters seeking an appeal of the FOIA Officer's initial determination must send a written appeal to the NTSB's Managing Director within 20 days. The NTSB's Managing Director will determine whether to grant or deny any appeal made pursuant to § 801.21 within 20 working days (excluding Saturdays, Sundays, and legal pub-

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lic holidays) after receipt of such appeal, except that this time limit may be extended for as many as 10 additional working days, in accordance with § 801.23.

§ 801.23 Extension.

In unusual circumstances as specified in this section, the time limits prescribed in either § 801.21 or § 801.22, may be extended by written notice to the person making a request and setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. Such notice will not specify a date that would result in an extension for more than 10 working days. As used in this paragraph, "unusual circumstances," as they relate to any delay that is reasonably necessary to the proper processing of the particular request, means—

(a) The need to search for and collect the requested records from field facilities or other establishments;

(b) The need to search for, collect, and appropriately examine and process a voluminous amount of records which are the subject of a single request; or

(c) The need to consult with another agency that has a substantial interest in the disposition of the request or with two or more components of the agency having substantial subject-matter interest therein.

Subpart D—Accident Investigation Records

§ 801.30 Records from accident investigations.

Upon completion of an accident investigation, each NTSB investigator (or "group chairman," depending on the investigation) shall complete a factual report with supporting documentation and include these items in the public docket for the investigation. The Chief, Records Management Division, will then make the records available to the public for inspection or production by an order for commercial copying.

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§ 801.31 Public hearings regarding investigations.

Within approximately four (4) weeks after a public hearing concerning an investigation, the Chief, Records Management Division, will make available to the public the hearing transcript. On or before the date of the hearing, the Chief, Records Management Division, will make the exhibits introduced at the hearing available to the public for inspection or commercial copy order.

§ 801.32 Accident reports.

(a) The NTSB will report the facts, conditions, and circumstances, and its determination of the probable causes of U.S. civil transportation accidents, in accordance with 49 U.S.C. 1131(e).

(b) These reports may be made available for public inspection in the NTSB's public reference room and/or on the NTSB's Web site, at <http://www.ntsb.gov>.

Subpart E—Other Board Documents

§ 801.40 The Board's rules.

The NTSB's rules are published in the Code of Federal Regulations as Parts 800 through 850 of Title 49.

§ 801.41 Reports to Congress.

The NTSB submits its annual report to Congress each year, in accordance with 49 U.S.C. 1117. The report will be available on the NTSB's Web site, found at <http://www.ntsb.gov>. Interested parties may purchase the report from the Government Printing Office or review it in the NTSB's public reference room. All other reports or comments to Congress will be available in the NTSB's public reference room for inspection or by ordering a copy after issuance.

Subpart F—Exemption From Public Disclosure

§ 801.50 Exemptions from disclosure.

Title 5, United States Code section 552(a) and (b) exempt certain records from public disclosure. As stated in § 801.2 of this title, the NTSB may choose to make a discretionary release of a record that is authorized to be

withheld under 5 U.S.C. 552(b), unless it determines that the release of that record would be inconsistent with the purpose of the exemption concerned. Examples of records given in §§ 801.51 through 801.58 included within a particular statutory exemption are not necessarily illustrative of all types of records covered by the applicable exemption.

§ 801.51 National defense and foreign policy secrets.

Pursuant to 5 U.S.C. 552(b)(1), national defense and foreign policy secrets established by Executive Order, as well as properly classified documents, are exempt from public disclosure. Requests to the NTSB for such records will be transferred to the source agency as appropriate, where such classified records are identified. (See, e.g., Executive Order 12,958, as amended on March 25, 2003.)

§ 801.52 Internal personnel rules and practices of the NTSB.

Pursuant to 5 U.S.C. 552(b)(2), the following records are exempt from disclosure under FOIA:

(a) Records relating solely to internal personnel rules and practices, including memoranda pertaining to personnel matters such as staffing policies, and procedures for the hiring, training, promotion, demotion, or discharge of employees, and management plans, records, or proposals relating to labor-management relations.

(b) Records regarding:

(1) Internal matters of a relatively trivial nature that have no significant public interest, and

(2) Predominantly internal matters, the release of which would risk circumvention of a statute or agency regulation.

§ 801.53 Records exempt by statute from disclosure.

Pursuant to 5 U.S.C. 552(b)(3), the NTSB will not disclose records specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)), provided that such statute:

(a) Requires that the matters be withheld from the public in such manner as to leave no discretion on the issue, or

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(b) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

§ 801.54 Trade secrets and commercial or financial information.

Pursuant to 5 U.S.C. 552(b)(4), trade secrets and items containing commercial or financial information that are obtained from a person and are privileged or confidential are exempt from public disclosure.

§ 801.55 Interagency and intra-agency exchanges.

(a) Pursuant to 5 U.S.C. 552(b)(5), any record prepared by an NTSB employee for internal Government use is exempt from public disclosure to the extent that it contains—

(1) Opinions made in the course of developing official action by the NTSB but not actually made a part of that official action, or

(2) Information concerning any pending NTSB proceeding, or similar matter, including any claim or other dispute to be resolved before a court of law, administrative board, hearing officer, or contracting officer.

(b) The purpose of this section is to protect the full and frank exchange of ideas, views, and opinions necessary for the effective functioning of the NTSB. These resources must be fully and readily available to those officials upon whom the responsibility rests to take official NTSB action. Its purpose is also to protect against the premature disclosure of material that is in the developmental stage, if premature disclosure would be detrimental to the authorized and appropriate purposes for which the material is being used, or if, because of its tentative nature, the material is likely to be revised or modified before it is officially presented to the public.

(c) Examples of materials covered by this section include, but are not limited to, staff papers containing advice, opinions, or suggestions preliminary to a decision or action; preliminary notes; advance information on such things as proposed plans to procure, lease, or otherwise hire and dispose of materials, real estate, or facilities; documents exchanged in preparation for anticipated legal proceedings; material

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intended for public release at a specified future time, if premature disclosure would be detrimental to orderly processes of the NTSB; records of inspections, investigations, and surveys pertaining to internal management of the NTSB; and matters that would not be routinely disclosed in litigation but which are likely to be the subject of litigation.

§ 801.56 Unwarranted invasion of personal privacy.

Pursuant to 5 U.S.C. 552(b)(6), any personal, medical, or similar file is exempt from public disclosure if its disclosure would harm the individual concerned or would be a clearly unwarranted invasion of the person's personal privacy.

§ 801.57 Records compiled for law enforcement purposes.

Pursuant to 5 U.S.C. 552(b)(7), any records compiled for law or regulatory enforcement are exempt from public disclosure to the extent that disclosure would interfere with enforcement, would be an unwarranted invasion of privacy, would disclose the identity of a confidential source, would disclose investigative procedures and practices, or would endanger the life or security of law enforcement personnel.

§ 801.58 Records for regulation of financial institutions.

Pursuant to 5 U.S.C. 552(b)(8), records compiled for agencies regulating or supervising financial institutions are exempt from public disclosure.

§ 801.59 Geological records.

Pursuant to 5 U.S.C. 552(b)(9), records concerning geological wells are exempt from public disclosure.

Subpart G—Fee Schedule

§ 801.60 Fee schedule.

(a) *Authority.* Pursuant to 5 U.S.C. 552(a)(4)(i) and 52 FR 10,012 (Mar. 27, 1987), the NTSB may charge certain fees for processing requests under the FOIA in accordance with paragraph (c) of this section, except where fees are limited under paragraph (d) of this section, or where a waiver or reduction of fees is granted under paragraph (e) of

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this section. The NTSB may collect all applicable fees before sending copies of requested records to a requester. A requester must pay fees in accordance with the instructions provided on the invoice the FOIA Office sends to the requester.

(b) *Definitions.* For purposes of this section:

(1) *Commercial use request* means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests. This includes the furtherance of commercial interests through litigation. When it appears that the requester will use the requested records for a commercial purpose, either because of the nature of the request or because the NTSB has reasonable cause to doubt a requester's stated use, the NTSB shall provide the requester with a reasonable opportunity to submit further clarification.

(2) *Direct costs* means those expenses that an agency actually incurs in searching for, reviewing, and duplicating records in response to a FOIA request. This includes the salaries of employees performing the work, as listed below, but does not include overhead expenses such as the costs of office space.

(3) *Duplication* means the copying of a record, or of the information contained in a record, in response to a FOIA request.

(4) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. In order for a requester to demonstrate that their request falls within the category of an "educational institution," the requester must show that the request is authorized by the qualifying institution and that the requester does not seek the records for commercial use, but only to further scholarly research.

(5) *Representative of the news media* or "news media requester" means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the

public. For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization (for example, a journalist may submit a copy of a publication contract for which the journalist needs NTSB records).

(6) *Review* means the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. "Review" also includes processing the record(s) for disclosure, which includes redacting and otherwise preparing releasable records for disclosure. The NTSB may require review costs even if the NTSB ultimately does not release the record(s).

(7) *Search* means the process of looking for and retrieving records or information within the scope of a request. "Search" includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. The NTSB will make an effort to conduct such searches in the least expensive manner.

(c) *Fees.* In responding to FOIA requests, the NTSB will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (d) of this section:

(1) *Search.* (i) The NTSB will charge search fees for all requests, unless an educational institution, a noncommercial scientific institution, or a news media representative submits a request containing adequate justification for obtaining a fee waiver. These fees, however, are subject to the limitations of paragraph (d) of this section. The NTSB may charge for time spent searching even if the NTSB does not locate any responsive record or if the NTSB withholds the record(s) located because such record(s) are exempt from disclosure.

(ii) The NTSB will charge \$4.00 for each quarter of an hour spent by clerical personnel in searching for and retrieving a requested record. Where clerical personnel cannot entirely perform a search and retrieval (for example, where the identification of records within the scope of a request requires

the assistance of professional personnel), the applicable fee will instead be \$7.00 for each quarter hour of search time spent by professional personnel. Where a request requires the time of managerial personnel, the fee will be \$10.25 for each quarter hour of time spent by these personnel.

(2) *Duplication.* The NTSB will charge duplication fees, subject to the limitations of paragraph (d) of this section.

(i) The NTSB utilizes the services of a commercial reproduction facility for requests for duplicates of NTSB public dockets and publications.

(ii) Regarding the reproduction of non-public records in response to a FOIA request, the NTSB will charge \$0.10 per page for the duplication of a standard-size paper record. For other forms of duplication, the NTSB will charge the direct costs of the duplication.

(iii) Where the NTSB certifies records upon request, the NTSB will charge the direct cost of certification.

(3) *Review.* The NTSB will charge fees for the initial review of a record to determine whether the record falls within the scope of a request, or whether the record is exempt from disclosure. Such fees will be charged to requesters who make a request for commercial purposes. The NTSB will not charge for subsequent review of the request and responsive record; for example, in general, the NTSB will not charge additional fees for review at the administrative appeal level when the NTSB has already applied an exemption. The NTSB will charge review fees at the same rate as those charged for a search under paragraph (c)(1)(ii), above.

(c) *Limitations on charging fees.* For purposes of this section:

(1) The NTSB will not charge a fee for notices, decisions, orders, etc. provided to persons acting as parties in the investigation, or where required by law to be served on a party to any proceeding or matter before the NTSB. Likewise, the NTSB will not charge fees for requests made by family members of accident victims, when the NTSB has investigated the accident that is the subject of the FOIA request.

(2) The NTSB will not charge a search fee for requests from edu-

cational institutions or representatives of the news media.

(3) The NTSB will not charge a search fee or review fee for a quarter-hour period unless more than half of that period is required for search or review.

(4) Except for requesters seeking records for commercial use, the NTSB will provide the following items *without* charge:

(i) The first 100 pages of duplication (or the cost equivalent) of a record; and

(ii) The first two hours of search (or the cost equivalent) for a record.

(5) Whenever the total fee calculated under paragraph (c) of this section is \$14.00 or less for any request, the NTSB will not charge a fee.

(6) When the NTSB's FOIA Office determines or estimates that fees to be charged under this section will amount to more than \$25.00, the Office will notify the requester of the actual or estimated amount of the fees, unless the requester has indicated a willingness to pay fees as high as those anticipated. If the FOIA Office is able to estimate only a portion of the expected fee, the FOIA Office will advise the requester that the estimated fee may be only a portion of the total fee. Where the FOIA Office notifies a requester that the actual or estimated fees will exceed \$25.00, the NTSB will not expend additional agency resources on the request until the requester agrees in writing to pay the anticipated total fee. In circumstances involving a total fee that will exceed \$250.00, the NTSB may require the requester to make an advance payment or deposit of a specific amount before beginning to process the request.

(7) The NTSB may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided at 31 U.S.C. 3717 and will accrue from the date of the billing until the NTSB receives payment. The NTSB shall follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

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(8) Where a requester has previously failed to pay a properly charged FOIA fee to the NTSB within 30 days of the date of billing, the NTSB may require the requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee, before the NTSB begins to process a new request or continues to process a pending request from that requester.

(9) Where the NTSB reasonably believes that a requester or group of requesters acting together is attempting to divide a request into multiple series of requests for the purpose of avoiding fees, the NTSB may aggregate those requests and charge accordingly.

(d) *Requirements for waiver or reduction of fees.* For fee purposes, the NTSB will determine, whenever reasonably possible, the use to which a requester will put the requested records.

(1) The NTSB will furnish records responsive to a request without charge, or at a reduced charge, where the NTSB determines, based on all available information, that the requester has shown that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations of activities of the government, and

(ii) Disclosure of the requested information is not primarily in the commercial interest or for the commercial use of the requester.

(2) In determining whether disclosure of the requested information is in the public interest, the NTSB will consider the following factors:

(i) Whether the subject of the requested records concerns identifiable operations or activities of the federal government, with a connection that is direct and clear, and not remote or attenuated. In this regard, the NTSB will consider whether a requester's use of the documents would enhance transportation safety or contribute to the NTSB's programs.

(ii) Whether the portions of a record subject to disclosure are meaningfully informative about government operations or activities. The disclosure of information already in the public domain, in either a duplicative or sub-

stantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) Whether disclosure of the requested information would contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. The NTSB will consider a requester's expertise in the subject area and ability to effectively convey information to the public.

(iv) Whether the disclosure is likely to enhance the public's understanding of government operations or activities.

(3) In determining whether the requester is primarily in the commercial interest of the requester, the NTSB will consider the following factors:

(i) The existence and magnitude of any commercial interest the requester may have, or of any person on whose behalf the requester may be acting. The NTSB will provide requesters with an opportunity in the administrative process to submit explanatory information regarding this consideration.

(ii) Whether the commercial interest is greater in magnitude than any public interest in disclosure.

(4) Additionally, the NTSB may, at its discretion, waive publication, reproduction, and search fees for qualifying foreign countries, international organizations, nonprofit public safety entities, State and Federal transportation agencies, and colleges and universities, after approval by the Chief, Records Management Division.

(5) Where only some of the records to be released satisfy the requirements for a waiver of fees, the NTSB will grant a waiver for those particular records.

(6) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (e)(2) and (e)(3) of this section, insofar as they apply to each request. The NTSB will exercise its discretion to consider the cost-effectiveness of its use of administrative resources in determining whether to grant waivers or reductions of fees.

(e) Services available free of charge.

(1) The following documents are available without commercial reproduction cost until limited supplies are exhausted:

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- (i) Press releases;
 - (ii) Safety Board regulations (Chapter VIII of Title 49, Code of Federal Regulations);
 - (iii) Indexes to initial decisions, Board orders, opinion and orders, and staff manuals and instructions;
 - (iv) Safety recommendations; and
 - (v) NTSB Annual Reports.
- (2) The NTSB public Web site, located at <http://www.nts.gov>, also includes an e-mail subscription service for press releases, safety recommendations, and other announcements.

§ 801.61 Appeals of fee determinations.

Requesters seeking an appeal of the FOIA Officer's fee or fee waiver determination must send a written appeal to the NTSB's Managing Director within 20 days. The NTSB's Managing Director will determine whether to grant or deny any appeal made pursuant to § 801.21 within 20 working days (excluding Saturdays, Sundays, and legal public holidays) after receipt of such appeal, except that this time limit may be extended for as many as 10 additional working days, in accordance with § 801.23.

PART 802—RULES IMPLEMENTING THE PRIVACY ACT OF 1974

Subpart A—Applicability and Policy

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- 802.1 Purpose and scope.
 - 802.2 Definitions.

Subpart B—Initial Procedures and Requirements

- 802.5 Procedures for requests pertaining to individual records in a record system.
- 802.6 Types of requests and specification of records.
- 802.7 Requests: How, where, and when presented; verification of identity of individuals making requests; accompanying persons; and procedures for acknowledgment of requests.

Subpart C—Initial Determinations

- 802.8 Disclosure of requested information.

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- 802.10 Request for correction or amendment to record.

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- 802.15 Fees.

Subpart G—Penalties

- 802.18 Penalties.

Subpart H—Specific Exemptions

- 802.20 Security records.

AUTHORITY: Privacy Act of 1974, Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a); Independent Safety Board Act of 1974, Pub. L. 93–633, 88 Stat. 2166 (49 U.S.C. 1901 et seq.); and Freedom of Information Act, Pub. L. 93–502, November 21, 1974, amending 5 U.S.C. 552.

SOURCE: 41 FR 22358, June 3, 1976, unless otherwise noted.

Subpart A—Applicability and Policy

§ 802.1 Purpose and scope.

The purpose of this part is to implement the provisions of 5 U.S.C. 552a with respect to the availability to an individual of records of the National Transportation Safety Board (NTSB) maintained on individuals. NTSB policy encompasses the safeguarding of individual privacy from any misuse of Federal records and the provision of access to individuals to NTSB records concerning them, except where such access is in conflict with the Freedom of Information Act, or other statute.

[41 FR 39758, Sept. 16, 1976]

§ 802.2 Definitions.

In this part:

Board means the five Members of the National Transportation Safety Board, or a quorum thereof;

Individual means a citizen of the United States or an alien lawfully admitted for permanent residence;

National Transportation Safety Board (NTSB) means the agency set up under the Independent Safety Board Act of 1974;

Record means any item, collection, or grouping of information about an individual that is maintained under the control of the NTSB pursuant to Federal law or in connection with the transaction of public business, including, but not limited to, education, financial transactions, medical history, and criminal or employment history, and that contains a name, or an identifying number, symbol, or other identifying particular assigned to an individual, such as a finger or voice imprint or photograph;

Routine use means the use of such record for a purpose compatible with the purpose for which it was collected, including, but not limited to, referral to law enforcement agencies of violations of the law and for discovery purposes ordered by a court referral to potential employers, and for security clearance;

Statistical record means a record in a system of records maintained for statistical research or reporting purposes only and which is not used wholly or partially in any determination concerning an identifiable individual;

System Manager means the agency official who is responsible for the policies and practices of his particular system or systems of record, as specified in the NTSB notices of systems or records; and

System of records means a group of any records under the control of the NTSB from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual, whether presently in existence or set up in the future.

Subpart B—Initial Procedures and Requirements

§ 802.5 Procedures for requests pertaining to individual records in a record system.

The NTSB may not disclose any record to any person or other agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, provided the record under the control of the NTSB is maintained in a system of records from which information is retrieved by the name of the in-

dividual or by some identifying number, symbol, or other particular assigned to such individual. Written consent is not required if the disclosure is:

(a) To officers or employees of the NTSB who require the information in the official performance of their duties;

(b) Required under 5 U.S.C. 552, Freedom of Information Act;

(c) For a routine use compatible with the purpose for which it was collected;

(d) To the Bureau of the Census for uses pursuant to title 13, U.S.C.;

(e) To a recipient who has provided the NTSB with advance adequate assurance that the record will be used solely as a statistical research or reporting record and that it is to be transferred in a form not individually identifiable; or

(f) Pursuant to the order of a court of competent jurisdiction.

§ 802.6 Types of requests and specification of records.

(a) *Types of requests.* An individual may make the following request respecting records about himself maintained by NTSB in any system of records subject to the Act:

(1) Whether information concerning himself is contained in any system of records.

(2) Access to a record concerning himself. Such request may include a request to review the record and/or obtain a copy of all or any portion thereof.

(3) Correction or amendment of a record concerning himself.

(4) Accounting of disclosure to any other person or Government agency of any record concerning himself contained in any system of records controlled by NTSB, except: (i) Disclosures made pursuant to the FOIA; (ii) disclosures made within the NTSB; (iii) disclosures made to another Government agency or instrumentality for an authorized law enforcement activity pursuant to subsection (b)(7) of the Act; and (iv) disclosures expressly exempted by NTSB from the requirements of subsection (c)(3) of the Act, pursuant to subsection (k) thereof.

(b) *Specification of records.* All requests for access to records must reasonably describe the system of records and the individual's record within the

system of records in sufficient detail to permit identification of the requested record. Specific information regarding the system name, the individual's full name, and other information helpful in identifying the record or records shall be included. Requests for correction or amendment of records shall, in addition, specify the particular record involved, state the nature of the correction or amendment sought, and furnish justification for the correction or amendment.

(c) *Inadequate identification of record.* Requests which do not contain information sufficient to identify the record requested will be returned promptly to the requester, with a notice indicating what information is lacking. Individuals making requests in person will be informed of any deficiency in the specification of the records at the time the request is made. Individuals making requests in writing will be notified of any such deficiency when their request is acknowledged.

§ 802.7 Requests: How, where, and when presented; verification of identity of individuals making requests; accompanying persons; and procedures for acknowledgment of requests.

(a) *Requests—general.* Requests may be made in person or in writing. Assistance regarding requests or other matters relating to the Act may be obtained by writing to the Director, Bureau of Administration, National Transportation Safety Board, 800 Independence Avenue, SW., Washington, DC 20594. The Director, Bureau of Administration, or his designee, on request, will aid an individual in preparing an amendment to the record or to an appeal following denial of a request to amend the record, pursuant to subsection (f)(4) of the Act.

(b) *Written requests.* Written requests shall be made to the Director, Bureau of Administration at the address given above, and shall clearly state on the envelope and on the request itself, “Privacy Act Request,” “Privacy Act Statement of Disagreement,” “Privacy Act Disclosure Accounting Request,” “Appeal from Privacy Act Adverse Determination,” or “Privacy Act Correction Request,” as the case may be. Actual receipt by the Director, Bureau of

Administration, or his designee, shall constitute receipt.

(c) *Requests made in person.* Requests may be made in person during official working hours of the NTSB at the office where the record is located, as listed in the “Notice of Systems of Records” for the system in which the record is contained.

(d) *Verification of identity of requester.* (1) For written requests, the requester's identity must be verified before the release of any record, unless exempted under the FOIA. This may be accomplished by adequate proof of identity in the form of a driver's license or other acceptable item of the same type.

(2) For requests in person, the requester's identity may be established by a single document bearing a photograph (such as a passport or identification badge) or by two items of identification containing name, address, and signature (such as a driver's license or credit card).

(3) Where a request is made for reproduced records which are to be delivered by mail, the request must include a notarized statement verifying the requester's identity.

(e) *Inability to provide requisite documentation of identity.* A requester who cannot provide the necessary documentation of identity may provide a notarized statement, swearing or affirming his identity and the fact that he is aware of the penalties for false statement imposed pursuant to 18 U.S.C. 1001, and subsection (i)(3) of the Act. Where requested, the Director, Bureau of Administration, or his designee, will assist the requester in formulating the necessary document.

(f) *Accompanying persons.* A requester may wish to have a person of his choice accompany him to review the requested record. Prior to the release of the record, the NTSB will require the requester to furnish the Director, Bureau of Administration or his designee, with a written statement authorizing disclosure of the record in the accompanying person's presence.

(g) *Acknowledgment of requests.* Written requests to verify the existence of, to obtain access to, or to correct or amend records about the requester maintained by NTSB in any system of

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records subject to the Act, shall be acknowledged in writing by the Director, Bureau of Administration, or his designee, within 3 working days after the date of actual receipt of the request by the Director, Bureau of Administration, or his designee. The acknowledgment shall advise the requester of the need for any additional information to process the request. Wherever practicable, the acknowledgment shall notify the individual whether his request has been granted or denied. When a request is made in person, every effort will be made to determine immediately whether the request will be granted. If such decision cannot be made, the request will be processed in the same manner as a written request. Records will be made available for immediate inspection whenever possible.

[41 FR 22358, June 3, 1976, as amended at 41 FR 43154, Sept. 30, 1976]

Subpart C—Initial Determinations

§ 802.8 Disclosure of requested information.

(a) The System Manager may initially determine that the request be granted. If so, the individual making the request shall be notified orally, or in writing, and the notice shall include:

(1) A brief description of the information to be made available;

(2) The time and place where the record may be inspected, or alternatively, the procedure for delivery by mail to the requesting party;

(3) The estimated cost for furnishing copies of the record;

(4) The requirements for verification of identity;

(5) The requirements for authorizing discussion of the record in the presence of an accompanying person; and

(6) Any additional requirements needed to grant access to a specific system of records or record.

(b) Within 10 working days after actual receipt of the request by the Director, Bureau of Administration, or his designee, in appropriate cases, the requester will be informed:

(1) That the request does not reasonably describe the system of records or record sought to permit its identification, and shall set forth the additional

information needed to clarify the request; or

(2) That the system of records identified does not include a record retrievable by the requester's name or other identifying particulars.

(c) The System Manager shall advise the requester within 10 working days after actual receipt of the request by the Director, Bureau of Administration, or his designee, that the request for access has been denied, and the reason for the denial, or that the determination has been made to grant the request, either in whole or in part, in which case the relevant information will be provided.

[41 FR 22358, June 3, 1976, as amended at 41 FR 43154, Sept. 30, 1976]

Subpart D—Correction or Amending the Record

§ 802.10 Request for correction or amendment to record.

All requests for correcting or amending records shall be made in writing to the Director, Bureau of Administration, National Transportation Safety Board, 800 Independence Avenue., SW., Washington, DC 20594, and shall be deemed received upon actual receipt by the Director, Bureau of Administration. The request shall clearly be marked on the envelope and in the letter with the legend that it is a "Privacy Act Correction Request." The request must reasonably set forth the portion of the record which the individual contends is not accurate, relevant, timely, or complete.

[41 FR 22358, June 3, 1976, as amended at 41 FR 43154, Sept. 30, 1976]

§ 802.11 Agency review of requests for correction or amendment of record.

Within 10 working days after actual receipt of the request by the Director, Bureau of Administration, or his designee, to correct or amend the record, the System Manager shall either make the correction in whole or in part, or inform the individual of the refusal to correct or amend the record as requested, and shall present the reasons for any denials.

[41 FR 22358, June 3, 1976, as amended at 41 FR 43154, Sept. 30, 1976]

§ 802.12 Initial adverse agency determination on correction or amendment.

If the System Manager determines that the record should not be corrected or amended in whole or in part, he will forthwith make such finding in writing, after consulting with the General Counsel, or his designee. The requester shall be notified of the refusal to correct or amend the record. The notification shall be in writing, signed by the System Manager, and shall include—

- (a) The reason for the denial;
- (b) The name and title or position of each person responsible for the denial of the request;
- (c) The appeal procedures for the individual for a review of the denial; and
- (d) Notice that the denial from the System Manager is appealable within 30 days from the receipt thereof by the requester to the Board.

The System Manager is allotted 10 working days (or within such extended period as is provided in the section concerning “unusual circumstances” *infra*) to respond to the request for review. If the requester does not receive an answer within such time, the delay shall constitute a denial of the request and shall permit the requester immediately to appeal to the Board, or to a district court.

Subpart E—Review of Initial Adverse Determination

§ 802.14 Review procedure and judicial review.

(a) A requester may appeal from any adverse determination within 30 days after actual receipt of a denial from the System Manager. The appeal must be in writing addressed to the Chairman, National Transportation Safety Board, 800 Independence Avenue, SW., Washington, DC 20594, and shall contain a statement on the envelope and in the appeal: “Appeal from Privacy Act Adverse Determination.”

(b) The Board shall make a determination with respect to the appeal within 30 working days after the actual receipt of the appeal by the Chairman, except as provided for in “unusual circumstances” *infra*.

(c)(1) *Review of denial of access.* If the appeal upholds the denial of access to records, the Board shall: Notify the requester in writing, explaining the Board’s determination; state that the denial is a final agency action and that judicial review is available in a district court of the United States in the district where the requester resides or has his principal place of business, or where the agency records are located, or in the District of Columbia; and request a filing with the Board of a concise statement enumerating the reasons for the requester’s disagreement with the denial, pursuant to subsection (g) of the Act.

(2) *Review of denial of correction or amendment.* If the appeal upholds the denial in whole or in part for correction or amendment of the record, the same notification and judicial review privileges described in paragraph (c)(1) of this section shall apply.

(d) If the denial is reversed on appeal, the Board shall notify the requester in writing of the reversal. The notice shall include a brief statement outlining those portions of the individual’s record which were not accurate, relevant, timely, or complete, and corrections of the record which were made, and shall provide the individual with a courtesy copy of the corrected record.

(e) Copies of all appeals and written determinations will be furnished by the System Manager to the Board.

(f) In unusual circumstances, time limits may be extended by not more than 10 working days by written notice to the individual making the request. The notice shall include the reasons for the extension and the date on which a determination is expected to be forthcoming. “Unusual circumstances” as used in this section shall include circumstances where a search and collection of the requested records from field offices or other establishments are required, cases where a voluminous amount of data is involved, and cases where consultations are required with other agencies or with others having a substantial interest in the determination of the request.

(g) *Statements of Disagreement.* (1) Written Statements of Disagreement may be furnished by the individual within 30 working days of the date of

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actual receipt of the final adverse determination of the Board. They shall be addressed to the Director, Bureau of Administration, National Transportation Safety Board, 800 Independence Avenue, SW., Washington, DC 20594, and shall be clearly marked, both on the statement and on the envelope, "Privacy Act Statement of Disagreement."

(2) The Director, Bureau of Administration, or his designee, shall be responsible for ensuring that:

(i) The Statement of Disagreement is included in the system of records in which the disputed item of information is maintained; and

(ii) The original record is marked to indicate the information disputed, the existence of the Statement of Disagreement, and its location within the relevant system of records.

(3) The Director, Bureau of Administration, or his designee, may, if he deems it appropriate, prepare a concise Statement of Explanation indicating why the requested amendments or corrections were not made. Such Statement of Explanation shall be included in the system of records in the same manner as the Statement of Disagreement. Courtesy copies of the NTSB Statement of Explanation and the notation of dispute, as marked on the original record, shall be furnished to the individual who requested correction or amendment of the record.

(h) *Notices of correction and/or amendment, or dispute.* After a record has been corrected or a Statement of Disagreement has been filed, the Director, Bureau of Administration, or his designee, shall within 30 working days thereof, advise all previous recipients of the affected record as to the correction or the filing of the Statement of Disagreement. The identity of such recipients shall be determined pursuant to an accounting of disclosures required by the Act or any other accounting previously made. Any disclosure of disputed information occurring after a Statement of Disagreement has been filed shall clearly identify the specific information disputed and shall be accompanied by a copy of the Statement of Disagreement and a copy of any NTSB Statement of Explanation.

(1) *Disclosure to others of records concerning individuals.* Neither the Board nor other NTSB personnel shall disclose any record which is contained in a system of records maintained by NTSB, by any means of communication, including oral communication, to any person, or to another Government agency, except pursuant to a written request by, or with the prior written consent, of the individual to whom the record pertains, unless disclosure of the record is:

(1) To the Board and NTSB personnel who have a need for the record in the performance of their duties;

(2) Required under the FOIA;

(3) For a routine use published in the FEDERAL REGISTER;

(4) To the Bureau of the Census for purposes of planning or carrying out a census or survey, or related activity pursuant to the provisions of title 13 of the U.S.C.;

(5) To a recipient who has provided NTSB with adequate advance written assurance that the record will be used solely as a statistical research or reporting record and that the record is transferred in a form that is not identifiable with respect to individuals;¹

(6) To the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the U.S. Government, or to the Administrator of the General Services Administration, or his designee, for evaluation to determine whether the record has such value;

(7) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to NTSB specifying the particular portion of the

¹The advance written statement of assurance shall state the purpose for which the record is requested and certify that it will be used only for statistical purposes. Prior to release under this paragraph, the record shall be stripped of all personally identifiable information and reviewed to ensure that the identity of any individual cannot reasonably be determined by combining two or more statistical records.

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record desired and the law enforcement activity for which the record is sought;²

(8) To any person upon a showing of compelling circumstances affecting the health or safety of any individual;

(9) To either House of Congress or, to the extent of matter within its jurisdiction, to any committee, or subcommittee thereof, or to any joint committee of the Congress, or to any subcommittee of such joint committee;

(10) To the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) Pursuant to the order of a court of competent jurisdiction.

(j) *Notices of subpoenas.* When records concerning an individual are subpoenaed or otherwise disclosed pursuant to court order, the NTSB officer or employee served with the subpoena shall be responsible for assuring that the individual is notified of the disclosure within 5 days after such subpoena or other order becomes a matter of public record. The notice shall be mailed to the last known address of the individual and shall contain the following information: (1) The date the subpoena is returnable; (2) the court in which it is returnable; (3) the name and number of the case or proceeding; and (4) the nature of the information sought.

(k) *Notices of emergency disclosures.* When information concerning an individual has been disclosed to any person under compelling circumstances affecting health or safety, the NTSB officer or employee who made or authorized the disclosure shall notify the individual at his last known address within 5 days of the disclosure. The notice shall contain the following information: (1) The nature of the information disclosed; (2) the person or agency to whom the information was disclosed; (3) the date of the disclosure; and (4)

²A record may be disclosed to a law enforcement agency at the initiative of NTSB if criminal conduct is suspected, provided that such disclosure has been established as a routine use by publication in the FEDERAL REGISTER, and the instance of misconduct is directly related to the purpose for which the record is maintained.

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the compelling circumstances justifying the disclosure.

[41 FR 22358, June 3, 1976, as amended at 41 FR 43154, Sept. 30, 1976]

Subpart F—Fees

§ 802.15 Fees.

No fees shall be charged for providing the first copy of a record, or any portion thereof, to individuals to whom the record pertains. The fee schedule for other records is the same as that appearing in the appendix to part 801 of this chapter, implementing the FOIA, as amended from time to time, except that the cost of any search for and review of the record shall not be included in any fee under this Act, pursuant to subsection (f)(5) of the Act.

Subpart G—Penalties

§ 802.18 Penalties.

(a) An individual may bring a civil action against the NTSB to correct or amend the record, or where there is a refusal to comply with an individual request or failure to maintain any record with accuracy, relevance, timeliness and completeness, so as to guarantee fairness, or failure to comply with any other provision of 5 U.S.C. 552a. The court may order the correction or amendment. It may assess against the United States reasonable attorney fees and other costs, or may enjoin the NTSB from withholding the records and order the production to the complainant, and it may assess attorney fees and costs.

(b) Where it is determined that the action was willful or intentional with respect to 5 U.S.C. 552(g)(1) (c) or (d), the United States shall be liable for the actual damages sustained, but in no case less than the sum of \$1,000 and the costs of the action with attorney fees.

(c) Criminal penalties may be imposed against an officer or employee of the NTSB who fully discloses material which he knows is prohibited from disclosure, or who willfully maintains a system of records without meeting the notice requirements, or who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses. These

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offenses shall be misdemeanors with a fine not to exceed \$5,000.

Subpart H—Specific Exemptions

§ 802.20 Security records.

Pursuant to, and limited by, 5 U.S.C. 552a(k)(5), the NTSB's system of records, which contains the Security Records of NTSB employees, prospective employees, and potential contractors, shall be exempt from disclosure of the material and the NTSB's handling thereof under subsections (d), (e)(1) and (e)(4) (H) and (I) of 5 U.S.C. 552a.

PART 803—OFFICIAL SEAL

Sec.

803.1 Description.

803.3 Authority to affix Seal.

803.5 Use of the Seal.

AUTHORITY: Sec. 303(c)(2), Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2168 (49 U.S.C. 1902(c)(2)).

§ 803.1 Description.

The official seal of the National Transportation Safety Board is described as follows: An American bald eagle with wings displayed, holding in his dexter (right) talon an olive branch and in his sinister (left) talon, a bundle of 13 arrows; above his head is a scroll inscribed "E Pluribus Unum," bearing a shield with vertical stripes of alternating white and red, crowned by a field of blue, all within an encircling inscription "National Transportation Safety Board." When illustrated in color, the background is white. The wings, the body, and the upper portion of the legs of the eagle are shades of brown; the head, neck, and tail are white; the beak, feet, and lower portion of the legs are gold. The inscription on the scroll is black. The encircling inscription is the same shade of gold as the eagle's beak. The arrows and the olive branch are a lighter shade of gold. The red and blue of the shield are national flag red and blue. The official seal of the Board, in black and white, appears below:



[43 FR 36454, Aug. 17, 1978]

§ 803.3 Authority to affix Seal.

(a) The Seal shall be in the custody and control of the Director, Bureau of Administration of the Board.

(b) The Director, Bureau of Administration may delegate and authorize re-delegations of this authority.

[40 FR 30238, July 17, 1975, as amended at 41 FR 39758, Sept. 16, 1976]

§ 803.5 Use of the Seal.

(a) The Seal is the official emblem of the Board and its use is therefore permitted only as provided in this part.

(b) Use by any person or organization outside of the Board may be made only with the Board's prior written approval.

(c) Requests by any person or organization outside of the Board for permission to use the Seal must be made in writing to Director, Bureau of Administration, National Transportation Safety Board, 800 Independence Avenue, SW., Washington, DC 20594. The request must specify in detail the exact use to be made. Any permission granted shall apply only to the specific use for which it was granted.

(d) Use of the Seal shall be essentially for informational purposes. The Seal may not be used on any article or in any manner which may discredit the Seal or reflect unfavorably upon the Board, or which implies Board endorsement of commercial products or services, or of the user's or users' policies or activities. Specifically, permission

may not be granted under this section for nonofficial use—

(1) On souvenir or novelty items of an expendable nature;

(2) On toys, gifts, or premiums;

(3) As a letterhead design;

(4) On menus, matchbook covers, calendars, or similar items;

(5) To adorn civilian clothing; or

(6) On athletic clothing or equipment.

(e) Where necessary to avoid any prohibited implication or confusion as to the Board's association with the user or users, an appropriate legend will be prescribed by the Board for prominent display in connection with the permitted use.

(f) Falsely making, forging, counterfeiting, mutilating, or altering the Seal, or knowingly using or possessing with fraudulent intent any altered Seal is punishable under section 506 of Title 18, U.S.C.

[40 FR 30238, July 17, 1975, as amended at 41 FR 39753, Sept. 16, 1976]

PART 804—RULES IMPLEMENTING THE GOVERNMENT IN THE SUNSHINE ACT

Sec.

804.1 Applicability.

804.2 Policy.

804.3 Definitions.

804.4 Open meetings requirement.

804.5 Grounds on which meetings may be closed or information may be withheld.

804.6 Procedures for closing meetings, or withholding information, and requests by affected persons to close a meeting.

804.7 Procedures for public announcement of meetings.

804.8 Changes following public announcement.

804.9 Transcripts, recordings, or minutes of closed meetings.

804.10 Availability and retention of transcripts, recordings, and minutes, and applicable fees.

AUTHORITY: Government in the Sunshine Act, Pub. L. 94-409, 90 Stat. 1241 (5 U.S.C. 552b); Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2166 (49 U.S.C. 1901 et seq.).

SOURCE: 42 FR 13284, Mar. 10, 1977, unless otherwise noted.

§ 804.1 Applicability.

(a) This part implements the provisions of the Government in the Sunshine Act (5 U.S.C. 552b). These procedures apply to meetings, as defined herein, of the Members of the National Transportation Safety Board (NTSB).

(b) Requests for all documentations other than the transcripts, recordings, and minutes described in § 804.9 shall continue to be governed by part 801 of the NTSB regulations (49 CFR part 801).

§ 804.2 Policy.

It is the policy of the NTSB to provide the public with the fullest practicable information regarding the decisionmaking processes of the Board, while protecting the rights of individuals and the ability of the Board to discharge its statutory functions and responsibilities. The public is invited to attend but not to participate in open meetings.

§ 804.3 Definitions.

As used in this part: *Meeting* means the deliberations of three or more Members where such deliberations determine or result in the joint conduct or disposition of official NTSB business, and includes conference telephone calls otherwise coming within the definition. A meeting does not include:

(a) Notation voting or similar consideration of business, whether by circulation of material to the Members individually in writing or by a polling of the Members individually by telephone.

(b) Deliberations by three or more Members (1) to open or to close a meeting or to release or to withhold information pursuant to § 804.6, (2) to call a meeting on less than seven days' notice as permitted by § 804.7(b), or (3) to change the subject matter or the determination to open or to close a publicly announced meeting under § 804.8(b).

(c) An internal session attended by three or more Members for which the sole purpose is to have the staff brief the Board concerning an accident, incident, or safety problem.

Member means an individual duly appointed and confirmed to the collegial body, known as "the Board," which heads the NTSB.

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National Transportation Safety Board (NTSB) means the agency set up under the Independent Safety Board Act of 1974.

[42 FR 13284, Mar. 10, 1977, as amended at 42 FR 31794, June 23, 1977]

§ 804.4 Open meetings requirement.

Members shall not jointly conduct or dispose of agency business other than in accordance with this part. Except as provided in § 804.5, every portion of every meeting of the Board shall be open to public observation.

§ 804.5 Grounds on which meetings may be closed or information may be withheld.

Except in a case where the Board finds that the public interest requires otherwise, a meeting may be closed and information pertinent to such meeting otherwise required by §§ 804.6, 804.7, and 804.8 to be disclosed to the public may be withheld if the Board properly determines that such meeting or portion thereof or the disclosure of such information is likely to:

- (a) Disclose matters that are (1) specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy, and (2) are in fact properly classified pursuant to such Executive Order;
- (b) Relate solely to the internal personnel rules and practices of the NTSB;
- (c) Disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. 552): *Provided*, That such statute (1) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (2) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (d) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (e) Involve accusing any person of a crime, or formally censuring any person;
- (f) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(g) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would:

- (1) Interfere with enforcement proceedings;
- (2) Deprive a person of a right to a fair trial or an impartial adjudication;
- (3) Constitute an unwarranted invasion of personal privacy;
- (4) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;
- (5) Disclose investigative techniques and procedures; or
- (6) Endanger the life or physical safety of law enforcement personnel;
- (h) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;
 - (i) Disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed action of the NTSB: *Provided*, That the NTSB has not already disclosed to the public the content or nature of its proposed action or is not required by law to make such disclosure on its own initiative prior to taking final action on such proposal; or
 - (j) Specifically concern the Board's issuance of a subpoena, or the NTSB's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the NTSB of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

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§ 804.6 Procedures for closing meetings, or withholding information, and requests by affected persons to close a meeting.

(a) A meeting shall not be closed, or information pertaining thereto withheld, unless a majority of all Members votes to take such action. A separate vote shall be taken with respect to any action under § 804.5. A single vote is permitted with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular subject matters and is scheduled to be held no more than thirty days after the initial meeting in such series. Each Member's vote under this paragraph shall be recorded and proxies are not permitted.

(b) Any person whose interest may be directly affected if a portion of a meeting is open may request the Board to close that portion on any of the grounds referred to in § 804.5 (e), (f), or (g). Requests, with reasons in support thereof, should be submitted to the General Counsel, National Transportation Safety Board, 800 Independence Avenue, SW., Washington, DC 20594. On motion of any Member, the Board shall determine by recorded vote whether to grant the request.

(c) Within one working day of any vote taken pursuant to this section, the NTSB shall make available a written copy of such vote reflecting the vote of each Member on the question and, if a portion of a meeting is to be closed to the public a full written explanation of its action closing the meeting and a list of all persons expected to attend and their affiliation.

(d) Before every closed meeting, the General Counsel of the NTSB shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement of the presiding officer setting forth the time and place of the meeting and the persons present, shall be retained by the NTSB as part of the transcript, recording, or minutes required by § 804.9.

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§ 804.7 Procedures for public announcement of meetings.

(a) For each meeting, the NTSB shall make public announcement, at least one week before the meeting, of the:

- (1) Time of the meeting;
- (2) Place of the meeting;
- (3) Subject matter of the meeting;
- (4) Whether the meeting is to be open or closed; and
- (5) The name and business telephone number of the official designated by the NTSB to respond to requests for information about the meeting.

(b) The one week advance notice required by paragraph (a) of this section may be reduced only if:

- (1) A majority of all Members determines by recorded vote that NTSB business requires that such meeting be scheduled in less than seven days; and
- (2) The public announcement required by paragraph (a) of this section be made at the earliest practicable time.

(c) Immediately following each public announcement required by this section, or by § 804.8, the NTSB shall submit a notice of public announcement for publication in the FEDERAL REGISTER.

§ 804.8 Changes following public announcement.

(a) The time or place of a meeting may be changed following the public announcement only if the NTSB publicly announces such change at the earliest practicable time. Members need not approve such change.

(b) The subject matter of a meeting or the determination of the Board to open or to close a meeting, or a portion thereof, to the public may be changed following public announcement only if:

- (1) A majority of all Members determines by recorded vote that NTSB business so requires and that no earlier announcement of the change was possible; and
- (2) The NTSB publicly announces such change and the vote of each Member thereon at the earliest practicable time.

§ 804.9 Transcripts, recordings, or minutes of closed meetings.

Along with the General Counsel's certification and presiding officer's

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statement referred to in § 804.6(d), the NTSB shall maintain a complete transcript of electronic recording adequate to record fully the proceedings of each meeting, or a portion thereof, closed to the public. The NTSB may maintain a set of minutes in lieu of such transcript or recording for meetings closed pursuant to § 804.5 (h) or (j). Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote. All documents considered in connection with any actions shall be identified in such minutes.

§ 804.10 Availability and retention of transcripts, recordings, and minutes, and applicable fees.

The NTSB shall make promptly available to the public the transcript, electronic recording, or minutes of the discussion of any item on the agenda or of any testimony received at the meeting, except for such item, or items, of discussion or testimony as determined by the NTSB to contain matters which may be withheld under the exemptive provisions of § 804.5. Copies of the non-exempt portions of the transcript or minutes, or transcription of such recordings disclosing the identity of each speaker, shall be furnished to any person at the actual cost of transcription or duplication. The NTSB shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or a portion thereof, closed to the public for at least two years after such meeting, or until one year after the conclusion of any NTSB proceeding with respect to which the meeting, or a portion thereof, was held, whichever occurs later.

PART 805 [RESERVED]

PART 806—NATIONAL SECURITY INFORMATION POLICY AND GUIDELINES, IMPLEMENTING REGULATIONS

Sec.
806.1 General policy.

806.2 Applicability.
806.3 Definitions.
806.4 Mandatory review for declassification.

AUTHORITY: Sec. 304, Independent Safety Board Act of 1974, 88 Stat. 2168 (49 U.S.C. 1903). E.O. 12065, 43 FR 28949, July 3, 1978.

SOURCE: 45 FR 20104, Mar. 27, 1980, unless otherwise noted.

§ 806.1 General policy.

(a) The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executive branch.

(b) Within the Federal Government there is some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints for the security of our Nation and the safety of our people and our allies. To protect against actions hostile to the United States, of both an overt and covert nature, it is essential that such official information and material be given only limited dissemination.

§ 806.2 Applicability.

This rule supplements Executive Order 12065 within the Board with regard to national security information. It establishes general policies and certain procedures for the classification and declassification of information which is generated, processed, and/or stored by the Board. In this connection, the Board does not have any original classification authority but infrequently does receive classified information from other agencies.

§ 806.3 Definitions.

(a) Classified information. Information or material, herein collectively termed information, that is owned by, produced for or by, or under the control of, the United States Government and that has been determined pursuant to Executive Order 12065, or prior orders, to require protection against unauthorized disclosure and that is so

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designated. One of the following classifications will be shown:

(1) *Top secret* means information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

(2) *Secret* means information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to national security.

(3) *Confidential* means information, the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security.

(b) *Foreign government information* means either: (1) Information provided to the United States by a foreign government or international organization of governments in the expectation, express or implied, that the information is to be kept in confidence; or (2) information produced by the United States pursuant to a written joint arrangement with a foreign government or international organization of governments requiring that either the information or the arrangements or both, be kept in confidence.

(c) *National security* means the national defense and foreign relations of the United States.

(d) *Declassification event* means an event which would eliminate the need for continued classification.

§ 806.4 Mandatory review for declassification.

(a) Requests for mandatory review for declassification under section 3-501 of E.O. 12065 must be in writing and should be addressed to: National Security Oversight Officer, National Transportation Safety Board, Washington, DC 20594.

(b) The requester shall be informed of the date of receipt of the request at the Board. This date will be the basis for the time limits specified by section 3-501 of E.O. 12065. If the request does not reasonably describe the information sought, the requester shall be notified that, unless additional information is provided or the request is made more specific, no further action will be taken.

(c) When the Board receives a request for information in a document which is

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in its custody but which was classified by another agency, it shall refer the request to the appropriate agency for review, together with a copy of the document containing the information requested, where practicable. The Board shall also notify the requester of the referral, unless the association of the reviewing agency with the information requires protection. The reviewing agency shall review the document in coordination with any other agency involved or which had a direct interest in the classification of the subject matter. The reviewing agency shall respond directly to the requester in accordance with the pertinent procedures described above and, if requested, shall notify the Board of its determination.

PART 807—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE NATIONAL TRANSPORTATION SAFETY BOARD

Sec.	
807.101	Purpose.
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807.103	Definitions.
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807.152-807.159	[Reserved]
807.160	Communications.
807.161-807.169	[Reserved]
807.170	Compliance procedures.

AUTHORITY: 29 U.S.C. 794.

SOURCE: 51 FR 4578, Feb. 5, 1986, unless otherwise noted.

§ 807.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which

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amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 807.102 Application.

This part applies to all programs or activities conducted by the agency.

§ 807.103 Definitions.

For purposes of this part, the term—
Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Handicapped person means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record

of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in subparagraph (1) of this definition but is treated by the agency as having such an impairment.

Qualified handicapped person means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a

handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) *Qualified handicapped person* is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 807.140.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

[51 FR 4579, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986]

§§ 807.104–807.109 [Reserved]

§ 807.110 **Self-evaluation.**

(a) The agency shall, by April 9, 1987, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspections:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

§ 807.111 **Notice.**

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 807.112–807.129 [Reserved]

§ 807.130 **General prohibitions against discrimination.**

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

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(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs and activities in the most inte-

grated setting appropriate to the needs of qualified handicapped persons.

§§ 807.131–807.139 [Reserved]

§ 807.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 807.141–807.148 [Reserved]

§ 807.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 807.150, no qualified handicapped person shall, because the agency's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 807.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 807.150(a) would result in such alteration or burdens. The decision that

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compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by June 6, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by April 7, 1989, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by

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October 7, 1986, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

[51 FR 4579, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986]

§ 807.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

§§ 807.152-807.159 [Reserved]

§ 807.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and

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enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §807.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure

that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 807.161–807.169 [Reserved]

§ 807.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Director, Bureau of Administration shall be responsible for coordinating implementation of this section. Complaints may be sent to Director, Bureau of Administration, 800 Independence Ave., SW., Room 802, Washington, DC 20594.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

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(2) A description of a remedy for each violation found;

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §807.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[51 FR 4579, Feb. 5, 1986, as amended at 51 FR 4579, Feb. 5, 1986]

PART 821—RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS

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821.64 Judicial review.

AUTHORITY: 49 U.S.C. 1101–1155, 44701–44723, 46301; unless otherwise noted.

SOURCE: 68 FR 22625, Apr. 29, 2003, unless otherwise noted.

Subpart A—General Provisions

§ 821.1 Definitions.

(a) As used in this part:

Administrator means the Administrator of the Federal Aviation Administration (FAA);

Airman certificate means any certificate issued by the FAA to an airman, and shall include medical certificates required for airmen;

Appeal from an initial decision means a request to the Board to review a law judge's decision;

Appeal to the Board means a request to the Board for the review by a law judge of an order of the Administrator;

Appealable order means an order of a law judge that has the effect of terminating the proceeding, such as one granting a motion to dismiss in lieu of an answer, as provided in § 821.17, or one granting a motion for judgment on the pleadings or summary judgment. *Appealable order* does not include an order granting in part a motion to dismiss and requiring an answer to any remaining allegation or allegations, an order granting in part judgment on the pleadings or summary judgment, or a ruling on an interlocutory matter;

Board means the National Transportation Safety Board;

Case Manager means the officer of the Board's Office of Administrative Law Judges responsible for the processing of cases within that office;

Certificate means any certificate issued by the Administrator under 49 U.S.C. Chapter 447;

Chief Law Judge means the administrative law judge in charge of the adjudicative function of the Board's Office of Administrative Law Judges;

Complaint means an order of the Administrator, reissued for pleading purposes, from which an appeal to the Board has been taken pursuant to sections 49 U.S.C. 44106, 44709 or 46301;

Emergency order means an order of the Administrator issued pursuant to 49 U.S.C. 44709, which recites that an emergency exists and that safety in air commerce or air transportation and the public interest require the immediate effectiveness of such order;

Flight engineer means a person who holds a flight engineer certificate issued under Part 63 of Title 14 of the Code of Federal Regulations;

Initial decision means the law judge's decision on the issue or issues remaining for disposition at the close of a hearing;

Law judge means the administrative law judge assigned to hear and preside over the respective proceeding;

Mechanic means a person who holds a mechanic certificate issued under Part 65 of Title 14 of the Code of Federal Regulations;

Order means the document (sometimes also termed the complaint) by which the Administrator seeks to amend, modify, suspend or revoke a certificate, or impose a civil penalty;

Petition for review means a petition filed pursuant to 49 U.S.C. 44703 for review of the Administrator's denial of an application for issuance or renewal of an airman certificate;

Petitioner means a person who has filed a petition for review;

Pilot means a person who holds a pilot certificate issued under Part 61 of Title 14 of the Code of Federal Regulations;

Repairman means a person who holds a repairman certificate issued under Part 65 of Title 14 of the Code of Federal Regulations;

Respondent means the holder of a certificate who has appealed to the Board from an order of the Administrator amending, modifying, suspending or revoking a certificate, or imposing a civil penalty.

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(b) Terms defined in 49 U.S.C. Chapters 11, 447 and 463 are used as so defined.

§ 821.2 Applicability and description of part.

The provisions of this part govern all air safety proceedings, including proceedings before a law judge on petition for review of the denial of any airman certificate (including a medical certificate), or on appeal from any order of the Administrator amending, modifying, suspending or revoking a certificate. The provisions of this part also govern all proceedings on appeal from an order of the Administrator imposing a civil penalty on a flight engineer, mechanic, pilot or repairman, or a person acting in such capacity. All proceedings on appeal to the Board from any initial decision or order of a law judge are also governed by this part.

§ 821.3 Description of docket numbering system.

In addition to sequential numbering of cases as received, each case formally handled by the Board will receive a letter prefix. These letter prefixes reflect the case type: "SE" for safety enforcement (certificate suspension/revocation) cases; "SM" (safety medical) for cases involving denials of medical certification; "CD" for cases involving non-medical certificate denials; "SR" for cases involving safety registration issues under 49 U.S.C. 44101 *et seq.*; "CP" for cases involving the imposition of civil penalties; "NA" for cases in which a petition for review or appeal is not accepted because of a patent procedural deficiency; and "EAJA" for cases involving applications for fees and expenses under the Equal Access to Justice Act, governed by Part 826.

Subpart B—General Rules Applicable to Petitions for Review, Appeals to the Board, and Appeals From Law Judges Initial Decisions and Appealable Orders

§ 821.6 Appearances and rights of witnesses.

(a) Any party to a proceeding may appear and be heard in person, or by an

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attorney or other representative designated by that party. Upon hearing, and for good cause shown, the Board may suspend or bar any person from practicing before it.

(b) Any person appearing in person in any proceeding governed by this part may be accompanied, represented and advised, and may be examined by, his or her own counsel or representative.

(c) Any person who submits data or evidence in a proceeding governed by this part may, by timely request, procure a copy of any document submitted by him or her, or a copy of any transcript made of his or her testimony, on payment of reasonable costs. Original documents, data or evidence may be retained by a party upon permission of the law judge or the Board, upon substitution of a copy thereof.

(d) Any party to a proceeding who is represented by an attorney or representative shall notify the Board of the name, address and telephone number of that attorney or representative. In the event of a change in representation, the party shall notify the Board (in the manner provided in § 821.7) and the other parties to the proceeding (pursuant to § 821.8) before the new attorney or representative may participate in the proceeding in any way.

§ 821.7 Filing of documents with the Board.

(a) *Filing address, method and date of filing.* (1) Except as provided in paragraph (a)(2) of this section, documents are to be filed with the Office of Administrative Law Judges, National Transportation Safety Board, 490 L'Enfant Plaza East, SW., Room 4704, Washington, DC 20594, and addressed to the assigned law judge, if any. If the proceeding has not yet been assigned to a law judge, documents shall be addressed to the Case Manager.

(2) Subsequent to the filing of a notice of appeal from a law judge's initial decision or appealable order, the issuance of a decision permitting an interlocutory appeal, or the expiration of the period within which an appeal from the law judge's initial decision or appealable order may be filed, all documents are to be filed with the Office of General Counsel, National Transportation Safety Board, 490 L'Enfant

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Plaza East, SW., Room 6401, Washington, DC 20594.

(3) Documents shall be filed by personal delivery, by U.S. Postal Service first-class mail or by overnight delivery service. Except as specifically provided in Subpart I (governing emergency proceedings), facsimile filing is limited. Documents to be filed with a law judge or the Case Manager may be transmitted by facsimile, but such filing must be followed, no later than the next business day, by transmission of the original by personal delivery, first-class mail or overnight delivery service. Facsimile filing of documents to be filed with the Office of General Counsel is not permitted unless specifically authorized under Subpart I or requested by that office.

(4) Documents shall be deemed filed on the date of personal delivery; on the send date shown on the facsimile (where facsimile service is permitted under paragraph (a)(3) of this section or Subpart I); and, for mail delivery service, on the mailing date shown on the certificate of service, on the date shown on the postmark if there is no certificate of service, or on the mailing date shown by other evidence if there is no certificate of service and no postmark. Where the document bears a postmark that cannot reasonably be reconciled with the mailing date shown on the certificate of service, the document will be deemed filed on the date of the postmark.

(b) *Number of copies.* Service on the Board of petitions for review, appeals from orders of the Administrator, and notices of appeal from law judges' initial decisions and appealable orders shall be by executed original and 3 copies. Service of all other documents shall be by executed original and one copy. Copies need not be signed, but the name of the person signing the original shall be shown thereon.

(c) *Form.* (1) Petitions for review, appeals to the Board from orders of the Administrator, and notices of appeal from law judges' initial decisions and appealable orders may be in the form of a letter signed by the petitioner or appealing party, and shall be typewritten or in legible handwriting.

(2) Documents filed with the Board consisting of more than one page may

be affixed only in the upper left-hand corner by staple or clip, and shall not be bound or hole-punched. Any document failing to comply with this requirement is subject to being returned to the filing party.

(d) *Content.* Each document filed with the Board shall contain a concise and complete statement of the facts relied upon, and the relief sought, by the filing party.

(e) *Subscription.* The original of every document filed shall be signed by the filing party, or by that party's attorney or other representative.

(f) *Designation of person to receive service.* The initial document filed by a party in a proceeding governed by this part shall show on the first page the name, address and telephone number of the person or persons who may be served with documents on that party's behalf.

(g) *To whom directed.* All motions, requests and documents submitted in connection with petitions for review and appeals to the Board from orders of the Administrator shall designate, and be addressed to, the law judge to whom the proceeding has been assigned, if any. If the proceeding has not yet been assigned to a law judge, the document shall bear the designation "unsigned," and shall be addressed to the Case Manager. All motions, requests and documents submitted subsequent to the filing of a notice of appeal from a law judge's initial decision or appealable order, or a decision permitting an interlocutory appeal, or after the expiration of the period within which an appeal from the law judge's initial decision or appealable order may be filed, shall be addressed to the Board's General Counsel.

§ 821.8 Service of documents.

(a) *Who must be served.* (1) Copies of all documents filed with the Board must be served on (*i.e.*, sent to) all other parties to the proceeding, on the date of filing, by the person filing them. A certificate of service shall be a part of each document and any copy or copies thereof tendered for filing, and shall certify concurrent service on the Board and the parties. A certificate of service shall be in substantially the following form:

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I hereby certify that I have this day served the foregoing [specify document] on the following party's counsel or designated representatives [or party, if without counsel or representative], at the address indicated, by [specify the method of service (e.g., first-class mail, personal service, etc.)]

[List names and addresses of all persons served]

Dated at _____, this _____ day of ____ 20____

(Signature) _____

For (on behalf of) _____

(2) Service shall be made on the person designated in accordance with § 821.7(f) to receive service. If no such person has been designated, service shall be made directly on the party.

(b) *Method of service.* (1) Service of documents by any party on any other party shall be accomplished by the method prescribed in § 821.7(a)(3) for the filing of documents with the Board.

(2) Notices of hearing, written initial decisions, law judges' appealable orders and Board orders on appeal shall be served by the Board on parties other than the Administrator by certified mail. Such documents may be served on the Administrator by first-class mail or facsimile. The Board may serve all other documents on the parties by first-class mail or facsimile.

(c) *Where service shall be made.* Except for personal service, parties shall be served at the address appearing in the official record. If no address for service on the Administrator is designated in the record, documents shall be addressed for service to the Office of Chief Counsel, 800 Independence Avenue, SW., Washington, DC 20591. In the case of an agent designated by an air carrier under 49 U.S.C. 46103, service may be accomplished only at the agent's office or usual place of residence.

(d) *Presumption of service.* There shall be a presumption of lawful service:

(1) When receipt has been acknowledged by a person who customarily or in the ordinary course of business receives mail at the residence or principal place of business of the party or of the person designated under § 821.7(f); or

(2) When a properly addressed envelope, sent to the most current address in the official record, by regular, registered or certified mail, has been returned as unclaimed or refused.

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(e) *Date of service.* The date of service shall be determined in the same manner as the filing date is determined under § 821.7(a)(4).

§ 821.9 Intervention and amicus appearance.

(a) *Intervention.* Any person may move for leave to intervene in a proceeding, and may become a party thereto, if it is found that such person has a property, financial or other legitimate interest that will not be adequately represented by the existing parties, and that such intervention will not unduly broaden the issues or delay the proceeding. Except for good cause shown, no motion for leave to intervene will be entertained if filed less than 15 days prior to the hearing. The extent to which an intervenor may participate in the proceeding is wholly within the law judge's discretion.

(b) *Amicus curiae briefs.* A brief of amicus curiae in a matter on appeal from a law judge's initial decision or appealable order may be filed, if accompanied by written consent of all the parties, or by leave of the General Counsel if, in his or her opinion, the brief will not unduly broaden the matters at issue or prejudice any party to the proceeding. A brief may be conditionally filed with motion for leave. The motion for leave shall identify the interest of the movant and shall state the reasons why a brief of amicus curiae is desirable. Such brief and motion shall be filed within the briefing time allowed the party whose position the brief would support, unless good cause for late filing is shown, in which event the General Counsel may provide an opportunity for response in determining whether to accept the amicus brief.

§ 821.10 Computation of time.

In computing any period of time prescribed or allowed by this part, by notice or order of a law judge or the Board, or by any applicable statute, the date of the act, event or default after which the designated period of time begins to run is not to be included in the computation. The last day of the period so computed is to be included unless it is a Saturday, Sunday or legal holiday for the Board, in which event

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the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. In all cases, Saturdays, Sundays and legal holidays for the Board shall be included in the computation of time, except they shall not be included in computations of time respecting petitions for review of determinations as to the existence of emergencies under §821.54.

§ 821.11 Extensions of time.

(a) On written request filed with the Board and served on all other parties, or oral request with any extension granted confirmed in writing and served on all other parties by the requestor, and for good cause shown, the law judge or the Board may grant an extension of time to file any document; however, no extension of time will be granted for the filing of a document to which a statutory time limit applies.

(b) Extensions of time to file petitions for reconsideration shall not be granted upon a showing of good cause, but only in extraordinary circumstances.

(c) The General Counsel is authorized to grant unopposed extensions of time on timely oral request without a showing of good cause in cases on appeal to the Board from a law judge's initial decision or appealable order. Written confirmation of such a grant of extension of time must promptly be sent by the requesting party to the Board and served on all other parties to the proceeding.

§ 821.12 Amendment and withdrawal of pleadings.

(a) *Amendment.* At any time more than 15 days prior to the hearing, a party may amend its pleadings by filing an amended pleading with the Board and serving copies thereof on all other parties. After that time, amendment shall be allowed only at the discretion of the law judge. In the case of amendment of an answerable pleading, the law judge shall allow any adverse party a reasonable time to object or answer. Amendments to complaints shall be consistent with the requirements of 49 U.S.C. 44709(c) and 44710(c).

(b) *Withdrawal.* Except in the case of a petition for review, an appeal to the Board, a complaint, or an appeal from

a law judge's initial decision or appealable order, pleadings may be withdrawn only upon approval of the law judge or the Board.

§ 821.13 Waivers.

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

§ 821.14 Motions.

(a) *General.* Any application to a law judge or to the Board for an order or ruling not otherwise provided for in this part shall be by motion. Prior to the assignment of the proceeding to a law judge, all motions shall be addressed to the Case Manager. Thereafter, and prior to the expiration of the period within which an appeal from the law judge's initial decision may be filed, all motions shall be addressed to the law judge. At all other times, motions shall be addressed to the General Counsel.

(b) *Form and content.* Unless made during a hearing, motions shall be made in writing, shall state with particularity the grounds for the relief requested, and shall be accompanied by affidavits or other evidence relied upon. Motions introduced during a hearing may be made orally on the record, unless the law judge directs otherwise.

(c) *Replies to motions.* Except when a motion is made during a hearing, any party may file a reply, accompanied by such affidavits or other evidence as that party desires to rely upon, within 15 days after the date of service of the motion on that party. Upon notice to the parties, the law judge or the Board may, where appropriate, set a shorter time for filing a reply. Where a motion is made during a hearing, the reply may be made at the hearing, or orally or in writing within such time as the law judge may fix.

(d) *Oral argument; briefs.* No oral argument will be heard on a motion unless the law judge or the Board directs otherwise.

(e) *Effect of pendency of motions.* Except as provided in §§ 821.17(a) and 821.18(a), the filing or pendency of a

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motion shall not automatically alter or extend the time fixed in this part (or any extension thereof previously granted) for the parties to take any actions.

§ 821.15 Motion to disqualify a Board Member.

A motion requesting that a Board Member disqualify himself or herself from participating in a proceeding under this part shall be filed in writing with the Board.

§ 821.16 Interlocutory appeals from law judges' rulings on motions.

Rulings of law judges on motions which are not dispositive of the proceeding as a whole may not be appealed to the Board prior to its consideration of the entire proceeding, except in extraordinary circumstances and with the consent of the law judge who made the ruling. Interlocutory appeals shall be disallowed unless the law judge finds, either orally on the record or in writing, that to allow such an appeal is necessary to prevent substantial detriment to the public interest or undue prejudice to a party. If an interlocutory appeal is allowed, any party may file a brief with the Board within such time as the law judge directs. No oral argument will be heard unless the Board directs otherwise.

§ 821.17 Motions to dismiss, for judgment on the pleadings and for summary judgment.

(a) *Motions to dismiss petition for review or complaint.* A motion to dismiss a petition for review or a complaint may be filed in lieu of an answer, within the time limit for filing an answer set forth in § 821.24(c) or § 821.31(b). If such motion is not granted in its entirety, the answer shall be filed within 10 days after service of the law judge's order on the motion.

(b) *Motions to dismiss for lack of jurisdiction.* A motion to dismiss on the ground that the Board lacks jurisdiction may be made by any party at any time.

(c) *Motions for judgment on the pleadings.* A party may file a motion for judgment on the pleadings on the basis that no answer has been filed, or that the pleadings disclose that there are no material issues of fact to be resolved

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and that party is entitled to judgment as a matter of law.

(d) *Motions for summary judgment.* A party may file a motion for summary judgment on the basis that the pleadings and other supporting documentation establish that there are no material issues of fact to be resolved and that party is entitled to judgment as a matter of law.

(e) *Appeals of dismissal, judgment on the pleadings and summary judgment orders.* When a law judge grants a motion to dismiss, a motion for judgment on the pleadings or a motion for summary judgment, and terminates the proceeding without a hearing, an appeal of such order to the Board may be filed pursuant to the provisions of § 821.47. When a motion to dismiss, a motion for judgment on the pleadings or a motion for summary judgment is granted in part, § 821.16 applies.

§ 821.18 Motion for a more definite statement.

(a) A party may, in lieu of an answer, file a motion requesting that the petitioner's statement of reasons and supporting facts in a petition for review or the Administrator's allegations of fact in a complaint be made more definite and certain. The motion shall cite the defects complained of and the details sought. If the motion is granted and the law judge's order is not complied with within 15 days after service thereof, the law judge shall strike the portion or portions of the petition for review or complaint to which the motion is directed. If the motion is denied, the moving party shall file an answer within 10 days after service of the law judge's order on the motion.

(b) A party may file a motion to clarify an answer in the event that the answer fails to respond clearly to the petition for review or the complaint.

§ 821.19 Depositions and other discovery.

(a) *Depositions.* After a petition for review or a complaint is filed, any party may take the testimony of any person, including a party, by deposition, upon oral examination or written questions, without seeking prior Board approval. Reasonable notice shall be given in writing to the other parties,

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stating the name of the witness and the time and place of the taking of the deposition. A copy of any notice of deposition shall be served on the law judge to whom the proceeding has been assigned or, if no law judge has been assigned, on the Case Manager. In other respects, the taking of any deposition shall be in compliance with the provisions of 49 U.S.C. 46104(c).

(b) *Exchange of information by the parties.* At any time before the hearing, at the request of any party, the parties may exchange information, such as witness lists, exhibit lists, curricula vitae and bibliographies of expert witnesses, and other pertinent data. Any party may also use written interrogatories, requests for admissions and other discovery tools. The requesting party shall set the time for compliance with the request, which shall be reasonable and give due consideration to the closeness of the hearing, especially in emergency proceedings governed by Subpart I. Copies of discovery requests and responses shall be served on the law judge to whom the proceeding has been assigned or, if no law judge has been assigned, on the Case Manager. In the event of a dispute, either the assigned law judge or another law judge delegated this responsibility (if a law judge has not yet been assigned or if the assigned law judge is unavailable) may issue an appropriate order, including an order directing compliance with any ruling previously made with respect to discovery.

(c) *Use of the Federal Rules of Civil Procedure.* Those portions of the Federal Rules of Civil Procedure that pertain to depositions and discovery may be used as a general guide for discovery practice in proceedings before the Board, where appropriate. The Federal Rules and the case law that construes them shall be considered by the Board and its law judges as instructive, rather than controlling.

(d) *Failure to provide or preserve evidence.* The failure of any party to comply with a law judge's order compelling discovery, or to cooperate with a timely request for the preservation of evidence, may result in a negative inference against that party with respect to the matter sought and not provided or preserved, a preclusion order, dismissal

or other relief deemed appropriate by the law judge.

§ 821.20 Subpoenas, witness fees, and appearances of Board Members, officers and employees.

(a) *Subpoenas.* Except as provided in paragraph (c) of this section, subpoenas requiring the attendance of witnesses, or the production of documentary or tangible evidence, for the purpose of taking depositions or at a hearing, may be issued by the presiding law judge (or the chief law judge, if the proceeding has not been assigned to a law judge) upon application by any party. The application shall show the general relevance and reasonable scope of the evidence sought. Any person upon whom a subpoena is served may, within 7 days after service of the subpoena, but in any event prior to the return date thereof, file with the law judge who issued the subpoena a motion to quash or modify the subpoena, and such filing shall stay the effectiveness of the subpoena pending final action by the law judge on the motion.

(b) *Witness fees.* Witnesses shall be entitled to the same fees and expenses for mileage as are paid to witnesses in the courts of the United States. The fees and expenses shall be paid by the party at whose request the witness is subpoenaed or appears. The Board may decline to process a proceeding further should a party fail to compensate a witness pursuant to this paragraph.

(c) *Board Members, officers and employees.* In order to encourage a free flow of information to the Board's accident investigators, the Board disfavors the use of its personnel in enforcement proceedings. Therefore, the provisions of paragraph (a) of this section are not applicable to Board Members, officers and employees, or the production of documents in their custody. Applications for subpoenas requiring the attendance of such persons, or the production of such documents, must be addressed to the General Counsel, and shall set forth the need of the moving party for the testimony or documents sought, and a showing that such material is not now, and was not otherwise, reasonably available from other sources. Only upon the General Counsel's written approval for the issuance

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of a subpoena requiring a Board Member, officer or employee to provide testimony and/or to produce documents in connection with discovery or at a hearing may a law judge issue such a subpoena. The law judge shall not permit the testimony or documentary evidence provided by a Board Member, officer or employee to include any expression of opinion, or any account of statements of a party made during the Board's investigation of any accident.

§ 821.21 Official notice.

Where a law judge or the Board intends to take official notice of a material fact not appearing in the evidence in the record, notice shall be given to all parties, who may within 10 days file a petition disputing that fact.

Subpart C—Special Rules Applicable to Proceedings Under 49 U.S.C. 44703

§ 821.24 Initiation of proceeding.

(a) *Petition for review.* Where the Administrator has denied an application for the issuance or renewal of an airman certificate, the applicant may file with the Board a petition for review of the Administrator's denial. The petition must be filed with the Board within 60 days after the date on which notice of the Administrator's denial was served on the petitioner.

(b) *Form and content of petition.* The petition may be in letter form. It shall identify the Administrator's certificate denial action, and contain a complete but concise statement of the reasons why the petitioner believes the certificate denial was erroneous.

(c) *Answer to petition.* The Administrator shall file an answer to the petition for review within 20 days after the date of service of the petition. The answer shall specifically address each of the reasons set forth in the petition as to why the petitioner believes the certificate denial was erroneous.

(d) *Stay of proceeding pending request for special issuance (restricted) medical certificate.* The Board lacks the authority to review requests for special issuance (restricted) medical certificates, or to direct that they be issued. Where a request for a special issuance certificate has been filed with the Ad-

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ministrator pursuant to the Federal Aviation Regulations, the Board will, upon the petitioner's written request, hold a petition for review of a denial of an unrestricted medical certificate in abeyance pending final action by the Administrator on the special issuance request, but for no longer than 180 days after the date on which the unrestricted medical certificate denial was issued.

(e) *New evidence.* Where review of a denial of an unrestricted medical certificate is at issue, if the petitioner has undergone medical testing or evaluation in addition to that already submitted or known to the Administrator, and wishes to introduce the results into the record, such new medical evidence must be served on the Administrator at least 30 days prior to the hearing. Absent good cause, failure to so timely serve the new medical evidence on the Administrator will result in the exclusion of such evidence from the record. The Administrator may amend his or her answer to respond to such new medical evidence within 10 days after the date on which he or she was served therewith.

§ 821.25 Burden of proof.

In proceedings under 49 U.S.C. 44703, the burden of proof shall be upon the petitioner.

§ 821.26 Motion to dismiss petition for review for lack of standing.

Upon motion by the Administrator within the time limit for filing an answer, a petition for review shall be dismissed for lack of standing in either of the following instances:

(a) If the petition seeks the issuance of the same type of certificate that was under an order of suspension on the date of the denial; or

(b) If the petition seeks the issuance of the same type of certificate that had been revoked within one year of the date of the denial, unless the order revoking such certificate provides otherwise.

Subpart D—Special Rules Applicable to Proceedings Under 49 U.S.C. 44709

§ 821.30 Initiation of proceeding.

(a) *Appeal.* Where the Administrator has issued an order amending, modifying, suspending or revoking a certificate, the affected certificate holder (respondent) may file with the Board an appeal from the Administrator's order. The respondent shall simultaneously serve a copy of the appeal on the Administrator. The appeal must be filed with the Board within 20 days after the date on which the Administrator's order was served on the respondent, except as provided with respect to emergency and other immediately effective orders under § 821.53(a).

(b) *Form and content of appeal.* The appeal may be in letter form. It shall identify the certificate or certificates affected and the Administrator's action from which the appeal is sought.

(c) *Effect of filing timely appeal with the Board.* Timely filing with the Board of an appeal from an order of the Administrator shall postpone the effective date of the order until final disposition of the appeal by the law judge or the Board, except where the order appealed from is an emergency or other immediately effective order, in which case the effectiveness of the order will not be so stayed during the pendency of the appeal.

§ 821.31 Complaint procedure.

(a) *Filing, time of filing and service on respondent.* The order of the Administrator from which an appeal has been taken shall serve as the complaint. The Administrator shall (except as provided in § 821.55(a) with respect to emergency proceedings) file the complaint with the Board within 10 days after the date on which he or she was served with the appeal by the respondent, and shall simultaneously serve a copy of the complaint on the respondent. If the Administrator has determined that the respondent lacks qualification to be a certificate holder, the order filed as the complaint, or an accompanying statement, shall identify the pleaded factual allegations on which this determination is based.

(b) *Answer to complaint.* The respondent shall (except as provided in § 821.55(b) with respect to emergency proceedings) file with the Board an answer to the complaint within 20 days after the date on which the complaint was served by the Administrator, and shall simultaneously serve a copy of the answer on the Administrator. Failure by the respondent to deny the truth of any allegation or allegations in the complaint may be deemed an admission of the truth of the allegation or allegations not answered. The answer shall also identify any affirmative defenses that the respondent intends to raise at the hearing. The answer may be amended to include affirmative defenses in accordance with the provisions of § 821.12(a).

§ 821.32 Burden of proof.

In proceedings under 49 U.S.C. 44709, the burden of proof shall be upon the Administrator.

§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising the respondent as to reasons for proposed action under 49 U.S.C. 44709(c), the respondent may move to dismiss such allegations as stale pursuant to the following provisions:

(a) In those cases where the complaint does not allege lack of qualification of the respondent:

(1) The Administrator shall be required to show, by reply filed within 15 days after the date of service of the respondent's motion, that good cause existed for the delay in providing such advice, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay, or for the imposition of a sanction in the public interest notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate the remaining portion of the complaint, if any.

(b) In those cases where the complaint alleges lack of qualification of

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the respondent, the law judge shall first determine whether an issue of lack of qualification would be presented if all of the allegations, stale and timely, are assumed to be true. If so, the law judge shall deny the respondent's motion. If not, the law judge shall proceed as in paragraph (a) of this section.

Subpart E—Law Judges

§ 821.35 Assignment, duties and powers.

(a) *Assignment of law judge and duration of assignment.* The chief law judge shall assign a law judge to preside over each proceeding. Until such assignment, motions, requests and documents shall be addressed to the Case Manager for handling by the chief law judge, who may handle these matters personally or delegate them to other law judges for decision. After assignment of a proceeding to a law judge, all motions, requests and documents shall be addressed to that law judge. The authority of the assigned law judge shall terminate upon the expiration of the period within which appeals from initial decisions or appealable orders may be filed, or upon the law judge's withdrawal from the proceeding.

(b) *Powers of law judge.* Law judges shall have the following powers:

(1) To give notice of, and to hold, pre-hearing conferences and hearings, and to consolidate proceedings which involve a common question of law or fact;

(2) To hold conferences, before or during the hearing, for the settlement or simplification of issues;

(3) To issue subpoenas, and to take depositions or cause depositions to be taken;

(4) To dispose of procedural requests or similar matters;

(5) To rule on motions;

(6) To regulate the conduct of hearings;

(7) To administer oaths and affirmations;

(8) To examine witnesses;

(9) To receive evidence and rule upon objections and offers of proof; and

(10) To issue initial decisions.

(c) *Disqualification.* A law judge shall withdraw from a proceeding if, at any

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time, he or she deems himself or herself disqualified. If the law judge does not withdraw, and if an appeal from the law judge's initial decision is filed, the Board will, on motion of a party, determine whether the law judge should have withdrawn and, if so, order appropriate relief.

Subpart F—Hearing

§ 821.37 Notice of hearing.

(a) *Time and location of hearing.* The law judge to whom the proceeding is assigned (or the chief judge) shall set a reasonable date, time and place for the hearing. Except as provided with respect to emergency proceedings in § 821.56(a), a written notice of hearing shall be served on the parties at least 30 days in advance of the hearing. The law judge may set the hearing for a date fewer than 30 days after the date of the issuance of the notice of hearing if all of the parties consent to an earlier hearing date. In setting the date of the hearing, due regard shall be given to the parties' discovery needs. In setting the place of the hearing, due regard shall be given to the location of the subject incident, the convenience of the parties and their witnesses, and the conservation of Board funds. Another relevant factor in determining the place of the hearing is the convenience of the hearing site to scheduled transportation service. Only in the most extraordinary circumstances may consideration be given to locating a hearing in a foreign country.

(b) *Hearing in several sessions.* Where appropriate, the law judge may hold a hearing in more than one session, at the same or different locations.

§ 821.38 Evidence.

Each party shall have the right to present a case-in-chief, or defense, by oral and documentary evidence, to submit evidence in rebuttal, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Hearsay evidence (including hearsay within hearsay, where there are acceptable circumstantial indicia of trustworthiness) shall be admissible. All material and relevant evidence should be admitted, but the law

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judge may exclude unduly repetitious evidence.

§ 821.39 Argument and submissions.

At the hearing, the law judge shall give the parties adequate opportunity for the presentation of arguments in support of, or in opposition to, motions, objections and proposed rulings. Prior to the issuance of the initial decision, the parties shall be afforded a reasonable opportunity to submit for consideration proposed findings and conclusions, and supporting reasons therefor.

§ 821.40 Record.

The transcript of testimony and exhibits, together with all papers, requests and rulings filed in the proceeding before the law judge, shall constitute the exclusive record of the proceeding. Copies of the transcript may be obtained by any party upon payment of the reasonable cost thereof. A copy of the transcript may be examined at the National Transportation Safety Board, Office of Administrative Law Judges, Public Docket Section.

Subpart G—Initial Decision

§ 821.42 Initial decision by law judge.

(a) *Written or oral decision.* The law judge may render his or her initial decision orally at the close of the hearing, or in writing at a later date, except as provided with respect to emergency proceedings in § 821.56(c).

(b) *Content.* The initial decision shall include findings and conclusions upon all material issues of fact, credibility of witnesses, law and discretion presented on the record, together with a statement of the reasons therefor.

(c) *Furnishing parties with, and issuance date of, oral decision.* If the initial decision is rendered orally, a copy thereof, excerpted from the hearing transcript, shall be furnished to the parties by the Office of Administrative Law Judges. Irrespective of the date on which the copy of the decision is transmitted to the parties, the issuance date of the decision shall be the date on which it was orally rendered.

§ 821.43 Effect of law judge's initial decision or appealable order and appeal therefrom.

If no appeal from the law judge's initial decision or appealable order is timely filed, the initial decision or order shall become final with respect to the parties, but shall not be binding precedent for the Board. The filing of a timely notice of appeal with the Board shall stay the effectiveness of the law judge's initial decision or order, unless the basis for the decision or order is that the Board lacks jurisdiction.

Subpart H—Appeal From Initial Decision

§ 821.47 Notice of appeal.

(a) *Time within which to file notice of appeal.* A party may appeal from a law judge's initial decision or appealable order by filing with the Board, and simultaneously serving on the other parties, a notice of appeal, within 10 days after the date on which the oral initial decision was rendered or the written initial decision or appealable order was served (except as provided in § 821.57(a) with respect to emergency proceedings). At any time before the time limit for filing an appeal from an initial decision or appealable order has passed, the law judge may, for good cause, reopen the matter on notice to the parties.

(b) *Request for reconsideration of law judge's initial decision or order.* A law judge may not reconsider an initial decision or appealable order after the time for appealing to the Board from the decision or order has expired, or after an appeal has been filed with the Board. However, a timely request for reconsideration by the law judge of the initial decision or appealable order, filed before an appeal to the Board is taken, will stay the deadline for filing an appeal until 10 days after the date on which the law judge serves his or her decision on the reconsideration request. For the purpose of this paragraph, if a request for reconsideration and a notice of appeal are filed on the same day, the reconsideration request will be deemed to have been filed first.

§ 821.48 Briefs and oral argument.

(a) *Appeal brief.* Except as provided in § 821.57(b) with respect to emergency proceedings, each appeal must be perfected, within 50 days after the date on which the oral initial decision was rendered, or 30 days after the date on which the written initial decision or appealable order was served, by the filing, and simultaneous service on the other parties, of a brief in support of the appeal. An appeal may be dismissed by the Board, either on its own initiative or on motion of another party, where a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

(b) *Form and content of appeal brief.* (1) In addition to the general form requirements for documents set forth in § 821.7(c)(2), the appeal brief must be typewritten, double-spaced, on 8½-by-11 inch paper. The appeal brief shall set forth the name, address and telephone number of the party, or the attorney or other representative filing the brief on the party's behalf. No appeal brief may contain more than 35 pages of text without prior leave of the General Counsel, upon a showing of good cause.

(2) The appeal brief shall enumerate the appealing party's objections to the law judge's initial decision or appealable order, and shall state the reasons for such objections, including any legal precedent relied upon in support thereof.

(3) Any error contained in the initial decision which is not objected to in the appeal brief may be deemed waived.

(c) *Reply brief.* Any other party to the proceeding may file a brief in reply to the appeal brief within 30 days after the date on which the appeal brief was served on that party (except as provided in § 821.57(b) with respect to emergency proceedings). A copy of the reply brief shall simultaneously be served on the appealing party and any other parties to the proceeding. The form requirements governing the appeal brief set forth in paragraph (b)(1) also apply to the reply brief.

(d) *Other filings.* Subsequent to the filing of the appeal and reply briefs, the parties may file citations to supplemental authorities. This procedure may be used only for identifying new and relevant legal authority, and not

to correct omissions in briefing or to respond to a reply brief. No argument may be included with such a filing. Such filing shall include a reference to the page of the brief to which the cited legal authority pertains. Any response shall be filed within 10 days of the date of service of the supplemental filing, and shall be similarly limited in scope. With these exceptions, the parties may make no other submissions, except by leave of the Board, upon a showing of good cause.

(e) *Oral argument.* Oral argument before the Board will not be held in proceedings under this part unless the Board, on motion of a party or on its own initiative, determines that oral argument is needed.

§ 821.49 Issues on appeal.

(a) On appeal, the Board will consider only 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?

(b) If the Board determines that the law judge erred in any respect, or that his or her initial decision or order should be changed, the Board may make any necessary findings and may issue an order in lieu of the law judge's initial decision or order, or may remand the proceeding for any such purpose as the Board may deem necessary.

§ 821.50 Petition for rehearing, reargument, reconsideration or modification of an order of the Board.

(a) *General.* Any party to a proceeding may petition the Board for rehearing, reargument, reconsideration or modification of a Board order on appeal from a law judge's initial decision or order. An initial decision or appealable order of a law judge that has become final because no timely appeal was taken therefrom may not be the subject of a petition under this section.

(b) *Timing and service.* The petition must be filed with the Board, and simultaneously served on the other parties, within 30 days after the date of

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service of the Board's order on appeal from the law judge's initial decision or order.

(c) *Content.* The petition shall state briefly and specifically the matters of record alleged to have been erroneously decided, and the ground or grounds relied upon. If the petition is based, in whole or in part, upon new matter, it shall set forth such new matter and shall contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable, and shall explain 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.

(d) *Repetitious petitions.* Repetitious petitions will not be entertained by the Board, and will be summarily dismissed.

(e) *Reply to petition.* Any other party to the proceeding may file a reply to the petition within 15 days after the date on which the petition was served on that party. A copy of such reply shall simultaneously be served on the petitioner and any other parties to the proceeding.

(f) *Stay of effective date of Board's order.* The filing of a petition under this section shall operate to stay the effective date of the Board's order, unless the Board directs otherwise.

Subpart I—Special Rules Applicable to Proceedings Involving Emergency and Other Immediately Effective Orders

§ 821.52 General.

(a) *Applicability.* This subpart shall apply to any order issued by the Administrator under 49 U.S.C. 44709 as an emergency order, as an order not designated as an emergency order but later amended to be an emergency order, and any order designated as immediately effective or effective immediately.

(b) *Effective date of emergency.* The procedure set forth herein shall apply as of the date on which written advice of the emergency character of the Administrator's order is received and docketed by the Board.

(c) *Computation of time.* Time shall be computed in accordance with the provisions of § 821.10.

(d) *Waiver.* Except as provided in § 821.54(f), or where the law judge or the Board determines that it would unduly burden another party or the Board, a certificate holder (respondent) affected by an emergency or other immediately effective order of the Administrator may, at any time after filing an appeal from such an order, waive the applicability of the accelerated time limits of this subpart; however, such a waiver shall not serve to lengthen any period of time for doing an act prescribed by this subpart which expired before the date on which the waiver was made.

§ 821.53 Appeal.

(a) *Time within which to file appeal.* An appeal from an emergency or other immediately effective order of the Administrator must be filed within 10 days after the date on which the Administrator's order was served on the respondent. The respondent shall simultaneously serve a copy of the appeal on the Administrator.

(b) *Form and content of appeal.* The appeal may be in letter form. It shall identify the certificate or certificates affected and indicate that an emergency or other immediately effective order of the Administrator is being appealed.

§ 821.54 Petition for review of Administrator's determination of emergency.

(a) *Time within which to file petition.* A respondent may, within 2 days after the date of receipt of an emergency or other immediately effective order of the Administrator, file with the Board a petition for review of the Administrator's determination that an emergency, requiring the order to be effective immediately, exists. This 2-day time limit is statutory and the Board has no authority to extend it. If the respondent has not previously filed an appeal from the Administrator's emergency or other immediately effective order, the petition shall also be considered a simultaneously filed appeal from the order under § 821.53.

(b) *Form, content and service of petition.* The petition may be in letter

form. A copy of the Administrator's order, from which review of the emergency determination is sought, must be attached to the petition. If a copy of the order is not attached, the petition will be dismissed. While the petition need only request that the Board review the Administrator's determination as to the existence of an emergency requiring the order be effective immediately, it may also enumerate the respondent's reasons for believing that the Administrator's emergency determination is not warranted in the interest of aviation safety. The petition must be filed with the Board by overnight delivery service or facsimile and simultaneously served on the Administrator by the same means.

(c) *Reply to petition.* If the petition enumerates the respondent's reasons for believing that the Administrator's emergency determination is unwarranted, the Administrator may, within 2 days after the date of service of the petition, file a reply, which shall be strictly limited to matters of rebuttal. Such reply must be filed with the Board by overnight delivery service or facsimile and simultaneously served on the respondent by the same means. No submissions other than the respondent's petition and the Administrator's reply in rebuttal will be accepted, except in accordance with paragraph (d) of this section.

(d) *Hearing.* No hearing shall be held on a petition for review of an emergency determination. However, the law judge may, on his or her own initiative, and strictly in keeping with the prohibition on ex parte communications set forth in § 821.61, solicit from the parties additional information to supplement that previously provided by the parties.

(e) *Disposition.* Within 5 days after the Board's receipt of the petition, the chief law judge (or, if the case has been assigned to a law judge, the law judge to whom the case is assigned) shall dispose of the petition by written order, and, in so doing, shall consider whether, based on the acts and omissions alleged in the Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it

supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal.

(f) *Effect of law judge's ruling.* If the law judge grants the petition, the effectiveness of the Administrator's order shall be stayed until final disposition of the respondent's appeal by a law judge or by the Board. In such cases, the remaining provisions of this subpart (§§ 821.55–821.57) shall continue to apply, unless the respondent, with the Administrator's consent, waives their applicability. If the petition is denied, the Administrator's order shall remain in effect, and the remaining provisions of this subpart shall continue to apply, unless their applicability is waived by the respondent. The law judge's ruling on the petition shall be final, and is not appealable to the Board. However, in the event of an appeal to the Board from a law judge's decision on the merits of the emergency or other immediately effective order, the Board may, at its discretion, note, in its order disposing of the appeal, its views on the law judge's ruling on the petition, and such views shall serve as binding precedent in all future cases.

§ 821.55 Complaint, answer to complaint, motions and discovery.

(a) *Complaint.* In proceedings governed by this subpart, the Administrator's complaint shall be filed by overnight delivery service or facsimile, and simultaneously served on the respondent by the same means, within 3 days after the date on which the Administrator received the respondent's appeal, or within 3 days after the date of service of an order disposing of a petition for review of an emergency determination, whichever is later.

(b) *Answer to complaint.* The respondent shall file with the Board an answer to the complaint within 5 days after the date on which the complaint was served by the Administrator, and shall simultaneously serve a copy of the answer on the Administrator. Failure by the respondent to deny the truth of any allegation or allegations in the complaint may be deemed an admission of the truth of the allegation or allegations not answered. The answer shall

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also identify any affirmative defenses that the respondent intends to raise at the hearing.

(c) *Motion to dismiss and motion for more definite statement.* In proceedings governed by this subpart, no motion to dismiss the complaint or for a more definite statement of the complaint's allegations shall be made, but the substance thereof may be stated in the respondent's answer. The law judge may permit or require a more definite statement or other amendment to any pleading at the hearing, upon good cause shown and upon just and reasonable terms.

(d) *Discovery.* Discovery is authorized in proceedings governed by this subpart. Given the short time available for discovery, the parties shall cooperate to ensure timely completion of the discovery process prior to the hearing. Discovery requests shall be served by the parties as soon as possible. A motion to compel discovery should be expeditiously filed where any dispute arises, and the law judge shall promptly rule on such a motion. Time limits for compliance with discovery requests shall be set by the parties so as to accommodate, and not conflict with, the accelerated adjudication schedule set forth in this subpart. The provisions of § 821.19 shall apply, modified as necessary to meet the exigencies of this subpart's accelerated timeframes.

§ 821.56 Hearing and initial decision or appealable order of law judge.

(a) *Notice of hearing.* Within 3 days after the date on which the Board receives the Administrator's complaint, or immediately upon the issuance of a law judge's order disposing of a petition for review of the Administrator's emergency determination, if later, the parties shall be served with a written notice of hearing, setting forth the date, time and place of the hearing. The hearing shall be set for a date no later than 30 days after the date on which the respondent's appeal was received and docketed. To the extent that they are not inconsistent with this section, the provisions of § 821.37(a) shall also apply.

(b) *Conduct of hearing.* The provisions of §§ 821.38, 821.39 and 821.40, concerning the taking of evidence, argument and

submissions by the parties, and the composition of the hearing record, shall apply to proceedings governed by this subpart.

(c) *Initial decision and effect of initial decision or appealable order.* The law judge's initial decision shall be made orally on the record at the termination of the hearing. The provisions of § 821.42, concerning the content of the initial decision, the furnishing of copies of the initial decision to the parties and the issuance date of the initial decision, and the provisions of § 821.43, concerning the effect of the law judge's initial decision or appealable order and any appeal therefrom, shall apply to proceedings governed by this subpart.

§ 821.57 Procedure on appeal.

(a) *Time within which to file notice of appeal.* A party may appeal from a law judge's initial decision or appealable order by filing with the Board, and simultaneously serving on the other parties, a notice of appeal, within 2 days after the date on which the initial decision was orally rendered or the appealable order was served. The time limitations for the filing of documents respecting appeals governed by this subpart will not be extended by reason of the unavailability of the hearing transcript.

(b) *Briefs and oral argument.* Each appeal in proceedings governed by this subpart must be perfected, within 5 days after the date on which the notice of appeal was filed, by the filing, and simultaneous service on the other parties, of a brief in support of the appeal. Any other party to the proceeding may file a brief in reply to the appeal brief within 7 days after the date on which the appeal brief was served on that party. A copy of the reply brief shall simultaneously be served on the appealing party and any other parties to the proceeding. Unless otherwise authorized by the Board, all briefs in connection with appeals governed by this subpart must be filed and served by overnight delivery service, or by facsimile confirmed by personal or first-class mail delivery of the original. Aside from the time limits and methods of filing and service specifically mandated by this paragraph, the provisions of § 821.48 shall apply.

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(c) *Issues on appeal.* The provisions of § 821.49(a) shall apply in proceedings governed by this subpart.

(d) *Petition for rehearing, reargument, reconsideration or modification of order.* The only petitions for rehearing, reargument, reconsideration or modification of an order which the Board will entertain in proceedings governed by this subpart are those based on the ground that new matter has been discovered. Such petitions 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.

Subpart J—Ex Parte Communications

AUTHORITY: Sec. 4, Pub. L. 94-409, 5 U.S.C. 556(d) and 557; 49 U.S.C. 1101-1155, 44701-44723, 46301.

§ 821.60 Definitions.

As used in this subpart:

Board decisional employee means a Board Member, law judge or other employee who is, or who may reasonably be expected to be, involved in the decisional process of the proceeding;

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 does not include requests for status reports on any matter or proceeding covered by this part.

§ 821.61 Prohibited ex parte communications.

(a) The prohibitions of this section shall apply from the time a petition for review or an appeal is filed unless the person responsible for the communication has knowledge that a petition for review or an appeal will be filed, in which case the prohibitions shall apply at the time of the acquisition of such knowledge. Such prohibitions shall continue until the time of the Board's final disposition of the petition, appeal and any ancillary matters, such as the

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adjudication of a claim for fees and expenses under the Equal Access to Justice Act.

(b) Except to the extent required for the disposition of ex parte matters as authorized by law:

(1) No interested person outside the Board shall make or knowingly cause to be made to any Board decisional employee an ex parte communication relevant to the merits of the proceeding;

(2) No Board decisional employee shall make or knowingly cause to be made to any interested person outside the Board an ex parte communication relevant to the merits of the proceeding. Ex parte communications solely relating to matters of Board procedure or practice are not prohibited by this section.

§ 821.62 Procedures for handling ex parte communications.

A Board decisional employee who receives, makes or knowingly causes to be made a communication prohibited by § 821.61 shall place in the public record of the proceeding:

- (a) All such written communications;
- (b) Memoranda stating the substance of all such oral communications; and
- (c) All written responses, and memoranda stating the substance of all oral responses, to the communications described in paragraphs (a) and (b) of this section.

§ 821.63 Requirement to show cause and imposition of sanction.

(a) Upon receipt of a communication made or knowingly caused to be made by a party in violation of § 821.61, the presiding law judge (or the chief law judge, if the proceeding has not been assigned to a law judge) or the Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes it administers, require the party to show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected on account of such violation.

(b) The Board may, to the extent consistent with the interest of justice and the policy of the underlying statutes it administers, consider a violation of § 821.61 sufficient grounds for a decision adverse to a party who has knowingly

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committed or knowingly caused such a violation to occur. Alternatively, the Board may impose a sanction on the party's attorney or representative, including suspending or barring the attorney or representative from practicing before it, where such action would be appropriate and penalizing the party represented would not be in the interest of justice.

Subpart K—Judicial Review of Board Orders

§ 821.64 Judicial review.

(a) *General.* Judicial review of a final order of the Board may be sought as provided in 49 U.S.C. 1153 and 46110 by the filing of a petition for review with the appropriate United States Court of Appeals within 60 days of the date of entry (*i.e.*, service date) of the Board's order. Under the applicable statutes, any party may appeal the Board's decision. The Board is not a party in interest in such appellate proceedings and, accordingly, does not typically participate in the judicial review of its decisions. In matters appealed by the Administrator, the other parties should anticipate the need to make their own defense.

(b) *Stay pending judicial review.* No request for a stay pending judicial review will be entertained if it is received by the Board after the effective date of the Board's order (*see* § 821.50(b)). If a stay action is to be timely, any request must be filed sufficiently in advance of the effective date of the Board's order to allow for a reply and Board review.

PART 825—RULES OF PROCEDURE FOR MERCHANT MARINE APPEALS FROM DECISIONS OF THE COMMANDANT, U.S. COAST GUARD

Sec.	
825.1	Applicability.
825.5	Notice of appeal.
825.10	Referral of record.
825.15	Issues on appeal.
825.20	Briefs in support of appeal.
825.25	Oral argument.
825.30	Action by the Board.
825.35	Action after remand.
825.40	Ex parte communications.

AUTHORITY: Sec. 304(a)(9)(B), Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2169 (49 U.S.C. 1903(a)(9)(B)).

SOURCE: 40 FR 30248, July 17, 1975, unless otherwise noted.

§ 825.1 Applicability.

The provisions of this part govern all proceedings before the National Transportation Safety Board (Board) on appeals taken from decisions, on or after April 1, 1975, of the Commandant, U.S. Coast Guard, sustaining orders of an administrative law judge, revoking, suspending, or denying a license, certificate, document, or register in proceedings under:

(a) R.S. 4450, as amended (46 U.S.C. 239);

(b) Act of July 15, 1954 (46 U.S.C. 239a-b); or

(c) Section 4, Great Lakes Pilotage Act (46 U.S.C. 216(b)).

§ 825.5 Notice of appeal.

(a) A party may appeal from the Commandant's decision sustaining an order of revocation, suspension, or denial of a license, certificate, document, or register in proceedings described in § 825.1, by filing a notice of appeal with the Board within 10 days after service of the Commandant's decision upon the party or his designated attorney. Upon good cause shown, the time for filing may be extended.

(b) Notice of appeal shall be addressed to the Docket Clerk, National Transportation Safety Board, Washington, DC 20594. At the same time, a copy shall be served on the Commandant (GL), U.S. Coast Guard, Washington, DC 20590.

(c) The notice of appeal shall state the name of the party, the number of the Commandant's decision, and, in brief, the grounds for the appeal.

§ 825.10 Referral of record.

Upon receipt of a notice of appeal, the Commandant shall immediately transmit to the Board the complete record of the hearing upon which his decision was based. This includes the charges, the transcript of testimony, and hearing proceedings (including exhibits), briefs filed by the party, the decision of the administrative law judge,

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and the Commandant's decision on appeal. It does not include intra-agency staff memoranda provided as advice to the Commandant to aid in his decision.

§ 825.15 Issues on appeal.

The only issues that may be considered on appeal are:

- (a) A finding of a material fact is erroneous;
- (b) A necessary legal conclusion is without governing precedent or is a departure from or contrary to law or precedent;
- (c) A substantial and important question of law, policy, or discretion is involved; or
- (d) A prejudicial procedural error has occurred.

§ 825.20 Briefs in support of appeal.

(a) Within 20 days after the filing of a notice of appeal, the appellant must file, in the same manner as prescribed for the notice in § 825.5, a brief in support of the appeal.

(b) This document shall set forth:

- (1) The name and address of the appellant;
- (2) The number and a description of the license, certificate, document, or register involved;
- (3) A summary of the charges affirmed by the Commandant as proved;
- (4) Fact findings by the Commandant disputed by the appellant;
- (5) Specific statements of errors of laws asserted;
- (6) Specific statements of any abuse of discretion asserted; and
- (7) The relief requested.

(c) Objection based upon evidence of record need not be considered unless the appeal contains specific record citation to the pertinent evidence.

(d) When a brief has been filed by appellant under this section, the Coast Guard may, within 15 days of service of the brief on the Commandant, submit to the Board a reply brief.

(e) If a party who has filed a notice of appeal does not perfect the appeal by the timely filing of an appeal brief, the Board may dismiss the appeal on its own initiative or on motion of the Coast Guard.

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§ 825.25 Oral argument.

(a) If any party desires to argue a case orally before the Board, he should request leave to make such argument in his brief filed pursuant to § 825.20.

(b) Oral argument before the Board will normally not be granted unless the Board finds good cause for such argument. If granted, the parties will be advised of the date.

§ 825.30 Action by the Board.

(a) On review by the Board, if no reversible error is found in the Commandant's decision on appeal, that decision will be affirmed.

(b) On review by the Board, if reversible error is found in the Commandant's decision on appeal, the Board may:

- (1) Set aside the entire decision and dismiss the charges if it finds the error incurable; or
- (2) Set aside the order, or conclusions, or findings of the Commandant and remand the case to him for further consideration if it finds the error curable.

(c) When a matter has been remanded to the Commandant under paragraph (b) of this section, the Commandant may act in accordance with the terms of the order of remand, or he may, as appropriate, further remand the matter to the administrative law judge of the Coast Guard who heard the case, or to another administrative law judge of the Coast Guard, with appropriate directions.

§ 825.35 Action after remand.

When a case has been remanded under § 825.30, a party shall retain all rights of review under 46 CFR part 5 and this part, as applicable.

§ 825.40 Ex parte communications.

(a) As used in this section:

Board decisional employee means a Board Member or employee who is or who may reasonably be expected to be involved in the decisional process of the proceeding;

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

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not given, but it shall not include requests for status reports on any matter or proceeding covered by this part.

(b) The prohibition of paragraph (c) of this section shall apply from the time a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibition shall apply at the time of the acquisition of such knowledge.

(c) Except to the extent required for the disposition of ex parte matters as authorized by law:

(1) No interested person outside the Board shall make or knowingly cause to be made to any Board employee an ex parte communication relevant to the merits of the proceeding;

(2) No Board employee shall make or knowingly cause to be made to any interested person outside the Board an ex parte communication relevant to the merits of the proceeding.

Ex parte communications regarding solely matters of Board procedure or practice are not prohibited by this paragraph.

(d) A Board employee who receives or who makes or knowingly causes to be made a communication prohibited by paragraph (c) of this section, shall place on the public record of the proceeding:

(1) All such written communications;

(2) Memoranda stating the substance of all such oral communication; and

(3) All written responses, and memoranda stating the substance of all oral responses, to materials described in paragraphs (d) (1) and (2) of this section.

(e) Upon receipt of a communication knowingly made or caused to be made in violation of paragraph (c) of this section, the Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his or her interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(f) The Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the Board, consider a violation of this section sufficient grounds for a decision adverse to a

party who has knowingly committed such violation or knowingly caused such violation to occur.

(Authority: Sec. 4, Government in the Sunshine Act, Pub. L. 94-409, amending 5 U.S.C. 556 (d) and 5 U.S.C. 557; Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2166 (49 U.S.C. 1901 *et seq.*)

[42 FR 21614, Apr. 28, 1977]

PART 826—RULES IMPLEMENTING THE EQUAL ACCESS TO JUSTICE ACT OF 1980

Subpart A—General Provisions

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AUTHORITY: Section 203(a)(1) Pub. L. 99-80, 99 Stat. 186 (5 U.S.C. 504).

SOURCE: 46 FR 48209, Oct. 1, 1981, unless otherwise noted.

Subpart A—General Provisions

§ 826.1 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (the Act), provides for the

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award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (adversary adjudications) before the National Transportation Safety Board (Board). An eligible party may receive an award when it prevails over the Federal Aviation Administration (FAA), unless the Government agency's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that this Board will use to make them. As used hereinafter, the term "agency" applies to the FAA.

§ 826.2 When the Act applies.

The Act applies to any adversary adjudication identified in § 826.3 as covered under the Act.

[59 FR 30531, June 14, 1994]

§ 826.3 Proceedings covered.

(a) The Act applies to certain adversary adjudications conducted by the Board. These are adjudications under 5 U.S.C. 554 in which the position of the FAA is presented by an attorney or other representative who enters an appearance and participates in the proceedings. Proceedings to grant or renew certificates or documents, hereafter referred to as "licenses," are excluded, but proceedings to modify, suspend, or revoke licenses or to impose a civil penalty on a flight engineer, mechanic, pilot, or repairman (or person acting in that capacity) are covered if they are otherwise "adversary adjudications." For the Board, the type of proceeding covered includes (but may not be limited to) aviation enforcement cases appealed to the Board under sections 501, 609, 611 and 901 of the Federal Aviation Act (49 U.S.C. 44101 *et seq.*, 44720-44711, 44715, 46301).

(b) The Board may also designate a proceeding not listed in paragraph (a) as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding or designating the matter for hearing. The Board's failure to designate a proceeding as an adversary adjudication

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shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the procedure is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

[46 FR 48209, Oct. 1, 1981, as amended at 59 FR 59054, Nov. 15, 1994]

§ 826.4 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart and in subpart B.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than \$2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than \$7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than \$7 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered an "individual" rather than a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

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(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the administrative law judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the administrative law judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

[46 FR 48209, Oct. 1, 1981, as amended at 54 FR 10332, Mar. 13, 1989]

§ 826.5 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on the agency counsel, who may avoid an award by showing that the agency's position was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

§ 826.6 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b)(1) No award for the fee of an attorney or agent under these rules may exceed \$75 indexed as follows:

$$\frac{X}{\$75/\text{hr}} = \frac{\text{CPI_New}}{\text{CPI_1981}}$$

The CPI to be used is the annual average CPI, All Urban Consumers, U.S. City Average, All Items, except where a local, All Item index is available. Where a local index is available, but results in a manifest inequity vis-a-vis the U.S. City Average, the U.S. City Average may be used. The numerator of that equation is the yearly average for the year(s) the services were provided, with each year calculated separately. If an annual average CPI for a particular year is not yet available, the prior year's annual average CPI shall be used. This formula increases the \$75 statutory cap by indexing it to reflect cost of living increases, as authorized in 5 U.S.C. 504(b)(1)(A)(ii). Application of these increased rate caps requires affirmative findings under §821.6(c) of this chapter. For ease of application, available U.S. City figures are reproduced as follows:

1981	90.9
1982	96.5
1983	99.6
1984	103.9
1985	107.6
1986	109.6
1987	113.6
1988	118.3
1989	124.0
1990	130.7
1991	136.2
1992	140.3
1993	144.5

(2) No award to compensate an expert witness may exceed the highest rate at which the agency pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness

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ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the administrative law judge shall consider the following:

(1) If the attorney, agent, or witness is in private practice, his or her customary fee for similar services, or if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

[46 FR 48209, Oct. 1, 1981, as amended at 58 FR 21544, Apr. 22, 1993; 59 FR 30531, June 14, 1994]

§ 826.7 Rulemaking on maximum rates for attorney fees.

(a) In addition to increases based on cost of living (*see* § 826.6), attorney fees in some or all of the proceedings covered by this part may also be increased beyond the statutory cap of \$75 if warranted by special factors (such as limited availability of attorneys qualified to handle certain types of proceedings). The Board will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

(b) Any person may file with the Board a petition for rulemaking to increase the maximum rate for attorney fees by demonstrating that a special factor(s) justifies a higher fee. The petition shall identify the rate the petitioner believes the Board should establish and the proceeding(s) or types of proceedings in which the rate should be

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used. It should also explain fully the reasons why the higher rate is warranted. The Board will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.

[58 FR 21545, Apr. 22, 1993]

§ 826.8 Awards against the Federal Aviation Administration.

When an applicant is entitled to an award because it prevails over an agency of the United States that participates in a proceeding before the Board and takes a position that is not substantially justified, the award shall be made against that agency.

Subpart B—Information Required From Applicants

§ 826.21 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the agency in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed \$2 million (if an individual) or \$7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)), or in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a)

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of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes this agency to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney for the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

[46 FR 48209, Oct. 1, 1981, as amended at 59 FR 30532, June 14, 1994]

§ 826.22 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 826.4(f) of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The administrative law judge may require an applicant to file additional information to determine the eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the administrative law judge in a sealed envelope labeled "Confidential Financial Information," accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b) (1) through (9), why public disclosure of

the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the agency against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the administrative law judge finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Board's established procedures under the Freedom of Information Act as implemented by Part 801 of the Board's rules.

§ 826.23 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The administrative law judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 826.24 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding, but in no case no later than the 30 days after the Board's final disposition of the proceeding. This 30-day deadline is statutory and the Board has no authority to extend it.

(b) If review or reconsideration is sought or taken of a decision to which an applicant believes it has prevailed, proceedings for the award of fees shall

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be stayed pending final disposition of the underlying controversy.

(c) For purposes of this rule, final disposition means the later of (1) the date on which an unappealed initial decision by an administrative law judge becomes administratively final; (2) issuance of an order disposing of any petitions for reconsideration of the Board's final order in the proceeding; (3) if no petition for reconsideration is filed, the last date on which such a petition could have been filed; or (4) issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

[46 FR 48209, Oct. 1, 1981, as amended at 59 FR 30532, June 14, 1994]

Subpart C—Procedures for Considering Applications

§ 826.31 Filing and service of documents and general procedures.

The rules contained in 49 CFR part 821 apply to proceedings under the Act, unless they are superseded by or are inconsistent with a provision of this part.

[59 FR 30532, June 14, 1994]

§ 826.32 Answer to application.

(a) Within 30 days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the administrative law judge upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested

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and identify the facts relied on in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include with the answer either supporting affidavits or a request for further proceedings under § 826.36.

§ 826.33 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 826.36.

§ 826.34 Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the administrative law judge determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 826.35 Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 826.36 Further proceedings.

(a) Ordinarily the determination of an award will be made on the basis of the written record; however, on request of either the applicant or agency counsel, or on his or her own initiative, the administrative law judge assigned to the matter may order further proceedings, such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Such further proceedings shall

be held only when necessary for full and fair resolution of the issues arising from the application and shall be conducted as promptly as possible.

(b) A request that the administrative law judge order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

§ 826.37 Decision.

The administrative law judge shall issue an initial decision on the application within 60 days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

§ 826.38 Board review.

Either the applicant or agency counsel may seek review of the initial decision on the fee application, or the Board may decide to review the decision on its own initiative, in accordance with subpart H of part 821 for FAA safety enforcement matters appealed under section 609 of the Federal Aviation Act. If neither the applicant nor agency counsel seeks review and the Board does not take review on its own initiative, the initial decision on the application shall become a final decision of the Board 30 days after it is issued. Whether to review a decision is a matter within the discretion of the Board. If review is taken, the Board will issue a final decision on the application or remand the application to the administrative law judge who issued the initial fee award determination for further proceedings.

§ 826.39 Judicial review.

Judicial review of final Board decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 826.40 Payment of award.

An applicant seeking payment of an award shall submit to the disbursing official of the FAA a copy of the Board's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. Applications for award grants in cases involving the FAA shall be sent to: The Office of Accounting and Audit, AAA-1, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

PART 830—NOTIFICATION AND REPORTING OF AIRCRAFT ACCIDENTS OR INCIDENTS AND OVERDUE AIRCRAFT, AND PRESERVATION OF AIRCRAFT WRECKAGE, MAIL, CARGO, AND RECORDS

Subpart A—General

Sec.

830.1 Applicability.

830.2 Definitions.

Subpart B—Initial Notification of Aircraft Accidents, Incidents, and Overdue Aircraft

830.5 Immediate notification.

830.6 Information to be given in notification.

Subpart C—Preservation of Aircraft Wreckage, Mail, Cargo, and Records

830.10 Preservation of aircraft wreckage, mail, cargo, and records.

Subpart D—Reporting of Aircraft Accidents, Incidents, and Overdue Aircraft

830.15 Reports and statements to be filed.

AUTHORITY: Independent Safety Board Act of 1974, as amended (49 U.S.C. 1101–1155); Federal Aviation Act of 1958, Public Law 85–726, 72 Stat. 731 (codified as amended at 49 U.S.C. 40101).

SOURCE: 53 FR 36982, Sept. 23, 1988, unless otherwise noted.

Subpart A—General

§ 830.1 Applicability.

This part contains rules pertaining to:

(a) Initial notification and later reporting of aircraft incidents and accidents and certain other occurrences in the operation of aircraft, wherever they occur, when they involve civil aircraft of the United States; when they involve certain public aircraft, as specified in this part, wherever they occur; and when they involve foreign civil aircraft where the events occur in the United States, its territories, or its possessions.

(b) Preservation of aircraft wreckage, mail, cargo, and records involving all civil and certain public aircraft accidents, as specified in this part, in the United States and its territories or possessions.

[60 FR 40112, Aug. 7, 1995]

§ 830.2 Definitions.

As used in this part the following words or phrases are defined as follows:

Aircraft accident means an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage. For purposes of this part, the definition of “aircraft accident” includes “unmanned aircraft accident,” as defined herein.

Civil aircraft means any aircraft other than a public aircraft.

Fatal injury means any injury which results in death within 30 days of the accident.

Incident means an occurrence other than an accident, associated with the operation of an aircraft, which affects or could affect the safety of operations.

Operator means any person who causes or authorizes the operation of an aircraft, such as the owner, lessee, or bailee of an aircraft.

Public aircraft means an aircraft used only for the United States Government, or an aircraft owned and operated (except for commercial purposes)

or exclusively leased for at least 90 continuous days by a government other than the United States Government, including a State, the District of Columbia, a territory or possession of the United States, or a political subdivision of that government. “Public aircraft” does not include a government-owned aircraft transporting property for commercial purposes and does not include a government-owned aircraft transporting passengers other than: transporting (for other than commercial purposes) crewmembers or other persons aboard the aircraft whose presence is required to perform, or is associated with the performance of, a governmental function such as fire-fighting, search and rescue, law enforcement, aeronautical research, or biological or geological resource management; or transporting (for other than commercial purposes) persons aboard the aircraft if the aircraft is operated by the Armed Forces or an intelligence agency of the United States. Notwithstanding any limitation relating to use of the aircraft for commercial purposes, an aircraft shall be considered to be a public aircraft without regard to whether it is operated by a unit of government on behalf of another unit of government pursuant to a cost reimbursement agreement, if the unit of government on whose behalf the operation is conducted certifies to the Administrator of the Federal Aviation Administration that the operation was necessary to respond to a significant and imminent threat to life or property (including natural resources) and that no service by a private operator was reasonably available to meet the threat.

Serious injury means any injury which: (1) Requires hospitalization for more than 48 hours, commencing within 7 days from the date of the injury was received; (2) results in a fracture of any bone (except simple fractures of fingers, toes, or nose); (3) causes severe hemorrhages, nerve, muscle, or tendon damage; (4) involves any internal organ; or (5) involves second- or third-degree burns, or any burns affecting more than 5 percent of the body surface.

Substantial damage means damage or failure which adversely affects the

structural strength, performance, or flight characteristics of the aircraft, and which would normally require major repair or replacement of the affected component. Engine failure or damage limited to an engine if only one engine fails or is damaged, bent fairings or cowling, dented skin, small punctured holes in the skin or fabric, ground damage to rotor or propeller blades, and damage to landing gear, wheels, tires, flaps, engine accessories, brakes, or wingtips are not considered "substantial damage" for the purpose of this part.

Unmanned aircraft accident means an occurrence associated with the operation of any public or civil unmanned aircraft system that takes place between the time that the system is activated with the purpose of flight and the time that the system is deactivated at the conclusion of its mission, in which:

- (1) Any person suffers death or serious injury; or
- (2) The aircraft has a maximum gross takeoff weight of 300 pounds or greater and sustains substantial damage.

[53 FR 36982, Sept. 23, 1988, as amended at 60 FR 40112, Aug. 7, 1995; 75 FR 51955, Aug. 24, 2010]

Subpart B—Initial Notification of Aircraft Accidents, Incidents, and Overdue Aircraft

§ 830.5 Immediate notification.

The operator of any civil aircraft, or any public aircraft not operated by the Armed Forces or an intelligence agency of the United States, or any foreign aircraft shall immediately, and by the most expeditious means available, notify the nearest National Transportation Safety Board (NTSB) office¹ when:

¹NTSB regional offices are located in the following cities: Anchorage, Alaska; Atlanta, Georgia; West Chicago, Illinois; Denver, Colorado; Arlington, Texas; Gardena (Los Angeles), California; Miami, Florida; Seattle, Washington; and Ashburn, Virginia. In addition, NTSB headquarters is located at 490 L'Enfant Plaza, SW., Washington, DC 20594. Contact information for these offices is available at <http://www.ntsb.gov>.

(a) An aircraft accident or any of the following listed serious incidents occur:

- (1) Flight control system malfunction or failure;
- (2) Inability of any required flight crewmember to perform normal flight duties as a result of injury or illness;
- (3) Failure of any internal turbine engine component that results in the escape of debris other than out the exhaust path;
- (4) In-flight fire;
- (5) Aircraft collision in flight;
- (6) Damage to property, other than the aircraft, estimated to exceed \$25,000 for repair (including materials and labor) or fair market value in the event of total loss, whichever is less.
- (7) For large multiengine aircraft (more than 12,500 pounds maximum certificated takeoff weight):
 - (i) In-flight failure of electrical systems which requires the sustained use of an emergency bus powered by a back-up source such as a battery, auxiliary power unit, or air-driven generator to retain flight control or essential instruments;
 - (ii) In-flight failure of hydraulic systems that results in sustained reliance on the sole remaining hydraulic or mechanical system for movement of flight control surfaces;
 - (iii) Sustained loss of the power or thrust produced by two or more engines; and
 - (iv) An evacuation of an aircraft in which an emergency egress system is utilized.

(8) Release of all or a portion of a propeller blade from an aircraft, excluding release caused solely by ground contact;

(9) A complete loss of information, excluding flickering, from more than 50 percent of an aircraft's cockpit displays known as:

- (i) Electronic Flight Instrument System (EFIS) displays;
- (ii) Engine Indication and Crew Alerting System (EICAS) displays;
- (iii) Electronic Centralized Aircraft Monitor (ECAM) displays; or
- (iv) Other displays of this type, which generally include a primary flight display (PFD), primary navigation display (PND), and other integrated displays;

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(10) Airborne Collision and Avoidance System (ACAS) resolution advisories issued either:

(i) When an aircraft is being operated on an instrument flight rules flight plan and compliance with the advisory is necessary to avert a substantial risk of collision between two or more aircraft; or

(ii) To an aircraft operating in class A airspace.

(11) Damage to helicopter tail or main rotor blades, including ground damage, that requires major repair or replacement of the blade(s);

(12) Any event in which an operator, when operating an airplane as an air carrier at a public-use airport on land:

(i) Lands or departs on a taxiway, incorrect runway, or other area not designed as a runway; or

(ii) Experiences a runway incursion that requires the operator or the crew of another aircraft or vehicle to take immediate corrective action to avoid a collision.

(b) An aircraft is overdue and is believed to have been involved in an accident.

[53 FR 36982, Sept. 23, 1988, as amended at 60 FR 40113, Aug. 7, 1995; 75 FR 927, Jan. 7, 2010; 75 FR 35330, June 22, 2010]

§ 830.6 Information to be given in notification.

The notification required in § 830.5 shall contain the following information, if available:

(a) Type, nationality, and registration marks of the aircraft;

(b) Name of owner, and operator of the aircraft;

(c) Name of the pilot-in-command;

(d) Date and time of the accident;

(e) Last point of departure and point of intended landing of the aircraft;

(f) Position of the aircraft with reference to some easily defined geographical point;

(g) Number of persons aboard, number killed, and number seriously injured;

(h) Nature of the accident, the weather and the extent of damage to the aircraft, so far as is known; and

(i) A description of any explosives, radioactive materials, or other dangerous articles carried.

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Subpart C—Preservation of Aircraft Wreckage, Mail, Cargo, and Records

§ 830.10 Preservation of aircraft wreckage, mail, cargo, and records.

(a) The operator of an aircraft involved in an accident or incident for which notification must be given is responsible for preserving to the extent possible any aircraft wreckage, cargo, and mail aboard the aircraft, and all records, including all recording mediums of flight, maintenance, and voice recorders, pertaining to the operation and maintenance of the aircraft and to the airmen until the Board takes custody thereof or a release is granted pursuant to § 831.12(b) of this chapter.

(b) Prior to the time the Board or its authorized representative takes custody of aircraft wreckage, mail, or cargo, such wreckage, mail, or cargo may not be disturbed or moved except to the extent necessary:

(1) To remove persons injured or trapped;

(2) To protect the wreckage from further damage; or

(3) To protect the public from injury.

(c) Where it is necessary to move aircraft wreckage, mail or cargo, sketches, descriptive notes, and photographs shall be made, if possible, of the original positions and condition of the wreckage and any significant impact marks.

(d) The operator of an aircraft involved in an accident or incident shall retain all records, reports, internal documents, and memoranda dealing with the accident or incident, until authorized by the Board to the contrary.

Subpart D—Reporting of Aircraft Accidents, Incidents, and Overdue Aircraft

§ 830.15 Reports and statements to be filed.

(a) *Reports.* The operator of a civil, public (as specified in § 830.5), or foreign aircraft shall file a report on Board

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Form 6120.¹/₂ (OMB No. 3147-0001)² within 10 days after an accident, or after 7 days if an overdue aircraft is still missing. A report on an incident for which immediate notification is required by § 830.5(a) shall be filed only as requested by an authorized representative of the Board.

(b) *Crewmember statement.* Each crewmember, if physically able at the time the report is submitted, shall attach a statement setting forth the facts, conditions, and circumstances relating to the accident or incident as they appear to him. If the crewmember is incapacitated, he shall submit the statement as soon as he is physically able.

(c) *Where to file the reports.* The operator of an aircraft shall file any report with the field office of the Board nearest the accident or incident.

[53 FR 36982, Sept. 23, 1988, as amended at 60 FR 40113, Aug. 7, 1995]

PART 831—ACCIDENT/INCIDENT INVESTIGATION PROCEDURES

Sec.

- 831.1 Applicability of part.
- 831.2 Responsibility of Board.
- 831.3 Authority of Directors.
- 831.4 Nature of investigation.
- 831.5 Priority of Board investigations.
- 831.6 Request to withhold information.
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- 831.9 Authority of Board representatives.
- 831.10 Autopsies.
- 831.11 Parties to the investigation.
- 831.12 Access to and release of wreckage, records, mail, and cargo.
- 831.13 Flow and dissemination of accident or incident information.
- 831.14 Proposed findings.

AUTHORITY: Independent Safety Board Act of 1974, as amended (49 U.S.C. 1101 *et seq.*); Federal Aviation Act of 1958, as amended (49 U.S.C. 40101 *et seq.*).

SOURCE: 53 FR 15847, May 4, 1988, unless otherwise noted.

§ 831.1 Applicability of part.

Unless otherwise specifically ordered by the National Transportation Safety Board (Board), the provisions of this

²Forms are available from the Board field offices (see footnote 1), from Board headquarters in Washington, DC, and from the Federal Aviation Administration Flight Standards District Offices.

part shall govern all accident or incident investigations, conducted under the authority of title VII of the Federal Aviation Act of 1958, as amended, and the Independent Safety Board Act of 1974. Rules applicable to accident hearings and reports are set forth in part 845.

§ 831.2 Responsibility of Board.

(a) *Aviation.* (1) The Board is responsible for the organization, conduct, and control of all accident and incident investigations (see § 830.2 of this chapter) within the United States, its territories and possessions, where the accident or incident involves any civil aircraft or certain public aircraft (as specified in § 830.5 of this chapter), including an investigation involving civil or public aircraft (as specified in § 830.5) on the one hand, and an Armed Forces or intelligence agency aircraft on the other hand. It is also responsible for investigating accidents/incidents that occur outside the United States, and which involve civil aircraft and/or certain public aircraft, when the accident/incident is not in the territory of another country (*i.e.*, in international waters).

(2) Certain aviation investigations may be conducted by the Federal Aviation Administration (FAA), pursuant to a "Request to the Secretary of the Department of Transportation to Investigate Certain Aircraft Accidents," effective February 10, 1977 (the text of the request is contained in the appendix to part 800 of this chapter), but the Board determines the probable cause of such accidents or incidents.¹ Under no circumstances are aviation investigations where the portion of the investigation is so delegated to the FAA by the Board considered to be joint investigations in the sense of sharing responsibility. These investigations remain NTSB investigations.

(3) The Board is the agency charged with fulfilling the obligations of the United States under Annex 13 to the Chicago Convention on International Civil Aviation (Eighth Edition, July

¹The authority of a representative of the FAA during such investigations is the same as that of a Board investigator under this part.

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1994), and does so consistent with State Department requirements and in coordination with that department. Annex 13 contains specific requirements for the notification, investigation, and reporting of certain incidents and accidents involving international civil aviation. In the case of an accident or incident in a foreign state involving civil aircraft of U.S. registry or manufacture, where the foreign state is a signatory to Annex 13 to the Chicago Convention of the International Civil Aviation Organization, the state of occurrence is responsible for the investigation. If the accident or incident occurs in a foreign state not bound by the provisions of Annex 13 to the Chicago Convention, or if the accident or incident involves a public aircraft (Annex 13 applies only to civil aircraft), the conduct of the investigation shall be in consonance with any agreement entered into between the United States and the foreign state.

(b) *Surface.* The Board is responsible for the investigation of: railroad accidents in which there is a fatality, substantial property damage, or which involve a passenger train (see part 840 of this chapter); major marine casualties and marine accidents involving a public and non-public vessel or involving Coast Guard functions (see part 850 of this chapter²); highway accidents, including railroad grade-crossing accidents, the investigation of which is selected in cooperation with the States; and pipeline accidents in which there is a fatality, significant injury to the environment, or substantial property damage.

(c) *Other accidents/incidents.* The Board is also responsible for the investigation of an accident/incident that occurs in connection with the transportation of people or property which, in the judgment of the Board, is catastrophic, involves problems of a recurring character, or would otherwise carry out the policy of the Independent Safety Board Act of 1974. This authority includes, but is not limited to, marine and boating accidents and incidents not covered by part 850 of this

²Part 850 also governs the conduct of certain investigations in which the Board and the Coast Guard participate jointly.

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chapter, and accidents/incidents selected by the Board involving transportation and/or release of hazardous materials.

[62 FR 3806, Jan. 27, 1997]

§ 831.3 Authority of Directors.

The Directors, Office of Aviation Safety, Office of Railroad Safety, Office of Highway Safety, Office of Marine Safety, and Office of Pipeline and Hazardous Materials Safety, subject to the provisions of § 831.2 and part 800 of this chapter, may order an investigation into any accident or incident.

[63 FR 71606, Dec. 29, 1998]

§ 831.4 Nature of investigation.

Accident and incident investigations are conducted by the Board to determine the facts, conditions, and circumstances relating to an accident or incident and the probable cause(s) thereof. These results are then used to ascertain measures that would best tend to prevent similar accidents or incidents in the future. The investigation includes the field investigation (on-scene at the accident, testing, tear-down, etc.), report preparation, and, where ordered, a public hearing. The investigation results in Board conclusions issued in the form of a report or "brief" of the incident or accident. Accident/incident investigations are fact-finding proceedings with no formal issues and no adverse parties. They are not subject to the provisions of the Administrative Procedure Act (5 U.S.C. 504 *et seq.*), and are not conducted for the purpose of determining the rights or liabilities of any person.

[62 FR 3806, Jan. 27, 1997]

§ 831.5 Priority of Board investigations.

Any investigation of an accident or incident conducted by the Safety Board directly or pursuant to the appendix to part 800 of this chapter (except major marine investigations conducted under 49 U.S.C. 1131(a)(1)(E)) has priority over all other investigations of such accident or incident conducted by other Federal agencies. The Safety Board shall provide for the appropriate participation by other Federal agencies in any such investigation, except that

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such agencies may not participate in the Safety Board's determination of the probable cause of the accident or incident. Nothing in this section impairs the authority of other Federal agencies to conduct investigations of an accident or incident under applicable provisions of law or to obtain information directly from parties involved in, and witnesses to, the transportation accident or incident, provided they do so without interfering with the Safety Board's investigation. The Safety Board and other Federal agencies shall assure that appropriate information obtained or developed in the course of their investigations is exchanged in a timely manner.

[62 FR 3807, Jan. 27, 1997]

§ 831.6 Request to withhold information.

(a) *Trade Secrets Act (18 U.S.C. 1905), Exemption 4 of the Freedom of Information Act (5 U.S.C. 552) (FOIA), and The Independent Safety Board Act of 1974, as amended*—(1) *General*. The Trade Secrets Act provides criminal penalties for unauthorized government disclosure of trade secrets and other specified confidential commercial information. The Freedom of Information Act authorizes withholding of such information; however, the Independent Safety Board Act, at 49 U.S.C. 1114(b), provides that the Board may, under certain circumstances, disclose information related to trade secrets.

(2) *Procedures*. Information submitted to the Board that the submitter believes qualifies as a trade secret or confidential commercial information subject either to the Trade Secrets Act or FOIA Exemption 4 shall be so identified by the submitter on each and every page of such document. The Board shall give the submitter of any information so identified, or information the Board has substantial reason to believe qualifies as a trade secret or confidential commercial information subject either to the Trade Secrets Act or FOIA Exemption 4, the opportunity to comment on any contemplated disclosure, pursuant to 49 U.S.C. 1114(b). In all instances where the Board determines to disclose pursuant to 49 U.S.C. 1114(b) and/or 5 U.S.C. 552, at least 10 days' notice will be provided the sub-

mitter. Notice may not be provided the submitter when disclosure is required by a law other than FOIA if the information is not identified by the submitter as qualifying for withholding, as is required by this paragraph, unless the Board has substantial reason to believe that disclosure would result in competitive harm.

(3) *Voluntarily-provided safety information*. It is the policy of the Safety Board that commercial, safety-related information provided to it voluntarily and not in the context of particular accident/incident investigations will not be disclosed. Reference to such information for the purposes of safety recommendations will be undertaken with consideration for the confidential nature of the underlying database(s).

(b) *Other*. Any person may make written objection to the public disclosure of any other information contained in any report or document filed, or otherwise obtained by the Board, stating the grounds for such objection. The Board, on its own initiative or if such objection is made, may order such information withheld from public disclosure when, in its judgment, the information may be withheld under the provisions of an exemption to the Freedom of Information Act (5 U.S.C. 552, see part 801 of this chapter), and its release is found not to be in the public interest.

[62 FR 3807, Jan. 27, 1997]

§ 831.7 Right to representation.

Any person interviewed by an authorized representative of the Board during the investigation, regardless of the form of the interview (sworn, unsworn, transcribed, not transcribed, etc.), has the right to be accompanied, represented, or advised by an attorney or non-attorney representative.

[62 FR 3807, Jan. 27, 1997]

§ 831.8 Investigator-in-charge.

The designated investigator-in-charge (IIC) organizes, conducts, controls, and manages the field phase of the investigation, regardless of whether a Board Member is also on-scene at the accident or incident site. (The role of the Board member at the scene of an accident investigation is as the official

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spokesperson for the Safety Board.) The IIC has the responsibility and authority to supervise and coordinate all resources and activities of all personnel, both Board and non-Board, involved in the on-site investigation. The IIC continues to have considerable organizational and management responsibilities throughout later phases of the investigation, up to and including Board consideration and adoption of a report or brief of probable cause(s).

[62 FR 3807, Jan. 27, 1997]

§ 831.9 Authority of Board representatives.

(a) *General.* Any employee of the Board, upon presenting appropriate credentials, is authorized to enter any property where an accident/incident subject to the Board's jurisdiction has occurred, or wreckage from any such accident/incident is located, and do all things considered necessary for proper investigation. Further, upon demand of an authorized representative of the Board and presentation of credentials, any Government agency, or person having possession or control of any transportation vehicle or component thereof, any facility, equipment, process or controls relevant to the investigation, or any pertinent records or memoranda, including all files, hospital records, and correspondence then or thereafter existing, and kept or required to be kept, shall forthwith permit inspection, photographing, or copying thereof by such authorized representative for the purpose of investigating an accident or incident, or preparing a study, or related to any special investigation pertaining to safety or the prevention of accidents. The Safety Board may issue a subpoena, enforceable in Federal district court, to obtain testimony or other evidence. Authorized representatives of the Board may question any person having knowledge relevant to an accident/incident, study, or special investigation. Authorized representatives of the Board also have exclusive authority, on behalf of the Board, to decide the way in which any testing will be conducted, including decisions on the person that will conduct the test, the type of test that will be conducted, and

any individual who will witness the test.

(b) *Aviation.* Any employee of the Board, upon presenting appropriate credentials, is authorized to examine and test to the extent necessary any civil or public aircraft (as specified in § 830.5), aircraft engine, propeller, appliance, or property aboard such aircraft involved in an accident in air commerce.

(c) *Surface.* (1) Any employee of the Board, upon presenting appropriate credentials, is authorized to test or examine any vehicle, vessel, rolling stock, track, pipeline component, or any part of any such item when such examination or testing is determined to be required for purposes of such investigation.

(2) Any examination or testing shall be conducted in such a manner so as not to interfere with or obstruct unnecessarily the transportation services provided by the owner or operator of such vehicle, vessel, rolling stock, track, or pipeline component, and shall be conducted in such a manner so as to preserve, to the maximum extent feasible, any evidence relating to the transportation accident, consistent with the needs of the investigation and with the cooperation of such owner or operator.

[53 FR 15847, May 4, 1988, as amended at 60 FR 40113, Aug. 7, 1995; 62 FR 3807, Jan. 27, 1997]

§ 831.10 Autopsies.

The Board is authorized to obtain, with or without reimbursement, a copy of the report of autopsy performed by State or local officials on any person who dies as a result of having been involved in a transportation accident within the jurisdiction of the Board. The investigator-in-charge, on behalf of the Board, may order an autopsy or seek other tests of such persons as may be necessary to the investigation, provided that to the extent consistent with the needs of the accident investigation, provisions of local law protecting religious beliefs with respect to autopsies shall be observed.

§ 831.11 Parties to the investigation.

(a) *All Investigations, regardless of mode.* (1) The investigator-in-charge

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designates parties to participate in the investigation. Parties shall be limited to those persons, government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident or incident and who can provide suitable qualified technical personnel actively to assist in the investigation. Other than the FAA in aviation cases, no other entity is afforded the right to participate in Board investigations.

(2) Participants in the investigation (*i.e.*, party representatives, party coordinators, and/or the larger party organization) shall be responsive to the direction of Board representatives and may lose party status if they do not comply with their assigned duties and activity proscriptions or instructions, or if they conduct themselves in a manner prejudicial to the investigation.

(3) No party to the investigation shall be represented in any aspect of the NTSB investigation by any person who also represents claimants or insurers. No party representative may occupy a legal position (see § 845.13 of this chapter). Failure to comply with these provisions may result in sanctions, including loss of status as a party.

(4) Title 49, United States Code § 1132 provides for the appropriate participation of the FAA in Board investigations, and § 1131(a)(2) provides for such participation by other departments, agencies, or instrumentalities. The FAA and those other entities that meet the requirements of paragraph (a)(1) of this section will be parties to the investigation with the same rights and privileges and subject to the same limitations as other parties, provided however that representatives of the FAA need not sign the "Statement of Party Representatives to NTSB Investigation" (see paragraph (b) of this section).

(b) *Aviation investigations.* In addition to compliance with the provisions of paragraph (a) of this section, and to assist in ensuring complete understanding of the requirements and limitations of party status, all party representatives in aviation investigations shall sign "Statement of Party Representatives to NTSB Investigation" immediately upon attaining party rep-

resentative status. Failure timely to sign that statement may result in sanctions, including loss of status as a party.

[62 FR 3808, Jan. 27, 1997, as amended at 63 FR 71606, Dec. 29, 1998]

§ 831.12 Access to and release of wreckage, records, mail, and cargo.

(a) Only the Board's accident investigation personnel, and persons authorized by the investigator-in-charge to participate in any particular investigation, examination or testing shall be permitted access to wreckage, records, mail, or cargo in the Board's custody.

(b) Wreckage, records, mail, and cargo in the Board's custody shall be released by an authorized representative of the Board when it is determined that the Board has no further need of such wreckage, mail, cargo, or records. When such material is released, Form 6120.15, "Release of Wreckage," will be completed, acknowledging receipt.

[62 FR 3808, Jan. 27, 1997]

§ 831.13 Flow and dissemination of accident or incident information.

(a) Release of information during the field investigation, particularly at the accident scene, shall be limited to factual developments, and shall be made only through the Board Member present at the accident scene, the representative of the Board's Office of Public Affairs, or the investigator-in-charge.

(b) All information concerning the accident or incident obtained by any person or organization participating in the investigation shall be passed to the IIC through appropriate channels before being provided to any individual outside the investigation. Parties to the investigation may relay to their respective organizations information necessary for purposes of prevention or remedial action. However, no information concerning the accident or incident may be released to any person not

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a party representative to the investigation (including non-party representative employees of the party organization) before initial release by the Safety Board without prior consultation and approval of the IIC.

[53 FR 15847, May 4, 1988, as amended at 62 FR 3808, Jan. 27, 1997]

§ 831.14 Proposed findings.

(a) *General.* Any person, government agency, company, or association whose employees, functions, activities, or products were involved in an accident or incident under investigation may submit to the Board written proposed findings to be drawn from the evidence produced during the course of the investigation, a proposed probable cause, and/or proposed safety recommendations designed to prevent future accidents.

(b) *Timing of submissions.* To be considered, these submissions must be received before the matter is calendared for consideration at a Board meeting. All written submissions are expected to have been presented to staff in advance of the formal scheduling of the meeting. This procedure ensures orderly and thorough consideration of all views.

(c) *Exception.* This limitation does not apply to safety enforcement cases handled by the Board pursuant to part 821 of this chapter. Separate *ex parte* rules, at part 821, subpart J, apply to those proceedings.

[62 FR 3808, Jan. 27, 1997]

PART 835—TESTIMONY OF BOARD EMPLOYEES

Sec.

835.1 Purpose.

835.2 Definitions.

835.3 Scope of permissible testimony.

835.4 Use of reports.

835.5 Manner in which testimony is given in civil litigation.

835.6 Request for testimony in civil litigation.

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835.11 Obtaining Board accident reports, factual accident reports, and supporting information.

AUTHORITY: 5 U.S.C. 301; Independent Safety Board Act of 1974, as amended (49 U.S.C. 1101 *et seq.*).

§ 835.1 Purpose.

This part prescribes policies and procedures regarding the testimony of employees of the National Transportation Safety Board (Board) in suits or actions for damages and criminal proceedings arising out of transportation accidents when such testimony is in an official capacity and arises out of or is related to accident investigation. The purpose of this part is to ensure that the time of Board employees is used only for official purposes, to avoid embroiling the Board in controversial issues that are not related to its duties, to avoid spending public funds for non-Board purposes, to preserve the impartiality of the Board, and to prohibit the discovery of opinion testimony.

[63 FR 71607, Dec. 29, 1998]

§ 835.2 Definitions.

Accident, for purposes of this part includes “incident.”

Board accident report means the report containing the Board’s determinations, including the probable cause of an accident, issued either as a narrative report or in a computer format (“briefs” of accidents). Pursuant to section 701(e) of the Federal Aviation Act of 1958 (FA Act), and section 304(c) of the Independent Safety Board Act of 1974 (49 U.S.C. 1154(b)) (Safety Act), no part of a Board accident report may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports.

Factual accident report means the report containing the results of the investigator’s investigation of the accident. The Board does not object to, and there is no statutory bar to, admission in litigation of factual accident reports. In the case of a major investigation, group chairman factual reports are factual accident reports.

[63 FR 71607, Dec. 29, 1998, as amended at 64 FR 5622, Feb. 4, 1999]

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§ 835.3 Scope of permissible testimony.

(a) Section 701(e) of the FA Act and section 304(c) of the Safety Act preclude the use or admission into evidence of Board accident reports in any suit or action for damages arising from accidents. These sections reflect Congress' "strong * * * desire to keep the Board free of the entanglement of such suits." Rep. No. 93-1192, 93d Cong., 2d Sess., 44 (1974), and serve to ensure that the Board does not exert an undue influence on litigation. The purposes of these sections would be defeated if expert opinion testimony of Board employees, which may be reflected in the views of the Board expressed in its reports, were admitted in evidence or used in litigation arising out of an accident. The Board relies heavily upon its investigators' opinions in its deliberations. Furthermore, the use of Board employees as experts to give opinion testimony would impose a significant administrative burden on the Board's investigative staff. Litigants must obtain their expert witnesses from other sources.

(b) For the reasons stated in paragraph (a) of this section and § 835.1, Board employees may only testify as to the factual information they obtained during the course of an investigation, including factual evaluations embodied in their factual accident reports. However, they shall decline to testify regarding matters beyond the scope of their investigation, and they shall not give any expert or opinion testimony.

(c) Board employees may testify about the firsthand information they obtained during an investigation that is not reasonably available elsewhere, including observations recorded in their own factual accident reports. Consistent with the principles cited in § 835.1 and this section, current Board employees are not authorized to testify regarding other employee's reports, or other types of Board documents, including but not limited to safety recommendations, safety studies, safety proposals, safety accomplishments, reports labeled studies, and analysis reports, as they contain staff analysis and/or Board conclusions.

(d) Briefs of accidents may be released in conjunction with factual accident reports. Nevertheless, they are

not part of those reports and are not to be admitted in evidence or used in a deposition approved under this part.

(e) Not all material in a factual accident report may be the subject of testimony. The purpose of the factual accident report, in great part, is to inform the public at large, and as a result the factual accident report may contain information and conclusions for which testimony is prohibited by this part.

(f) No employee may testify in any matter absent advance approval by the General Counsel as provided in this part.

[55 FR 41541, Oct. 12, 1990, as amended at 63 FR 71607, Dec. 29, 1998; 64 FR 5622, Feb. 4, 1999]

§ 835.4 Use of reports.

(a) As a testimonial aid and to refresh their memories, Board employees may use copies of the factual accident report they prepared, and may refer to and cite from that report during testimony.

(b) Consistent with section 701(e) of the FA Act and section 304(c) of the Safety Act, a Board employee may not use the Board's accident report for any purpose during his testimony.

[55 FR 41541, Oct. 12, 1990, as amended at 63 FR 71607, Dec. 29, 1998]

§ 835.5 Manner in which testimony is given in civil litigation.

(a) Testimony of Board employees with unique, firsthand information may be made available for use in civil actions or civil suits for damages arising out of accidents through depositions or written interrogatories. Board employees are not permitted to appear and testify in court in such actions.

(b) Normally, depositions will be taken and interrogatories answered at the Board's office to which the employee is assigned, and at a time arranged with the employee reasonably fixed to avoid substantial interference with the performance of his duties.

(c) Board employees are authorized to testify only once in connection with any investigation they have made of an accident. Consequently, when more than one civil lawsuit arises as a result of an accident, it shall be the duty of counsel seeking the employee's deposition to ascertain the identity of all

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parties to the multiple lawsuits and their counsel, and to advise them of the fact that a deposition has been granted, so that all interested parties may be afforded the opportunity to participate therein.

(d) Upon completion of the deposition of a Board employee, the original of the transcript will be provided the deponent for signature and correction, which the Board does not waive. A copy of the transcript of the testimony and any videotape shall be furnished, at the expense of the party requesting the deposition, to the Board's General Counsel at Washington, DC headquarters for the Board's files.

[55 FR 41541, Oct. 12, 1990, as amended at 63 FR 71607, Dec. 29, 1998]

§ 835.6 Request for testimony in civil litigation.

(a) A written request for testimony by deposition or interrogatories of a Board employee relating to an accident shall be addressed to the General Counsel, who may approve or deny the request consistent with this part. Such request shall set forth the title of the civil case, the court, the type of accident (aviation, railroad, etc.), the date and place of the accident, the reasons for desiring the testimony, and a showing that the information desired is not reasonably available from other sources.

(b) Where testimony is sought in connection with civil litigation, the General Counsel shall not approve it until the factual accident report is issued (*i.e.*, in the public docket). In the case of major accident investigations where there are multiple factual reports issued and testimony of group chairmen is sought, the General Counsel may approve depositions regarding completed group factual reports at any time after incorporation of the report in the public docket. However, no deposition will be approved prior to the Board's public hearing, where one is scheduled or contemplated. The General Counsel may approve a deposition in the absence of a factual accident report when such a report will not be issued but all staff fact-finding is complete.

(c) The General Counsel shall attach to the approval of any deposition such

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reasonable conditions as may be deemed appropriate in order that the testimony will be consistent with § 835.1, will be limited to the matters delineated in § 835.3, will not interfere with the performance of the duties of the employee as set forth in § 835.5, and will otherwise conform to the policies of this part.

(d) A subpoena shall not be served upon a Board employee in connection with the taking of a deposition in civil litigation.

[63 FR 71607, Dec. 29, 1998]

§ 835.7 Testimony of former Board employees.

It is not necessary to request Board approval for testimony of a former Board employee, nor is testimony limited to depositions. However, the scope of permissible testimony continues to be constrained by all the limitations set forth in § 835.3 and § 835.4.

[63 FR 71608, Dec. 29, 1998]

§ 835.8 Testimony by current Board employees regarding prior activity.

Any testimony regarding any accident within the Board's jurisdiction, or any expert testimony arising from employment prior to Board service is prohibited absent approval by the General Counsel. Approval shall only be given if testimony will not violate § 835.1 and § 835.3, and is subject to whatever conditions the General Counsel finds necessary to promote the purposes of this part as set forth in § 835.1 and § 835.3.

[63 FR 71608, Dec. 29, 1998]

§ 835.9 Procedure in the event of a subpoena in civil litigation.

(a) If the Board employee has received a subpoena to appear and testify in connection with civil litigation, a request for his deposition shall not be approved until the subpoena has been withdrawn.

(b) Upon receipt of a subpoena, the employee shall immediately notify the General Counsel and provide all information requested by the General Counsel.

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(c) The General Counsel shall determine the course of action to be taken and will so advise the employee.

[63 FR 71608, Dec. 29, 1998]

§ 835.10 Testimony in Federal, State, or local criminal investigations and other proceedings.

(a) As with civil litigation, the Board prefers that testimony be taken by deposition if court rules permit, and that testimony await the issuance of the factual accident report. The Board recognizes, however, that in the case of coroner's inquests and grand jury proceedings this may not be possible. The Board encourages those seeking testimony of Board employees to contact the General Counsel as soon as such testimony is being considered. Whenever the intent to seek such testimony is communicated to the employee, he shall immediately notify the General Counsel.

(b) In any case, Board employees are prohibited from testifying in any civil, criminal, or other matter, either in person or by deposition or interrogatories, absent advance approval of the General Counsel. The Board discourages the serving of a subpoena for testimony but, if issued, it should be served on the General Counsel, rather than the employee.

(c) If permission to testify by deposition or in person is granted, testimony shall be limited as set forth in § 835.3. Only factual testimony is authorized; no expert or opinion testimony shall be given.

[63 FR 71608, Dec. 29, 1998]

§ 835.11 Obtaining Board accident reports, factual accident reports, and supporting information.

It is the responsibility of the individual requesting testimony to obtain desired documents. There are a number of ways to obtain Board accident reports, factual accident reports, and accompanying accident docket files. Our rules at parts 801 and 837 of this chapter explain our procedures, as will our web site, at *www.nts.gov*. Or, you may call our Public Inquiries Branch, at (800) 877-6799. Documents will not be supplied by witnesses at depositions,

nor will copying services be provided by deponents.

[63 FR 71608, Dec. 29, 1998]

PART 837—PRODUCTION OF RECORDS IN LEGAL PROCEEDINGS

Sec.

837.1 Purpose and scope.

837.2 Applicability.

837.3 Published reports, material contained in the public accident investigation dockets, and accident database data.

837.4 Other material.

AUTHORITY: 49 U.S.C. 1101 *et seq.*; 40101 *et seq.*; 5 U.S.C. 301.

SOURCE: 62 FR 27703, May 21, 1997, unless otherwise noted.

§ 837.1 Purpose and scope.

(a) This part sets forth procedures to be followed when requesting material for use in legal proceedings (including administrative proceedings) in which the National Transportation Safety Board (NTSB or Board) is not a party, and procedures to be followed by the employee upon receipt of a subpoena, order, or other demand (collectively referred to here as a demand) by a court or other competent authority or by a private litigant. "Material," as used in this part, means any type of physical or documentary evidence, including but not limited to paper documents, electronic media, videotapes, audiotapes, etc.

(b) The purposes of this part are to:

(1) Conserve the time of employees for conducting official business;

(2) Minimize the possibility of involving the NTSB in controversial issues not related to its mission;

(3) Maintain the impartiality of the Board among private litigants;

(4) Avoid spending the time and money of the United States for private purposes; and

(5) To protect confidential, sensitive information, and the deliberative processes of the Board.

§ 837.2 Applicability.

This part applies to requests to produce material concerning information acquired in the course of performing official duties or because of the employee's official status. Specifically, this part applies to requests for:

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material contained in NTSB files; and any information or material acquired by an employee of the NTSB in the performance of official duties or as a result of the employee's status. Two sets of procedures are here established, dependent on the type of material sought. Rules governing requests for employee testimony, as opposed to material production, can be found at 49 CFR part 835. Document production shall not accompany employee testimony, absent compliance with this part and General Counsel approval.

§ 837.3 Published reports, material contained in the public accident investigation dockets, and accident database data.

(a) Demands for material contained in the NTSB's official public docket files of its accident investigations, or its computerized accident database(s) shall be submitted, in writing, to the Public Inquiries Branch. Demands for specific published reports and studies should be submitted to the National Technical Information Service. The Board does not maintain stock of these items. Demands for information collected in particular accident investigations and made a part of the public docket should be submitted to the Public Inquiries Branch or, directly, to our contractor. For information regarding the types of documents routinely issued by the Board, see 49 CFR part 801.

(b) No subpoena shall be issued to obtain materials subject to this paragraph, and any subpoena issued shall be required to be withdrawn prior to release of the requested information. Payment of reproduction fees may be required in advance.

§ 837.4 Other material.

(a) *Production prohibited unless approved.* Except in the case of the material referenced in § 837.3, no employee or former employee of NTSB shall, in response to a demand of a private litigant, court, or other authority, produce any material contained in the files of the NTSB (whether or not agency records under 5 U.S.C. 552) or produce any material acquired as part of the performance of the person's official duties or because of the person's

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official status, without the prior written approval of the General Counsel.

(b) *Procedures to be followed for the production of material under this paragraph.* (1) All demands for material shall be submitted to the General Counsel at NTSB headquarters, Washington, DC 20594. If an employee receives a demand, he shall forward it immediately to the General Counsel.

(2) Each demand must contain an affidavit by the party seeking the material or his attorney setting forth the material sought and its relevance to the proceeding, and containing a certification, with support, that the information is not available from other sources, including Board materials described in §§ 837.3 and part 801 of this chapter.

(3) In the absence of General Counsel approval of a demand, the employee is not authorized to comply with the demand.

(4) The General Counsel shall advise the requester of approval or denial of the demand, and may attach whatever conditions to approval considered appropriate or necessary to promote the purposes of this part. The General Counsel may also permit exceptions to any requirement in this part when necessary to prevent a miscarriage of justice, or when the exception is in the best interests of the NTSB and/or the United States.

PART 840—RULES PERTAINING TO NOTIFICATION OF RAILROAD ACCIDENTS

Sec.

840.1 Applicability.

840.2 Definitions.

840.3 Notification of railroad accidents.

840.4 Information to be given in notification.

840.5 Inspection, examination and testing of physical evidence.

840.6 Priority of Board investigations.

AUTHORITY: Sec. 304(a)(1)(c), Independent Safety Board Act of 1974, as amended (49 U.S.C. 1903).

§ 840.1 Applicability.

This part contains the Safety Board's accident notification requirements, and its authority for inspection, examination, and testing of physical evidence, and describes the exercise of the

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Safety Board's priority accorded to its activities when investigating railroad accidents.

[47 FR 49408, Nov. 1, 1982]

§ 840.2 Definitions.

As used in this part, the following words or phrases are defined as follows:

(a) *Railroad* means any system of surface transportation of persons or property over rails. It includes, but is not limited to, line-haul freight and passenger-carrying railroads, and rapid transit, commuter, scenic, subway, and elevated railways.

(b) *Accident* means any collision, derailment, or explosion involving railroad trains, locomotives, and cars; or any other loss-causing event involving the operation of such railroad equipment that results in a fatality to a passenger or employee, or the emergency evacuation of persons.

(c) *Joint operations* means rail operations conducted on a track used jointly or in common by two or more railroads subject to this part, or operation of a train, locomotive, or car by one railroad over the track of another railroad.

(d) *Fatality* means the death of a person either at the time an accident occurs or within 24 hours thereafter.

[41 FR 13925, Apr. 1, 1976, as amended at 47 FR 49408, Nov. 1, 1982]

§ 840.3 Notification of railroad accidents.

The operator of a railroad shall notify the Board by telephoning the National Response Center at telephone 800-424-0201 at the earliest practicable time after the occurrence of any one of the following railroad accidents:

(a) No later than 2 hours after an accident which results in:

(1) A passenger or employee fatality or serious injury to two or more crewmembers or passengers requiring admission to a hospital;

(2) The evacuation of a passenger train;

(3) Damage to a tank car or container resulting in release of hazardous materials or involving evacuation of the general public; or

(4) A fatality at a grade crossing.

(b) No later than 4 hours after an accident which does not involve any of the circumstances enumerated in paragraph (a) of this section but which results in:

(1) Damage (based on a preliminary gross estimate) of \$150,000 or more for repairs, or the current replacement cost, to railroad and nonrailroad property; or

(2) Damage of \$25,000 or more to a passenger train and railroad and nonrailroad property.

(c) Accidents involving joint operations must be reported by the railroad that controls the track and directs the movement of trains where the accident has occurred.

(d) Where an accident for which notification is required by paragraph (a) or (b) of this section occurs in a remote area, the time limits set forth in that paragraph shall commence from the time the first railroad employee who was not at the accident site at the time of its occurrence has received notice thereof.

[53 FR 49152, Dec. 6, 1988]

§ 840.4 Information to be given in notification.

The notice required by § 840.3 shall include the following information:

(a) Name and title of person reporting.

(b) Name of railroad.

(c) Location of accident (relate to nearest city).

(d) Time and date of accident.

(e) Description of accident.

(f) Casualties:

(1) Fatalities.

(2) Injuries.

(g) Property damage (estimate).

(h) Name and telephone number of person from whom additional information may be obtained.

[41 FR 13925, Apr. 1, 1976]

§ 840.5 Inspection, examination and testing of physical evidence.

(a) Any employee of the Safety Board, upon presenting appropriate credentials is authorized to enter any property wherein a transportation accident has occurred or wreckage from any such accident is located and do all

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things necessary for proper investigation, including examination or testing of any vehicle, rolling stock, track, or any part of any part of any such item when such examination or testing is determined to be required for purposes of such investigation.

(b) Any examination or testing shall be conducted in such a manner so as not to interfere with or obstruct unnecessarily the transportation services provided by the owner or operator of such vehicle, rolling stock, or track, and shall be conducted in such a manner so as to preserve, to the maximum extent feasible, any evidence relating to the transportation accident, consistent with the needs of the investigation and with the cooperation of such owner or operator. The employee may inspect, at reasonable times, records, files, papers, processes, controls, and facilities relevant to the investigation of such accident. Each inspection shall be commenced and completed promptly and the results of such inspection, examination, or test made available to the parties.

[47 FR 49408, Nov. 1, 1982]

§ 840.6 Priority of Board investigations.

Any investigation of an accident conducted by the Safety Board shall have priority over all other investigations of such accident conducted by other Federal agencies. The Safety Board shall provide for the appropriate participation by other Federal agencies in any such investigation, except that such agencies may not participate in the Safety Board's determination of the probable cause of the accident. Nothing in this section impairs the authority of other Federal agencies to conduct investigations of an accident under applicable provisions of law or to obtain information directly from parties involved in, and witnesses to, the transportation accident. The Safety Board and other Federal agencies shall assure that appropriate information obtained or developed in the course of their investigations is exchanged in a timely manner.

[47 FR 49408, Nov. 1, 1982]

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PART 845—RULES OF PRACTICE IN TRANSPORTATION; ACCIDENT/INCIDENT HEARINGS AND REPORTS

Sec.

- 845.1 Applicability.
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- 845.12 Notice of hearing.
- 845.13 Designation of parties.

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- 845.40 Accident report.
- 845.41 Petitions for reconsideration or modification.

Subpart D—Public Record

- 845.50 Public docket.
- 845.51 Investigation to remain open.

AUTHORITY: Title VII, Federal Aviation Act of 1958, as amended (49 U.S.C. 1441 *et seq.*); and the Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2166 (49 U.S.C. 1901 *et seq.*).

SOURCE: 44 FR 34419, June 14, 1979, unless otherwise noted.

§ 845.1 Applicability.

Unless otherwise specifically ordered by the National Transportation Safety Board (Board), the provisions of this part shall govern all transportation accident investigation hearings conducted under the authority of section 304(b) of the Independent Safety Board Act of 1974 (49 U.S.C. 1903(b)) and accident reports issued by the Board.

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§ 845.2 Nature of hearing.

Transportation accident hearings are convened to assist the Board in determining cause or probable cause of an accident, in reporting the facts, conditions, and circumstances of the accident, and in ascertaining measures which will tend to prevent accidents and promote transportation safety. Such hearings are factfinding proceedings with no formal issues and no adverse parties and are not subject to the provisions of the Administrative Procedure Act (Pub. L. 89-554, 80 Stat. 384 (5 U.S.C. 554)).

[44 FR 34419, June 14, 1979; 44 FR 39181, July 5, 1979]

§ 845.3 Sessions open to the public.

(a) All hearings shall normally be open to the public (subject to the provision that any person present shall not be allowed at any time to interfere with the proper and orderly functioning of the board of inquiry).

(b) Sessions shall not be open to the public when evidence of a classified nature or which affects national security is to be received.

Subpart A—Initial Procedure

§ 845.10 Determination to hold hearing.

The Board may order a public hearing as part of an accident investigation whenever such hearing is deemed necessary in the public interest: *Provided*, that if a quorum of the Board is not immediately available in the event of a catastrophic accident, the determination to hold a public hearing may be made by the Chairman of the Board.

§ 845.11 Board of inquiry.

The board of inquiry shall consist of a Member of the Board who shall be chairman of the board of inquiry, and such other employees as may be designated by the chairman of the board of inquiry. Assignment of a Member to serve as the chairman of each board of inquiry shall be determined by the Board. The board of inquiry shall examine witnesses and secure, in the form of a public record, all known facts pertaining to the accident or incident and surrounding circumstances and

conditions from which cause or probable cause may be determined and recommendations for corrective action may be formulated.

[49 FR 32853, Aug. 17, 1984]

§ 845.12 Notice of hearing.

The chairman of the board of inquiry shall designate a time and place for the hearing which meets the needs of the Board. Notice to all known interested persons shall be given.

§ 845.13 Designation of parties.

(a) The chairman of the board of inquiry shall designate as parties to the hearing those persons, agencies, companies, and associations whose participation in the hearing is deemed necessary in the public interest and whose special knowledge will contribute to the development of pertinent evidence. Parties shall be represented by suitable qualified technical employees or members who do not occupy legal positions.

(b) No party shall be represented by any person who also represents claimants or insurers. Failure to comply with this provision shall result in loss of status as a party.

[44 FR 34419, June 14, 1979, as amended at 51 FR 7278, Mar. 3, 1986]

Subpart B—Conduct of Hearing

§ 845.20 Powers of chairman of board of inquiry.

The chairman of the board of inquiry, or his designee, shall have the following powers:

(a) To designate parties to the hearing and revoke such designations;

(b) To open, continue, or adjourn the hearing;

(c) To determine the admissibility of and to receive evidence and to regulate the course of the hearing;

(d) To dispose of procedural requests or similar matters; and

(e) To take any other action necessary or incident to the orderly conduct of the hearing.

[44 FR 34419, June 14, 1979; 44 FR 39181, July 5, 1979]

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§ 845.21 Hearing officer.

The hearing officer, upon designation by the Chairman of the Board, shall have the following powers:

- (a) To give notice concerning the time and place of hearing;
- (b) To administer oaths and affirmations to witnesses; and
- (c) To issue subpoenas requiring the attendance and testimony of witnesses and production of documents.

§ 845.22 Technical panel.

The Director, Bureau of Accident Investigation, or the Director, Bureau of Field Operations, shall designate members of the Board's technical staff to participate in the hearing and initially develop the testimony of witnesses.

[49 FR 32853, Aug. 17, 1984]

§ 845.23 Prehearing conference.

(a) Except as provided in paragraph (d) of this section for expedited hearings, the chairman of the board of inquiry shall hold a prehearing conference with the parties to the hearing at a convenient time and place prior to the hearing. At such prehearing conference, the parties shall be advised of the witnesses to be called at the hearing, the areas in which they will be examined, and the exhibits which will be offered in evidence.

(b) Parties shall submit at the prehearing conference copies of any additional documentary exhibits they desire to offer. (Copies of all exhibits proposed for admission by the board of inquiry and the parties shall be furnished to the board of inquiry and to all parties, insofar as available at that time.)

(c) A party who, at the time of the prehearing conference, fails to advise the chairman of the board of inquiry of additional exhibits he intends to submit, or additional witnesses he desires to examine, shall be precluded from introducing such evidence unless the chairman of the board of inquiry determines for good cause shown that such evidence should be admitted.

(d) *Expedited hearings.* When time permits, the chairman of the board of inquiry may hold a prehearing conference. In the event that an expedited hearing is held, the requirements in paragraphs (b) and (c) of this section

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concerning the identification of witnesses, exhibits or other evidence may be waived by the chairman of the board of inquiry.

§ 845.24 Right of representation.

Any person who appears to testify at a public hearing shall be accorded the right to be accompanied, represented, or advised by counsel or by any other duly qualified representative.

§ 845.25 Examination of witnesses.

(a) Witnesses shall be initially examined by the board of inquiry or its technical panel. Following such examination, parties to the hearing shall be given the opportunity to examine such witnesses.

(b) Materiality, relevancy, and competency of witness testimony, exhibits, or physical evidence shall not be the subject of objections in the legal sense by a party to the hearing or any other person. Such matters shall be controlled by rulings of the chairman of the board of inquiry on his own motion. If the examination of a witness by a party is interrupted by a ruling of the chairman of the board of inquiry, opportunity shall be given to show materiality, relevancy, or competency of the testimony or evidence sought to be elicited from the witness.

§ 845.26 Evidence.

The chairman of the board of inquiry shall receive all testimony and evidence which may be of aid in determining the cause of accident. He may exclude any testimony or exhibits which are not pertinent to the investigation or are merely cumulative.

§ 845.27 Proposed findings.

Any party may submit proposed findings to be drawn from the testimony and exhibits, a proposed probable cause, and proposed safety recommendations designed to prevent future accidents. The proposals shall be submitted within the time specified by the presiding officer at the close of the hearing, and shall be made a part of the public docket. Parties to the hearing shall serve copies of their proposals on all other parties to the hearing.

[48 FR 52740, Nov. 22, 1983]

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§ 845.28 Stenographic transcript.

A verbatim report of the hearing shall be taken. Copies of the transcript may be obtained by any interested person from the Board or from the court reporting firm preparing the transcript upon payment of the fees fixed therefor. (See part 801, Appendix—Fee Schedule.)

§ 845.29 Payment of witnesses.

Any witness subpoenaed to attend the hearing under this part shall be paid such fees for his travel and attendance as shall be certified by the hearing officer.

Subpart C—Board Reports

§ 845.40 Accident report.

(a) The Board will issue a detailed narrative accident report in connection with the investigation into those accidents which the Board determines to warrant such a report. The report will set forth the facts, conditions and circumstances relating to the accident and the probable cause thereof, along with any appropriate recommendations formulated on the basis of the investigation.

(b) The probable cause and facts, conditions, and circumstances of all other accidents will be reported in a manner and form prescribed by the Board.

§ 845.41 Petitions for reconsideration or modification.

(a) Petitions for reconsideration or modification of the Board's findings and determination of probable cause filed by a party to an investigation or hearing or other person having a direct interest in the accident investigation will be entertained only if based on the discovery of new evidence or on a showing that the Board's findings are erroneous. The petitions shall be in writing. Petitions which are repetitious of proposed findings submitted pursuant to § 845.27, or of positions previously advanced, and petitions filed by a party to the hearing who failed to submit proposed findings pursuant to § 845.27 will not be entertained. Petitions based on the discovery of new matter shall identify the new matter; contain affidavits of prospective witnesses, au-

thenticated documents, or both, or an explanation of why such substantiation is unavailable; and state why the new matter was not available prior to Board's adoption of its findings. Petitions based on a claim of erroneous findings shall set forth in detail the grounds relied upon.

(b) When a petition for reconsideration or modification is filed with the Board, copies of the petition and any supporting documentation shall be served on all other parties to the investigation or hearing and proof of service shall be attached to the petition. The other parties may file comments no later than 90 days after service of the petition.

(c) Oral presentation before the Board normally will not form a part of proceedings under this part. However, the Board may permit oral presentation where a party or interested person makes an affirmative showing that the written petition for reconsideration or modification is an insufficient means to present the party's or person's position to the Board. Where oral presentation is allowed, the Board will specify the issues to be addressed and all parties to the investigation or hearing will be given notice and the opportunity to participate.

[48 FR 52740, Nov. 22, 1983]

Subpart D—Public Record

§ 845.50 Public docket.

(a) The public docket shall include all factual information concerning the accident. Proposed findings submitted pursuant to § 831.12 or § 845.27 and petitions for reconsideration and modification submitted pursuant to § 845.41, comments thereon by other parties, and the Board's rulings, shall also be placed in the public docket.

(b) The docket shall be established as soon as practicable following the accident, and material shall be added thereto as it becomes available. Where a hearing is held, the exhibits will be introduced into the record at the hearing.

(c) A copy of the docket shall be made available to any person for review at the Washington office of the Board. Copies of the material in the

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docket may be obtained, upon payment of the cost of reproduction, from the Public Inquiries Section, Bureau of Administration, National Transportation Safety Board, Washington, DC 20594.

[44 FR 34419, June 14, 1979, as amended at 48 FR 52740, Nov. 22, 1983]

§ 845.51 Investigation to remain open.

Accident investigations are never officially closed but are kept open for the submission of new and pertinent evidence by any interested person. If the Board finds that such evidence is relevant and probative, it shall be made a part of the docket and, where appropriate, parties will be given an opportunity to examine such evidence and to comment thereon.

PART 850—COAST GUARD—NATIONAL TRANSPORTATION SAFETY BOARD MARINE CASUALTY INVESTIGATIONS

Sec.

850.1 Purpose.

850.3 Relationship to Coast Guard marine investigation regulations and procedures.

850.5 Definitions.

850.10 Preliminary investigation by the Coast Guard.

850.15 Marine casualty investigation by the Board.

850.20 Cause or probable cause determinations from Board investigation.

850.25 Coast Guard marine casualty investigation for the Board.

850.30 Procedures for Coast Guard investigation.

850.35 Records of the Coast Guard and the Board.

AUTHORITY: Sec. 304(a)(1)(E), Independent Safety Board Act of 1974, Pub. L. 93-633, 88 Stat. 2168 (49 U.S.C. 1903).

SOURCE: 42 FR 61204, Dec. 1, 1977, unless otherwise noted.

§ 850.1 Purpose.

This part prescribes the joint regulations of the National Transportation Safety Board and the Coast Guard for the investigation of marine casualties.

[47 FR 46089, Oct. 15, 1982]

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§ 850.3 Relationship to Coast Guard marine investigation regulations and procedures.

(a) The Coast Guard's responsibility to investigate marine casualties is not eliminated nor diminished by the regulations in this part.

(b) In those instances where the Board conducts an investigation in which the Coast Guard also has responsibility under R.S. 4450 (46 U.S.C. 239), the proceedings are conducted independently, but so as to avoid duplication as much as possible.

§ 850.5 Definitions.

As used in this part:

(a) *Act* means Title III of Pub. L. 93-633, the Independent Safety Board Act of 1974 (49 U.S.C. 1901, *et seq.*).

(b) *Board* means the National Transportation Safety Board.

(c) *Chairman* means the Chairman of the National Transportation Safety Board.

(d) *Commandant* means the Commandant of the Coast Guard.

(e) *Major marine casualty* means a casualty involving a vessel, other than a public vessel, that results in—

(1) The loss of six or more lives;

(2) The loss of a mechanically propelled vessel of 100 or more gross tons;

(3) Property damage initially estimated as \$500,000 or more; or

(4) Serious threat, as determined by the Commandant and concurred in by the Chairman, to life, property, or the environment by hazardous materials.

(f) *Public vessel* means a vessel owned by the United States, except a vessel to which the Act of October 25, 1919, c. 82 (41 Stat. 305, 46 U.S.C. 363) applies.

(g) *Vessel of the United States* means a vessel—

(1) Documented, or required to be documented, under the laws of the United States;

(2) Owned in the United States; or

(3) Owned by a citizen or resident of the United States and not registered under a foreign flag.

§ 850.10 Preliminary investigation by the Coast Guard.

(a) The Coast Guard conducts the preliminary investigation of marine casualties.

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(b) The Commandant determines from the preliminary investigation whether:

(1) The casualty is a major marine casualty; or

(2) The casualty involves a public and a nonpublic vessel and at least one fatality or \$75,000 in property damage; or

(3) The casualty involves a Coast Guard and a nonpublic vessel and at least one fatality or \$75,000 in property damage; or

(4) The casualty is a major marine casualty which involves significant safety issues relating to Coast Guard safety functions, e.g., search and rescue, aids to navigation, vessel traffic systems, commercial vessel safety, etc.

(c) The Commandant notifies the Board of a casualty described in paragraph (b) of this section.

[42 FR 61204, Dec. 1, 1977, as amended at 47 FR 46089, Oct. 15, 1982]

§ 850.15 Marine casualty investigation by the Board.

(a) The Board may conduct an investigation under the Act of any major marine casualty or any casualty involving public and nonpublic vessels. Where the Board determines it will convene a hearing in connection with such an investigation, the Board's rules of practice for transportation accident hearings in 49 CFR part 845 shall apply.

(b) The Board shall conduct an investigation under the Act when:

(1) The casualty involves a Coast Guard and a nonpublic vessel and at least one fatality or \$75,000 in property damage; or

(2) The Commandant and the Board agree that the Board shall conduct the investigation, and the casualty involves a public and a nonpublic vessel and at least one fatality or \$75,000 in property damage; or

(3) The Commandant and the Board agree that the Board shall conduct the investigation, and the casualty is a major marine casualty which involves significant safety issues relating to Coast Guard safety functions.

[47 FR 46090, Oct. 15, 1982]

§ 850.20 Cause or probable cause determinations from Board investigation.

After an investigation conducted by the Board under § 850.15, the Board determines cause or probable cause and issues a report of that determination.

§ 850.25 Coast Guard marine casualty investigation for the Board.

(a) If the Board does not conduct an investigation under § 850.15(a), (b)(2) or (3), the Coast Guard, at the request of the Board, may conduct an investigation under the Act unless there is an allegation of Federal Government misfeasance or nonfeasance.

(b) The Board will request the Coast Guard to conduct an investigation under paragraph (a) of this section within 48 hours of receiving notice under § 850.10(c).

(c) The Coast Guard will advise the Board within 24 hours of receipt of a request under paragraph (b) of this section whether the Coast Guard will conduct an investigation under the Act.

[47 FR 46090, Oct. 15, 1982]

§ 850.30 Procedures for Coast Guard investigation.

(a) The Coast Guard conducts an investigation under § 850.25 using the procedures in 46 CFR 4.01-1 through 4.23-1.

(b) The Board may designate a person or persons to participate in every phase of an investigation, including on-scene investigation, that is conducted under the provisions of § 850.25.

(c) Consistent with Coast Guard responsibility to direct the course of the investigation, the person or persons designated by the Board under paragraph (b) of this section may:

(1) Make recommendations about the scope of the investigation.

(2) Call and examine witnesses.

(3) Submit or request additional evidence.

(d) The Commandant provides a record of the proceedings to the Board of an investigation of a major marine casualty under paragraph (a) of this section.

(e) The Board, under the Act, makes its determination of the facts, conditions, and circumstances, and the cause or probable cause of a major marine casualty, using the record of the

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proceedings provided by the Commandant under paragraph (d) of this section and any additional evidence the Board may acquire under its own authority.

(f) An investigation by the Coast Guard under this section is both an investigation under the Act and under R.S. 4450 (46 U.S.C. 239).

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§ 850.35 Records of the Coast Guard and the Board.

(a) Records of the Coast Guard made under § 850.30 are available to the public under 49 CFR part 7.

(b) Records of the Board made under §§ 850.20 and 850.30 are available to the public under 49 CFR part 801.

PARTS 851–999 [RESERVED]