

## NATIONAL TRANSPORTATION SAFETY BOARD

### 49 CFR Part 831

[Docket No. NTSB-GC-2012-0002]

RIN 3147-AA01

### Investigation Procedures

**AGENCY:** National Transportation Safety Board (NTSB).

**ACTION:** Final rule.

**SUMMARY:** This final rule adopts revisions to the NTSB's regulations regarding its investigative procedures. The intent of these revisions is to reorganize, clarify and update the regulations to reflect the last 20 years of NTSB's experience in conducting transportation investigations. These regulations affect investigations of transportation accidents within the NTSB's statutory authority, except marine casualty investigations.

**DATES:** This rule is effective July 31, 2017.

**ADDRESSES:** A copy of this Final Rule, published in the **Federal Register** (FR), is available for inspection and copying in the NTSB's public reading room, located at 490 L'Enfant Plaza SW., Washington, DC 20594-2003. Alternatively, a copy is available on the government-wide Web site on regulations at <http://www.regulations.gov> (Docket ID Number NTSB-GC-2012-0002).

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### SUPPLEMENTARY INFORMATION:

#### I. Abbreviations and Acronyms Used in This Document

ARSA—Aeronautical Repair Station Association  
 AIA—Aerospace Industries Association  
 ALPA—Air Line Pilots Association, International  
 ATSAP—Air Traffic Safety Action Program  
 AOPA—Aircraft Owners and Pilots Association  
 A4A—Airlines for America  
 AAJ—American Association for Justice  
 ATA—American Trucking Associations  
 AAR/ASLRRRA—Association of American Railroads and American Short Line and Regional Railroad Association  
 ASAP—Aviation Safety Action Program  
 Aidyn—Aidyn Corporation  
 Boeing—The Boeing Company  
 CPUC/RTSB—California Public Utilities Commission, Rail Transit Safety Branch  
 CVR—Cockpit voice recorder  
 DHHS—Department of Health and Human Services  
 DOT—Department of Transportation  
 DOT OAs—Department of Transportation Operating Administrations

EAR—Export Administration Regulations  
 FAA—Federal Aviation Administration  
 FAA COS—Federal Aviation Administration Continued Operational Safety  
 FDR—Flight data recorder  
 FOQA—Flight Operational Quality Assurance  
 FOIA—Freedom of Information Act  
 GE—GE Aviation  
 GAMA—General Aviation Manufacturers Association  
 HIPAA—Health Insurance Portability and Accountability Act of 1996  
 HAI—Helicopter Association International  
 IPA—Independent Pilots Association  
 ICAO—International Civil Aviation Organization  
 ITAR—International Traffic in Arms Regulations  
 IIC—Investigator-in-charge  
 Kettles—The Kettles Law Firm, PLLC  
 NADAF—National Air Disaster Alliance/Foundation  
 NATCA—National Air Traffic Controllers Association  
 NBAA—National Business Aviation Association  
 NTSB—National Transportation Safety Board  
 NJASAP—Net Jets Association of Shared Aircraft Pilots  
 RMA—Rubber Manufacturers Association  
 Sikorsky—Sikorsky Aircraft Corporation  
 SWAPA—Southwest Airlines Pilots' Association  
 Textron—Textron Aviation  
 United—United Airlines  
 USCG or Coast Guard—United States Coast Guard  
 VSI—Voluntarily submitted information

#### II. Background

In June 2012, the NTSB published a proposed rule stating the agency's intent to review its regulations (77 FR 37865, June 25, 2012). That review was undertaken in response to Executive Order 13579, "Regulation and Independent Regulatory Agencies" (76 FR 41587, July 14, 2011). That Order sought to ensure that all independent regulatory agencies address the key principles of Executive Order 13563, "Improving Regulation and Regulatory Review" (76 FR 3821, January 21, 2011). Together, the Executive Orders encourage agencies to review their regulations with an eye to promoting public participation in rulemaking, improving integration and innovation, promoting flexibility and freedom of choice, and ensuring scientific integrity during the rulemaking process in order to create a regulatory system that protects public health, welfare, safety, and the environment while also promoting economic growth, innovation, competitiveness, and job creation. In undertaking its review, the NTSB stated that it is committed to updating its regulations and incorporating these principles. The NTSB proposed rule also described NTSB's commitment to reviewing, in

particular, 49 CFR part 831, titled "Investigative Practices and Procedures."

The previous revision to part 831 of the NTSB's regulations on accident investigation procedures was published in 1997 (62 FR 3806, January 27, 1997). In August 2014, the NTSB published an NPRM proposing substantive changes to and reorganization of 49 CFR part 831, (79 FR 47064, August 12, 2014). In this revision to part 831, the NTSB sought to reorganize its investigative rules to reflect its authority to investigate accidents that occur in different modes of transportation, and to update those regulations based on its investigative experience of the previous 20 years.

#### III. Reorganization and Reformatting

The 2014 NPRM proposed various changes to the organizational structure of the investigative rules and sought to present a set of regulations applicable to all modes of transportation (Subpart A) and individual subparts that address matters specific to modes of transportation (subparts B, C and D). In view of the unique nature of the NTSB's relationship with the USCG in conducting marine casualty investigations, as codified in statute, the NTSB will address its marine casualty investigative procedures in a separate rulemaking. New Subpart E of part 831 appears as an interim final rule published elsewhere in this issue of the **Federal Register**.

In this final rule, the regulations in part 831 reflect this separation of transportation modes by subpart. This final rule also reformats several sections to make them easier to read, understand and reference. The reformatting was not intended to introduce any substantive change not addressed in the disposition of comments below.

#### IV. Comments Received

The NTSB received 38 comments in response to the August 12, 2014 NPRM. Commenters included organizations from various sectors of the transportation industry, nonprofit organizations, law firms, individuals, two Federal Government agencies, and one state government agency.

The USCG submitted a comprehensive comment on the regulations as they relate to marine casualties within its jurisdiction. The NTSB has a unique relationship with the USCG as evidenced by the NTSB's statutory authority (49 U.S.C. 1131(a)(1)(E)), its joint marine casualty regulations with the Coast Guard (codified at 49 CFR part 850 for the NTSB and at 46 CFR subpart 4.40 for the Coast Guard), and a Memorandum of

Understanding outlining cooperation and coordination between the two agencies when conducting marine casualty investigations. The NTSB determined that it is appropriate to exclude the USCG from the general investigative rules of subpart A of part 831, and instead include the rules applicable to marine investigations in a new subpart E of part 831 to be titled "Marine Investigations." Therefore, the language proposed in August 2014 as sections 831.50 and 831.51 has been stricken from this rule. As mentioned above, the NTSB is publishing an interim final rule containing these changes and additions to subpart E concurrent with this final rule.

#### IV. Analysis of Issues

##### A. Section 831.1 and the Term "Event"

The NTSB proposed adoption of the more general term "event" when referencing the various types of accidents and incidents that it has the authority to investigate. The new term was proposed to function as a general descriptor and eliminate the need for reference to a laundry list of mode-specific terms such as collision, crash, mishap, or rupture in sections that apply across modes.

Commenters almost universally expressed concern that a change to the broader term "event" could be viewed as an attempt to expand the NTSB's investigative authority. The DOT suggested inclusion of the phrase "consistent with statutory authority" in the regulatory text to prevent this perception. Aviation industry commenters noted that the NTSB's regulations already define "accident" and "incident" in part 830, concluding that the term "event" might later be distinguished from these widely understood terms used by the aviation industry. The commenters also noted the proposed rule did not include a definition of event, raising question of how that term might differ from the well-known definitions of accident and incident.

Based on these comments, we are not adopting the term event in this final rule. In its place, we are adopting the term "accident" as a general descriptor. Section 831.1(b) includes a list of transportation events that are the responsibility of the NTSB to investigate, as well as a statement that the use of the term "accident" in part 831 subparts A through D is intended to include all such listed events in the NTSB's authority.

Section 831.1(a) contains a more general reference to the NTSB's statutory authority. A new paragraph (c)

was added to address the use of the abbreviation "IIC" (for "Investigator-in-charge") throughout the part.

##### B. Section 831.2 Responsibility of the NTSB

This final rule adopts a different format for § 831.2 than was proposed. The section was reformatted to better identify the subject of the new modal subparts. No substantive changes were made, and the section is otherwise adopted as proposed.

ATA requested that the agency develop a definition for of the term "catastrophic" outside of the rail and aviation modes. We did not propose language to define catastrophic in this rulemaking and decline to do so at this time. What is considered a catastrophic accident can vary by mode of transportation and the circumstances surrounding the accident. Our statute leaves it to the discretion of the Board to determine whether to investigate "any other [catastrophic] accident related to the transportation of individuals or property" as specified in 49 U.S.C. 1131(a)(1)(F).

##### C. Section 831.3 Authority of Directors

This section was revised for grammatical content only. It is otherwise adopted as proposed.

##### D. Section 831.4 Nature of Investigation

We proposed retention of the regulatory text that describes the characteristics and purposes of the NTSB's investigations, including the statement that investigations are fact-finding proceedings in which the NTSB does not attempt to determine the rights or liabilities of any person or entity. The section also states that the NTSB determines the probable cause of the accident after gathering all necessary information. We proposed adding that the NTSB also "causes investigations to be conducted," because other Federal agencies gather records and other evidence and provide information to the NTSB in furtherance of an investigation. We noted the phrase "on behalf of" and "authorized representatives of the [NTSB]" already appear throughout various sections of part 831. We also proposed adding a phrase indicating that one of the goals of our investigations is to mitigate the effects of future accidents. New subparagraphs in § 831.4 were proposed to identify the phases of investigations, including preliminary and formal. In the preamble to the NPRM, we explained that we may upgrade or downgrade investigations between these categories as we proceed with each investigation. We received

several comments on these proposed changes.

##### 1. "Causes Investigations To Be Conducted" and "Mitigate the Effects of"

DOT opposed inclusion of the phrase "causes investigations to be conducted" since DOT modal agencies "have their own responsibilities" and do not perform work on behalf of the NTSB. GE suggested we reference "authorized representative" in the description of "on-scene investigation" in proposed § 831.4(b)(3)(i).

The CPUC/RTSB, the state agency charged with oversight of rail transit system safety in California, agreed with including the phrase "mitigate the effects of" any future occurrences. Since the NTSB shares investigative information with parties, the CPUC/RTSB concluded that including this phrase may help in its own information gathering and the mitigation of effects of similar future accidents.

This final rule adopts the phrase "conducts investigations" to reflect the NTSB's statutory authority.<sup>1</sup> This final rule includes the phrase "mitigate the effects of." The NTSB acknowledges the independent authority of other agencies and the assistance they provide to the NTSB following an accident.

##### 2. "Preliminary and Formal Investigations" and "Manner of Investigations"

The majority of commenters, including Boeing, HAI, Airbus Helicopters, GAMA, United, and Textron, found the proposed description of the phases of investigation ("preliminary" and "formal") to be unnecessary or requiring more clarification than was provided in the proposed rule. Several commenters also stated that including these terms raised new questions of the exact timing of when one phase ends and the next begins, whether and how the NTSB would inform parties of the relevant phase as an investigation proceeds, and when the NTSB might downgrade an investigation from formal to preliminary. Boeing suggested we retain flexibility with all investigations and refrain from adopting a "one-size-fits-all approach," especially for formal investigations. Commenters, including GE and NBAA, also recommended that we clarify whether activities listed in the proposed rule text (*e.g.*, visiting the site of an accident, interviewing

<sup>1</sup> 49 U.S.C. 1131(a)(1), requires the NTSB to "investigate or have investigated (in detail the Board prescribes) and establish the facts, circumstances, and cause or probable cause of" the accidents listed in section 1131(a)(1)(A)-(F).

witnesses, conducting testing, extracting data, gathering documentation, or engaging in any other activities), are simply examples or are to be considered exhaustive.

We are not adopting the proposed descriptions of and distinctions between preliminary and formal investigations. While the NPRM sought to explain the activities we conduct in a typical investigation, in reality, investigative activities may vary widely from case to case. Decisions by NTSB investigators at the site of an accident are often made immediately, without reference to a formalized determination of status of the investigation. In some cases, the NTSB may choose to forego a preliminary investigation and immediately launch a full investigative staff. In some cases, a Board Member may accompany staff. In other cases, we may review records and other evidence, choose not to travel to the site of an accident or incident, and close the investigation following a review of all information collected. Since most of these decisions and actions are internal to the NTSB based on the unique circumstances of an accident, we have determined that formalized discussions of the status of an investigation are not necessary or appropriate for regulatory text. Similarly, we are removing the list describing the manner of and activities associated with investigations. Since the list may be too restrictive or the descriptions not applicable across transportation modes, we are placing this information in the mode-specific new subparts that address them, as described in § 831.2.

### 3. Cost-Benefit Analysis for Recommendations

In its comment, ATA suggested we include cost-benefit analyses in reports that contain safety recommendations. ATA stated that because regulatory agencies “cannot promulgate regulatory standards that fail a cost-benefit test, recommendations with costs that exceed benefits are exceedingly unlikely to be adopted,” limiting the effectiveness of recommendations. The ATA concluded that agencies may fail to enact NTSB recommendations that are cost beneficial because they become “lost” in a “growing list of perpetually open recommendations” that do not get cost-benefit analyses.

The NTSB is sensitive to the reality of safety recommendations that are not feasible for regulatory agencies to adopt because of their cost. As a result, the NTSB often recommends non-regulatory actions, such as promulgating guidance, conducting evaluations, or exploring the feasibility of various other actions to

improve safety. Further, various sectors of the transportation industry may find value in NTSB recommendations and may choose to develop means to implement them as good business practice even when not required by regulation.

There are several reasons the NTSB does not perform the type of cost-benefit analyses undertaken by regulatory agencies. NTSB recommendations are often articulated broadly, while agency regulations implementing them may necessarily be very specific and require specialized knowledge of equipment, practices, and industry economics to be implemented effectively. Recommendations are not always issued specific to certain equipment or certain operations, while estimated costs must be described specifically. Cost-benefit analyses are resource and time intense using specialized staff, and could result in delayed issuance of safety critical recommendations. Cost benefit analyses are often modified by the information gained during the rulemaking process, possibly rendering any initial cost-benefit analytical efforts by the NTSB of little value. The timely accomplishment of a cost-benefit analysis is best left to the regulatory agencies subject to the standards for their completion at the time a specific solution is proposed by the agency. A duplicative or untimely product by the NTSB would not serve the public interest in advancing transportation safety.

#### *E. Section 831.5 Priority of NTSB Investigations*

In the NPRM, the NTSB proposed reorganizing § 831.5 into two paragraphs and revising the text to address how the NTSB will exercise its priority over other Federal investigations when other Federal agencies seek to interview witnesses and gather evidence. In the preamble to the NPRM, we stated the proposed regulatory language sought to balance our need to conduct investigative activities while remaining cognizant of the need for other agencies to fulfill their statutory mandates, such as rulemaking and enforcement.

We described one proposed change as stating that other Federal agencies must conduct their work in a manner consistent with our statutorily granted priority.<sup>2</sup> To carry out this objective, we

<sup>2</sup> For all investigations except major marine casualty investigations, 49 U.S.C. 1131(a)(2)(A) provides that the NTSB’s investigation has priority over other federal agencies’ investigation. The NTSB must provide for the “appropriate participation” of other agencies in its investigation. Nonetheless, determining the probable cause of an accident is exclusively the duty and responsibility of the NTSB. See also 49 U.S.C. 1135(a) (requiring

proposed: (1) Employees of other Federal agencies who are involved in parallel activities contact the NTSB IIC prior to questioning a witness, gathering records or other evidence, or otherwise obtaining any type of information relevant to the non-NTSB investigation; (2) Federal agencies communicate with us about the information they collect relevant to an investigation; and (3) Federal agencies inform us of corrective or mitigating actions they are taking during the course of an investigation.

In their comments, other government entities generally expressed concern that the NTSB was overstating its authority and had proposed language that could result in interference with investigations conducted by other agencies. We have redrafted § 831.5 to reflect these concerns by more closely tracking the language of our statutory authorization, primarily that found in 49 U.S.C. 1131(a)(2)(A). It was apparent that not all commenters were familiar with the several provisions in that section regarding the priority of NTSB investigations and the participation of other Federal agencies. We address some of the particular issues raised below.

#### 1. NTSB Authority To Exercise Priority Over Other Federal Investigations

In its comment, DOT recognized that the NTSB “certainly” has priority in investigations, but stated “[h]owever, this ‘priority’ does not authorize the Board to exercise ‘exclusive’ authority to determine how all information is gathered by another agency, nor does it confer the Board with ‘advance approval’ authority over other agencies’ investigations.” DOT stated that these requirements could interfere with a DOT operating administration’s exercise of its own authority.<sup>3</sup> DOT indicated that our proposal stating we have “exclusive authority” to decide when, and the manner in which, testing, extraction of data, and examination of evidence will occur is “precisely what 49 U.S.C. Section 1131(a)(3) appears to prohibit.” DOT noted that the statute “makes it clear that the NTSB’s authorities ‘do not affect’ the authority of another agency from investigating matters within its jurisdiction.” DOT feared the language could serve to “undermine transportation safety” by

the Secretary of the Department of Transportation to respond to NTSB safety recommendations within 90 days of the issuance of such recommendations).

<sup>3</sup> DOT listed the authorities of the Federal Railroad Administration, the Pipeline and Hazardous Materials Safety Administration, and the Federal Transit Administration. Later in its comment on this issue, DOT mentioned the Federal Motor Carrier Safety Administration and the FAA.

restricting agencies with expertise from making “independent and timely safety determinations.” DOT also noted that the authority granted to its operating administrations to address imminent hazards may mean that they arrive on site before NTSB investigators arrive, “or may otherwise need to commence an investigation while evidence is still present, with an eye towards taking potential immediate corrective action.” DOT stated that the proposed requirement to obtain IIC approval before collecting evidence could impair the effectiveness of its investigations, and possibly delay or prevent “immediate corrective action” taken through DOT orders.

The NBAA was concerned that the proposed priority language might adversely affect FAA continued operational safety (COS) activities. They also raised concern with the requirement that other agencies coordinate with the IIC regarding fact-gathering, which could delay investigations, particularly when the IIC is “resource constrained.”

United stated it appreciated the efforts of the NTSB and FAA to reach agreement concerning FAA access to COS information during an NTSB investigation [known as the Ashburn agreement, included in the public docket for this rulemaking].

United recommended inclusion of provisions of the policy agreement in § 831.5 as appropriate. United stated that the FAA may obtain information while participating in NTSB investigations, and may use that information to carry out “COS responsibilities, which also frequently migrate into disciplinary actions against individual certificated employees or the company involved in the event.” United suggested that when the FAA is going to use such information obtained through an investigation, the FAA inform the IIC and the company so that appropriate internal actions can be taken.

The CPUC/RTSB noted that although the NTSB’s authorizing legislation, provides for investigative priority when other Federal agencies are involved, the language does not include priority over state agencies. CPUC/RTSB stated that when a state agency is a party to an NTSB investigation, the state agency should be granted concurrent access in reviewing evidence as long as it does not release or publish such information.

CPUC/RTSB also expressed concern regarding NTSB’s priority over other agencies’ investigations. CPUC/RTSB recognized the “importance of keeping NTSB investigators informed of all actions of state and/or local regulators,” but remained concerned that the NTSB

investigation could hamper a state agency’s ability to take corrective action as a regulator. CPUC/RTSB stated that it has encountered delays in collecting or gaining access to evidence or information that have “limited [its] abilities to take timely action to address identified concerns.”

We have reviewed the considerable concerns and suggestions made by commenters regarding proposed § 831.5. As stated above, we realized that some commenters may not have fully distinguished the different statutory provisions related to the scope and priority of the NTSB’s investigations. We have redrafted that section to more closely track the language of the statute regarding investigative priority, right of first access, and the relationship between the NTSB and other authorities investigating transportation accidents.

The legislative history concerning NTSB’s priority establishes that, since 1981, Congress intended the NTSB to have “first priority” for its accident investigations. H.R. Rep. No. 97–108, pt. 1, 1981 U.S.C.C.A.N. 1729, 1730. This priority was established “to reduce duplicate Federal accident investigations,” to prevent “waste,” and to eliminate unnecessary “burdens” associated with duplicative investigations by multiple agencies. *Id.* “[I]t is desirable to have one Federal agency responsible for coordinating accident investigations. Designating a lead agency will help prevent duplicate investigations and unnecessary disputes over jurisdiction.”<sup>4</sup> The statutory priority “protects the legitimate roles of other agencies,” given that “participation by these agencies in the Board’s investigations shall be assured.” *Id.* The Committee further stated, “all appropriate information obtained or developed by the Board . . . shall be exchanged in a timely manner with other Federal agencies.” *Id.* The Committee reasoned Federal agencies should obtain substantial information through participating in NTSB investigations, reducing the need for those agencies to conduct their own parallel investigations.

This priority is critical to the conduct of independent, comprehensive investigations that the Congress has tasked the NTSB with completing. The NTSB is aware that Congress intended that it share information with other

<sup>4</sup> H.R. Rep. No. 97–108, pt. 2, 1981 U.S.C.C.A.N. 1734, 1736. This is from a report of the House of Representatives’ Committee on Public Works and Transportation, the predecessor of the current Committee on Transportation and Infrastructure, which exercises primary oversight jurisdiction in the U.S. House of Representatives with respect to the NTSB.

agencies in a timely manner while remaining independent of enforcement and other regulatory activities intrinsic to those agencies.

This final rule adopts the term “priority” to indicate the status of the NTSB’s investigation of an accident in which another Federal agency has a significant role. Pursuant to its statutory responsibility, the NTSB will provide for the participation of other Federal agencies. Notwithstanding its responsibility to share information with other Federal agencies, the NTSB exercises its authority to gain first access to witnesses, wreckage, and other evidence. The NTSB considers this a fair reading of the statute, while remaining mindful of the requirement other government entities may have to investigate and take action after accidents. We will continue our long-held practices that provide the opportunity for Federal, state, and local agencies participating in an investigation to receive the information that we collect in a timely manner, and avoid the need for duplicative requests.

For example, in a recent rail investigation, another Federal agency participating in the investigation informed the NTSB IIC of the agency’s need to provide information to additional employees within that agency. After coordinating with the IIC, the NTSB accommodated the other agency’s request by permitting its employees who were not party participants to obtain the necessary factual information. Similarly, when an operator who is a party in an investigation sends records or information to the NTSB via email or in some electronic format, we generally do not oppose the operator sending a copy to another Federal agency. While we maintain that we have priority in an investigation, we appreciate that the timely sharing of information is a best practice for all agencies involved in investigating a transportation accident.

As to the meeting we held with the FAA in January 2014, we consider the resulting policy letter to be a step forward in cooperation between the agencies. However, such policy was negotiated only with the FAA, and the content of the letter is not appropriate for inclusion in a more general regulation. We used our experience with that negotiation in drafting this final rule, and believe that the spirit of that agreement is reflected in the regulations we are adopting here.

Regarding our relationships with state agencies, we intend to continue working with them in a manner similar to our practices with Federal agencies. We often rely on the local knowledge

intrinsic to state agencies following an accident, and usually coordinate with them concerning the timing of certain investigative activities and releases of information to ensure we do not impede a state agency's contemplated enforcement or other activities.

Each investigation presents challenges we must review on a case-by-case basis, and investigators in each NTSB safety office may vary its activities in response to the needs of the investigation. We are adopting language that indicates the expectation that other Federal agencies will coordinate their investigative efforts, and remain cognizant of the priority and authority granted to the NTSB by Congress. The language of § 831.5 must remain sufficiently general to encompass our interactions with other agencies in all types of investigations.

## 2. Authority of Other Federal Agencies

We have included language suggested by DOT that states nothing in our regulations limits the authority of other Federal agencies to conduct their own investigations.

We recognize that other agencies have separate, distinct responsibilities. The FAA and other agencies within DOT assist the NTSB during investigations as parties. As with other parties, we will ask DOT agencies for assistance and expertise. We are not adopting the term "authorized representative" as proposed, since commenters interpreted it as the NTSB authorizing other agencies to act for it. Since that has never been true, we are eliminating that term from the final rule.

## 3. Testing

As discussed previously, some commenters questioned the NTSB's authority to determine the manner and method of testing. In reviewing the comments, it appeared that several commenters may not be aware of the specific language of 49 U.S.C. 1134(d), titled "Exclusive authority of the Board," which states "Only the Board has the authority to decide on the way in which testing under this section will be conducted." The commenters were concerned with the use of the word exclusive, but none explained a perceived difference between it and word "only" when used in the context of testing. This exclusive authority has been upheld by the courts. *See, Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 647 (10th Cir. 1990); *Graham v. Teledyne-Continental Motors*, 805 F.2d 1386, 1389 (9th Cir. 1986); *Miller v. Rich*, 723 F.Supp. 505 (C.D. Cal. 1989). Commenters may have interpreted the exclusive testing language to mean the

NTSB was asserting a broader exclusive authority to investigate an accident. That was not intended. The NTSB continues to acknowledge that other agencies may be authorized to conduct other investigations.

## 4. Provision of Information Relating to Other Federal Agencies' Activities

We proposed a requirement that other Federal agencies coordinate and communicate with the NTSB about their activities to avoid duplication and to ensure more efficient Federal investigations.

Commenters objected to the proposal that Federal agencies provide the results of their investigations to us when such investigations are for purposes of remedial action or safety improvement. The proposed language stated, "[i]n general, this requirement will not apply to enforcement records or enforcement investigation results." The DOT requested that the NTSB clarify the circumstances under which we might demand enforcement records or enforcement investigation results. DOT recommended that we clarify whether we would seek such records upon request, or in every instance, and noted that a request in every instance would be unduly burdensome.

We are adopting language in § 831.5(b)(3) stating that the NTSB may request the results of any reviews undertaken by other Federal agencies aimed at safety improvements or remedial action. Examples of these results might be copies of reviews that result in advisory materials, rulemaking actions, or interpretive guidance. We will not routinely request enforcement investigation reports or results.

We anticipate that we might need to request documents that reflect another Federal agency's preliminary deliberations, and we understand that these documents would be exempt from public disclosure under Exemption 5 of the FOIA. If the NTSB received a FOIA request regarding such deliberative documents, we would refer the request to the submitting agency to make a public release determination. This approach is consistent with standard practice among government agencies.

We note that we had proposed language in this section indicating the NTSB may take possession of wreckage or other evidence. Boeing commented that this language was unnecessary given NTSB statutory authority, or in the alternative, that such language is more appropriately placed in § 831.9, which addresses NTSB authority during investigations. We agree with Boeing that the language is more appropriately

included in section 831.9, and thus have moved it to that section.

## F. Section 831.6 Request To Withhold Information

In the NPRM, the NTSB proposed changes to § 831.6 that include reformatting the section into different paragraphs and adding language that differentiates treatment of information in domestic accidents and international accidents.

Proposed provisions regarding the non-release of commercial information under the Trade Secrets Act and the FOIA generated significant comments. Boeing stated that the NTSB should conform its practice "more closely to the statutory requirement" with regard to the Trade Secrets Act. Boeing noted that 49 U.S.C. 1114(b)(1) allows disclosure only in four limited circumstances, one of which is to protect health and safety after providing the entity notice of the planned release and an opportunity to comment.<sup>5</sup> Boeing asserted that the NTSB has in recent years read more broadly the health and safety exception that allows release to the public. Boeing stated that this position may lead to the disclosure of "a broad range of Boeing trade secrets to the public" while the connection of the information to public health and safety is "attenuated at best." Boeing suggested limiting the scope of the exception "to the disclosure of data necessary to prevent imminent risks to the traveling public" to "better comport with the Congressional intent of ensuring strong trade-secret protections subject only to carefully defined exceptions."

Textron stated that while it will continue to provide proprietary data relevant to an investigation, it is concerned that the proposed language in § 831.6 "potentially inhibits the free flow of information during an investigation." GAMA requested that we establish a consistent process to ensure the continued protection of proprietary data.

## 1. Confidential Business Information

We have reformatted § 831.6. The NTSB retains the authorization to disclose "information related to a trade secret," as defined by 18 U.S.C. 1905, without the consent of the owner when

<sup>5</sup> Boeing notes the remaining three exceptions that permit release other than to the general public are narrow, with a minimal risk of public disclosure. The three exceptions permit release to other government agencies for official use, to a committee of Congress that has jurisdiction over the subject matter to which the information is related, or in judicial proceedings pursuant to a court order that preserves the confidentiality of the information. 49 U.S.C. 1114(b)(1).

necessary to “to protect public health and safety” under 49 U.S.C. 1114(b)(1)(D). We interpret this to mean disclosure is necessary to support a key finding, a safety recommendation, or the NTSB’s statement of probable cause of an accident or incident.

When we release information related to a trade secret or confidential commercial information without consent, we do so in a manner designed to preserve confidentiality.<sup>6</sup> We interpret this to require that the agency minimize the scope and extent of information released. The NTSB is also subject to the limitations on disclosure in FOIA Exemption 4 (5 U.S.C. 552(b)(4)), and relevant case law, when a FOIA request is made that requests disclosure of trade secrets or confidential commercial information.<sup>7</sup>

In § 831.6(c), we set out the procedure for informing the owner of the subject information under consideration for disclosure. When a party has identified information as a trade secret that the NTSB believes needs to be disclosed to protect public health and safety, we engage in a process of negotiation to limit the disclosure while still meeting the agency’s needs to explain the accident or issue safety recommendations. NTSB investigative staff makes initial decisions about what to include in its reports based on investigative needs and understandings of company confidentiality concerns obtained by working with the party representatives. When submitters of information to the NTSB claim information is confidential and should be withheld from public disclosure, such as in the public docket, the NTSB Office of General Counsel will address these issues with the submitter’s counsel. A submitter must identify in writing information it objects to releasing. The NTSB Office of General Counsel discusses the submitter’s objections internally (with NTSB report writers and investigative staff) to understand whether and why the identified information is necessary to support a finding, safety recommendations, or probable cause statement. The NTSB Office of the General Counsel will generally negotiate with the submitter’s counsel until an agreement regarding release of the material can be reached.

If the submitter and the NTSB cannot reach agreement, the NTSB will notify the submitter in writing of the NTSB’s

intent to release the information under its statutory authority. This written notification will provide at least 10 days’ advance notice of the NTSB’s intent to disclose the information.

Confidential business information material considered for release is reviewed using the same analytical framework as the agency employs in determining whether submitted information is subject to withholding in accordance with FOIA Exemption 4. If the agency could not withhold information in response to a FOIA request, we will use it in agency reports as desired. If an Exemption 4 analysis concludes that information should be withheld, we will consider whether release is necessary and release the information only as is consistent with NTSB statutory authority.

We proposed limiting the applicability of § 831.6 to domestic matters, and considering information we receive regarding international aviation investigations under proposed § 831.23 (now renumbered as § 831.22). We also stated we would not release information from an international investigation if the information would be protected by the Trade Secrets Act. Our statements regarding this change raised questions of ambiguity of our intent. For example, an accident or incident occurring in U.S. territory will often involve both foreign and domestic entities. As a recent example, these questions arose in the context of the Asiana Flight 214 investigation (involving a foreign operator) and the Boeing 787 Battery Fire investigation (involving foreign component manufacturers).

There is no practical difference in our process or authority for treating trade secrets or confidential commercial information based on identifying the source of the information as domestic or foreign, even though the foreign entities participate as advisors to accredited representatives in accordance with ICAO Annex 13 (“Aircraft Accident and Incident Investigation”). The Trade Secrets Act does not differentiate between information received from domestic or foreign companies. *See* 18 U.S.C. 1905. Similarly, FOIA Exemption 4 applies to information “obtained from a person,” which is read broadly to include both foreign and domestic entities. *See, e.g., Maryland Dep’t of Human Resources v. Dep’t of Health and Human Serv.*, 763 F.2d 1441, 1445 n.1 (D.C. Cir. 1985) (citing *Stone v. Export-Import Bank*, 552 F.2d 132, 136 (5th Cir. 1977)).

Accordingly, we are not adopting the domestic vs. foreign distinction in this final rule. We will continue to treat information from both domestic and

foreign sources consistently for purposes of determining whether disclosure of information related to a trade secret or confidential commercial information is authorized.

The NTSB’s release of investigative information from a foreign accident investigation is limited by statute (49 U.S.C. 1114(f)) and by these regulations. We have included this information in § 831.22.

## 2. Voluntarily Submitted Information (VSI)

We specifically requested comments concerning the protection of VSI from disclosure. In the NPRM, we proposed language that more closely replicates 49 U.S.C. 1114(b)(3).<sup>8</sup> We recognize this topic is of significant interest to the transportation industry and other government agencies, and specifically invited comments on the issue of the NTSB’s disclosure of VSI.

The agency will issue interpretative guidance to more fully explain the process for the NTSB’s use and protection of VSI. In the interim, the language adopted in § 831.6(d) represents the need of the NTSB to access such information and protect that information from public release.

A4A, which had previously submitted a comment on this issue in response to our plan for retrospective review of our regulations in 2012, reiterated its view that we should protect all VSI. In its comment in response to our NPRM, A4A stated the NTSB’s “supposition that the collection and dissemination of such information that may be used in a Board investigation cannot be protected is wrong and is not in the public interest.” A4A emphasizes the importance of protecting VSI, and states the success of the effectiveness of VSI systems “depends on participants’ confidence that inappropriate disclosure will not occur.” A4A further stated that the NTSB’s protection of such information will not inhibit the conduct of our investigations or our ability to disclose “relevant information and conclusions to the public.” A4A concluded that the NTSB “should adopt a policy of invoking Exemption 4” to deny release of any voluntarily submitted safety information. A4A also suggested the NTSB publish a “non-exclusive list of categories of information that it will not publicly disclose,” and pursue legislation to provide assurance it may need to do so. HAI also urged us to explore a statutory exemption “or any other possible

<sup>6</sup> 49 U.S.C. 1114(b)(2).

<sup>7</sup> Exemption states “trade secrets and commercial or financial information obtained from a person and privileged or confidential” are exempt from disclosure under the FOIA.

<sup>8</sup> Section 1114(b)(3) describes the conditions under which the NTSB, or any agency receiving VSI from the NTSB, is prohibited from disclosing VSI.

methods to safeguard the disclosure of safety-related proprietary data and trade secrets." HAI stated that protection of safety information is critical to the effectiveness of safety risk management and the development of effective safety recommendations.

RMA and ARSA also raised FOIA exemption 4 as a basis for maintaining the confidentiality of information submitted to us voluntarily. As with the other commenters, the RMA stated that strengthening our protections for VSI will "remove potential barriers for companies providing such information voluntarily."

Boeing, NATCA, and AAR/ASLRRA suggested removing the term "in general" from proposed § 831.6(b)(1) and (2), which they read as a misstatement of the statutory prohibition. Boeing states 49 U.S.C. 1114(b)(3) "flatly prohibits the release of such information, if the NTSB 'finds that the disclosure of the information would inhibit the voluntary provisions of that type of information.'"

### 3. Comments Adverse to Greater Protections for VSI

The NTSB received comments from attorneys who oppose greater protection of VSI. The Chair of the Aviation Section of AAJ stated "manufacturer-parties have the expanded capability of hiding evidence in a civil case by turning it over to the NTSB as 'voluntarily-provided safety information' and then seeking protection from disclosure of such evidence based on their party status."

We found commenters' suggestions regarding our access to, and use of, VSI to be worthy of more careful consideration. To that end, and as mentioned previously in this preamble, the NTSB will issue separate guidance to further explain its use and treatment of VSI. For the purposes of this Final Rule, we adopt the language we proposed for § 831.6, with one revision. We find that the language proposed is sufficiently broad for the NTSB to accept information received as voluntarily submitted under 49 U.S.C. 1114(b)(3). We decline to adopt the phrase "in general" because this phrase is not consistent with our statutory authority.

We disagree with commenters' concerns that our proposed text sought to inhibit a free flow of information. We do not seek to frustrate any agency's practices regarding the acquisition and safeguarding of VSI. To the extent we believe we may access such information, we will only do so when 49 U.S.C. 1114(b)(3) applies to the information.

We did not propose any regulatory text regarding information covered by ITAR and/or EAR. While we appreciate commenters' feedback concerning this type of information, we decline to add any specific text.

### 4. Objections To Release of Other Information

Original paragraph (b) of § 831.6 addresses objection to public disclosure of other information that does not qualify for protection as trade secret or confidential commercial information under § 831.6(a). It has been retained as new paragraph (e), with a revision to note that interview summaries and transcripts are examples of documents that could be the subject of such an objection, if the requirements of the paragraph are met.

### G. Section 831.7 Witness Interviews

In the NPRM, we proposed to: (1) Retain regulatory text that permits a witness to be accompanied by a representative; (2) permit NTSB investigators to remove a representative who is disruptive; and (3) add text stating NTSB will release interview transcripts or notes with the witness's name.

The proposed rule included the title "Witness Interviews" for this section, but the content was in actuality more limited. This final rule is adopted with the section title revised to "Representation During an Interview" to more accurately describe the material in the section. We have also reformatted the material into list form to make it easier to understand. The following issues with the proposed rule were raised by commenters.

#### 1. More Than One Representative

Five commenters, including A4A, urged us to permit more than one representative to be present. A4A stated that when a witness is both an employee and a member of a labor union, the witness is occupying distinctly different roles. As a result, witnesses should be able to be accompanied by representatives from both the employer and the union. Comments from IPA, NJASAP, ATA, AAR/ASLRRA, and ATA agreed with A4A's.

We decline to adopt the commenters' recommendation to permit each witness to be accompanied by more than one representative during an interview. Three commenters agreed with our rationale.

We recognize the concerns expressed by the five commenters and the perceived benefit of having more than one representative accompany a witness. While we understand that a

representative from the employer and a representative from a labor union have different interests, the purpose of representation is to provide counsel to the individual in the safety investigation, not to ensure various interests are represented in the course of witness interviews. Witness interviews are a means of gaining factual information. They are not part of an adjudicatory proceeding, and are not a means to support questions of future employee discipline or employer liability. Further, multiple representatives could give conflicting advice to an interviewee, complicating the process, confusing the interviewee, and delaying the collection of data without benefitting the investigation. This final rule retains the limit on one representative at an interview.

#### 2. Exclusion of Representatives or Parties

We proposed to allow an interviewer to exclude a witness's representative if the representative becomes disruptive. NATCA found this provision too subjective, and requested that we adopt a clear standard to apply to such exclusions. GE suggested that we add language indicating that if a representative is excluded for disruptive conduct, the witness may elect to be accompanied by another representative.

This final rule allows an NTSB investigator to exclude a disruptive witness representative. Disruptive behavior might come in the form of repeatedly interrupting questions or the interviewee's answers, or arguing excessively with NTSB investigators or party members. We will not attempt to list all possible disruptive behaviors. Witness interviews are often critical to obtaining factual information following an accident, and disruptive behavior may unnecessarily delay and complicate the gathering of time-sensitive information. Further, we do not find a need to specify that an alternate representative may accompany a witness during an interview. Any attempt to list the alternatives that might occur in a given situation suggests all situations can be foreseen and that list would be inclusive. A determination of how to handle the removal and possible replacement of a representative is best left to the discretion of the IIC to assess under the circumstances of the investigation.

#### 3. Roles of Individuals Present at Interviews

Airbus Helicopters requested that we "clarify the role of parties and technical advisors participating in witness interviews." It also stated that party and

technical advisor participation in witness interviews can add considerable value to an investigation.

We appreciate the suggestion, but do not find that such clarification would be proper for regulatory text. We will consider this suggestion in the development of guidance for investigators in relating the role of each party member and any technical advisors participating in an interview.

#### 4. Release of Transcripts or Summaries of Interviews

We proposed to place the transcripts or summaries of witness interview in a public docket for an investigation. Commenters opposed this proposal. Boeing noted that the international standard, Paragraph 5.12 of ICAO Annex 13, prohibits making available, for purposes other than the investigation, statements authorities took from a person in the course of the investigation unless the appropriate authority determines disclosure outweighs the possible adverse impact on that or future investigations. Other commenters urged that we adopt the same practice, both to protect the flow of information and to remain consistent with international standards. SWAPA suggested releasing the full transcript of an interview only when a consensus of all parties finds release to be appropriate.

The NTSB is retaining its discretion to release any part of an interview transcript, including the name of the witness, when we find it is appropriate to an investigation. The NTSB filed a formal difference with ICAO on this point, indicating in part that “The laws of the United States require the determination and public reporting of the facts, circumstances, and cause(s) or probable cause(s) of every civil aviation accident. This requirement does not confine the disclosure of such information to an accident investigation or report.”<sup>9</sup> By not including the text of paragraph 5.12 of Annex 13 in our regulation regarding disclosure of any specific information, we maintain our discretion to release or withhold certain information, including names, from interviews depending on relevant circumstances; attempts to categorize information are not appropriate for regulatory text.

Because we have changed the title of § 831.7 to “Representation during an interview”, we have moved this provision on disclosure in a docket to § 831.6(e) and included the right of any person to object to the public disclosure

of information in the same paragraph so that the two are not unnecessarily separated.

#### H. Section 831.8 Investigator-in-Charge

In our NPRM, we included a reference to § 800.27 of the NTSB regulations in describing the IIC’s authority to sign and issue subpoenas, administer oaths and affirmations, and take or order depositions in furtherance of an investigation. We stated such a reference ensures the public and participants in NTSB investigations are aware of an IIC’s authority. In addition, we proposed removing the word “considerable” from the final sentence in § 831.8, because we believed it was unnecessary.

Comments from DOT, Textron, and Airbus Helicopters supported adoption of our proposed changes to § 831.8. DOT believes the changes will enhance the clarity of the IIC’s role and authority.

This final rule adopts a different format for this information by more clearly providing the authority in a list format. We have moved the description of the role of a Board Member to § 831.13(c)(1)(ii) as the official spokesperson who may release investigative information in coordination with the IIC; the role of a Board Member is not related to the scope of authority of the IIC. No substantive change was made to the proposed description of the IIC’s authority or to the role of the Board Member when that provision was moved.

#### I. Section 831.9 Authority of NTSB Representatives

Proposed § 831.9 generally discussed the NTSB’s authority to inspect and collect evidence. We first proposed using the term *authorized representative of the NTSB* in lieu of “employee” because we may request the assistance of the FAA, law enforcement agencies, or other party representatives to inspect or photograph the site of an accident or to collect evidence. We also proposed language to reflect accurately the NTSB’s authority to obtain health and medical information as a “public health authority” and to collect data and records from electronic and wireless devices. The proposed rule recognized the use of electronic devices from which the NTSB would need to extract and analyze data.

##### 1. Authorized Representatives

The joint comment we received from six railroad labor organizations supported our proposed amendments and recognizes our need for text

concerning authorized representatives of the NTSB. Other commenters, including GAMA, requested further clarification of proposed changes to § 831.9. Textron and Airbus Helicopters requested an explanation of whether our use of the term “any other party representative,” could be a manufacturer’s representative, union representative, or operator whom we could consider, at any time, to be an authorized representative of the NTSB when we direct such a person to conduct or oversee testing. Textron and Airbus Helicopters were concerned we could designate a person or entity as an “authorized representative of the NTSB” to inspect or gather evidence when “the person or entity has no background in transportation accident investigation.” GAMA also noted the NTSB relies on salvage companies to gather wreckage, and asks whether individuals from salvage companies would be “authorized representative[s] of the NTSB” under the proposed rule.

As indicated in the discussion of § 831.4, we have determined that the term “authorized representative” is confusing and we have not included it in this final rule. Instead, the rule title has been changed to “Authority during investigations”, and sets out the authority and discretion of NTSB investigators (including the IIC) to direct the gathering of information by others.

##### 2. Medical and Personal Records

Several commenters addressed our proposed access to medical records for investigative purposes. ALPA opposed our proposed language over concern that personal health information could be made available to the public, either as part of a public docket or in response to a FOIA request to the NTSB for the information. ALPA, IPA and A4A noted our current subpoena process already affords important protections. ALPA stated the process “provides for independent judicial review of requests for information and therefore provides checks and balances to minimize inappropriate access to private information.”

Commenters, including A4A, also disagreed with the finding that the NTSB has the status of a “public health authority” under the HIPAA.<sup>10</sup> ALPA noted that the NTSB’s authorizing legislation “makes no reference to activities as neither a public health authority nor does its authorized budget provide for such activity.”

We disagree. The NTSB may need to obtain and review medical records in

<sup>9</sup> See Annex 13, Section 5.12.1, citing 49 U.S.C. 1114.

<sup>10</sup> Public Law 104–191, 100 Stat. 2548 (Aug. 21, 1996).

furtherance of a complete investigation. The agency is authorized to require production of necessary evidence. 49 U.S.C. 1113(a)(1). Historically, the NTSB has obtained records containing medical information from hospitals and healthcare providers using our statutory subpoena authority and our status as a public health authority under the HIPAA, and we will continue to use both as circumstances require. We have reworded § 831.9(b)(2) to include the basis for our authority and clarify that we may receive medical and health information from HIPAA “covered entities” without the prior written authorization of the subject of the records. We note that the NTSB employs well-qualified medical and public health professionals to address medical and survivability issues in transportation accidents. These issues include whether operators were affected by medication or medical conditions. The DHHS regulation addressing disclosures to public health authorities does not attempt to list all known public health authorities, but describes them functionally, to include agencies that seek to prevent injuries, disability, or deaths. (See 45 CFR 164.512(b)(1)(i)) Moreover, in the preamble to the NPRM promulgating that regulation, DHHS included the NTSB as an example of this functional description:

Other government agencies and entities carry out public health activities in the course of their missions. For example, the Occupational Safety and Health Administration, the Mine Safety and Health Administration, and the National Institute for Occupational Safety and Health conduct public health investigations related to occupational health and safety. The National Transportation Safety Board investigates airplane and train crashes in an effort to reduce mortality and injury by making recommendations for safety improvements.

*Standards for Privacy of Individually Identifiable Health Information*, 64 FR 59918, 59956 (Nov. 3, 1999). We discussed this language in a notice advising the public that we exercise status as a public health authority under HIPAA. *Notice of National Transportation Safety Board Public Health Authority Status*, 79 FR 28970 (May 20, 2014). This final rule reiterates this NTSB authority by including it in our regulations.

### 3. Examination of the Evidence

As we noted in the discussion of § 831.5, some commenters disagreed with the proposed language regarding the exclusive authority of the NTSB to decide when and in what manner evidence will be examined and data extracted. The same comments were

reiterated for proposed § 831.9 in reference to whether this interpretation of our authority to oversee or conduct testing or extract data will impinge on another agency’s authority to pursue its own enforcement or other responsibilities. Commenters also stated that we appear to have asserted the authority to extract data even when we do not launch a formal investigation.

Sikorsky suggested that we include language that we will provide “copies of the extracted data as soon as possible to the technical advisers for the purpose of directing potential immediate safety actions.” Sikorsky also stated that such data should be used for safety purposes only; and should be restricted from any legal use(s).

In the reformatted § 831.9, paragraph (c) was redrafted to cite to our statutory authority to decide on the manner and method of testing, including the phrase “extraction of data,” since the distinction appeared unclear to some commenters. Our analysis of any type of data recorder requires us to extract data, and the language now reflects our standard practice.

The commenters that stated the NTSB might use the proposed language to determine the manner and method of tests performed in furtherance of another regulatory agency’s administrative action, or even when the NTSB does not decide to launch a formal investigation, are incorrect. The language of our regulation cannot extend our authority beyond that granted for the investigation of transportation accidents and cannot be validly read to do so. We did not add language to indicate this limitation as it is inherent in our statutory authority and each regulation that implements it.

To prevent any confusion regarding this authority, we state it primarily in § 831.9(c) and reference that paragraph in § 831.5(a)(4).

The regulation is adopted with these changes.

#### *J. Section 831.10 Autopsies and Postmortem Testing*

This section was redrafted to more clearly state its content. No substantive changes were made from the proposed text. The regulation is adopted with these changes.

#### *K. Section 831.11 Parties to the Investigation*

In the NPRM, we proposed adoption of the term “technical advisor” in lieu of “party.” We noted that with the exception of the statutory inclusion of the FAA in aviation accidents (49 U.S.C. 106(g)(1)(A)), no individual or organization has a right to party status.

We proposed that participants in an investigation “should, to the extent practicable, be personnel who had no direct involvement in the event under investigation” to help ensure independence from the accident under investigation; this restriction would also apply to employees of Federal entities. We have often requested that party participants also engaged in enforcement activities erect a figurative “wall” between their agency’s enforcement and investigative duties, especially when the same person must serve in both roles. Because our investigations vary significantly, we found it impracticable to propose a regulatory prohibition on the participation of individuals with enforcement duties.

Our proposed language included the NTSB maintaining the discretion to disclose party representatives’ names, and that information might be shared among parties for purposes of the investigation. We also indicated we would preserve confidentiality, to the extent possible, of information gained in the course of an investigation, and adhere to our statutory authority to disclose and use information (49 U.S.C. 1114(b)). We indicated that we would not share confidential information between parties without considerable analysis of the need to do so. We also indicated that we would consider a party’s requests for imposing limits on sharing certain information. We proposed that employees of other Federal agencies would not be required to sign the Statement of Party Representatives.

Regarding party inquiries and reviews, we proposed that parties that conduct reviews or audits based on a transportation accident (1) inform the IIC in a timely manner of such reviews or audits; (2) obtain IIC approval to conduct a post-accident activity that overlaps with the NTSB’s work or anticipated work; and (3) provide the NTSB with a copy of the results of the separate audit, inquiry, or other review. We indicated that a party that engages in such activities without the prior approval of the IIC, or without disclosing the results of its reviews, may lose party status.

#### 1. Use of the Term “Party”

Several commenters, including HAI, United, Textron, ALPA, and NATCA, opposed the adoption of the term “technical advisor” stating it was confusing, and preferred we continue to use the term “party.” Commenters concluded that the public might interpret a “technical advisor” to be someone who maintains technical

expertise on a certain subject matter related to technology, while the term “party,” reflects the many duties of the participants that are broader than technical expertise.

Some commenters, including Sikorsky, supported the use of both terms since the term “technical advisor” would be consistent with the terminology of ICAO Annex 13. The joint comment we received from six railroad labor organizations stated they did not strongly oppose our use of the term “technical advisor,” but suggested we refer to a party representative as an ‘authorized technical advisor’ as a more proper name for a party representative based on their relationship to the NTSB investigation process.

The CPUC/RTSB agreed to a change to “technical advisor” as being a more suitable description of a participant’s role. “[I]n CPUC parlance,” it noted, the term “party” has “a specific meaning.” Such change could minimize confusion for its “staff and decision-makers.”

After assessing all the comments, we are retaining the term “party.” The word “advisor” seemed to provide the most concern, since ICAO Annex 13 defines “adviser” as a person assisting the “accredited representative.” A party, however, provides assistance under the authority of the IIC, not another representative. Since the two systems differ in approach, we decline to add confusion by eliminating a term already understood in the transportation community. We have included a more detailed discussion of international aviation investigations as part of § 831.22 below.

## 2. Right to Party Status and Party Agreement

A4A, IPA and SWAPA recommended we not exempt other Federal agencies from signing the party statement. These organizations contend that signing the statement reminds each party of its responsibilities during the investigation, and all parties need the benefit of this reminder.

Textron expressed concern about our proposed language that we “will provide for the participation of the [FAA] in the investigation of an aircraft accident when participation is necessary to carry out the duties and powers of the FAA.” Textron suggested this statement potentially limits the FAA’s involvement, and therefore could create a “contentious relationship” between the NTSB and FAA. Other commenters were concerned that such a limit on the FAA’s involvement could hinder COS programs. The commenters suggested that any decision of the FAA’s involvement rest with FAA.

The ATA stated its concern how we might enforce our proposal that parties should refrain from having the same participant who is involved in our safety investigation also be involved in enforcement action arising out of the accident we are investigating. ATA stated that “enforcement personnel should, to the extent possible, be personnel who have no direct enforcement role regarding the accident under investigation. Such a provision would clarify that the NTSB’s investigation covers safety outcomes only.” ATA recommended we “adopt language that limits enforcement personnel just as it does private sector parties.”

The CPUC/RTSB agreed that we should not expressly prohibit employees with enforcement duties from participating in NTSB investigations. CPUC/RTSB stated it “has its own team of experts in its Safety and Enforcement Division to investigate rail incidents on both railroad and public rail fixed guideway systems,” while it is “involved in the safety oversight of rail public guideway system operations . . . and railroads,” as well as the enforcement of CPUC General Orders and provisions.

We have carefully considered these comments. First, we have a statutory requirement to provide for the appropriate participation of other Federal agencies in NTSB investigations found at 49 U.S.C. 1131(a)(2)(A). We are merely reiterating that language in our regulation. We are also required to cooperate with states in highway investigations (49 U.S.C. 1131(a)(1)(B)), and we remain mindful of our relationship as an equal partner with the USCG in marine investigations (49 U.S.C. 1131(a)(1)(E), 46 U.S.C. Chapters 61 and 63, and 14 U.S.C. 141). However, using the term “party” to describe other Federal agencies in all investigations may not always be accurate. As discussed in the context of § 831.5, other Federal agencies may have statutory obligations in addition to participation in NTSB accident investigations, and the NTSB cannot ignore the duties and roles of other agencies, which distinguishes them from private-sector parties. Our proposed text that included the language of our authorizing statute was not intended to suggest that other Federal agencies would not participate in NTSB investigations, but rather a statement of the relationship we have with other Federal agencies when we conduct the investigation of a transportation accident.

Our general practice is for the NTSB IIC to inform a Federal agency’s

representative of his or her responsibilities and obligations when participating in an NTSB accident investigation. We have found this to be sufficient notice to Federal agencies, and it is consistent with SWAPA’s suggestion that “at minimum, if the representatives from other Federal agencies are not required to sign, they should be given a copy of the Statement, instructed by the NTSB IIC that they are obligated to abide by the Statement and the IIC record that such instruction and copy of the Statement was given.” Section 831.11(a) and (c) are adopted as proposed, with non-substantive revisions that are consistent with the section as reformatted.

## 3. Removal of Parties

Both A4A and United recommended we provide a formal process for the removal of a designated party. A4A “recognizes [our] authority in this regard,” but stated that removal is a serious action after “senior representatives from the NTSB, the FAA and the air carrier have discussed the matter.”

United recommended we create a process that allows for removal of a party only after “a hearing by third party, such as a Federal district judge,” to maintain the integrity of our party procedures. United further recommended we not release media statements until the hearing process is complete, and consider sanctions, in lieu of removal, “against a party for an activity that has been identified to be contrary to party rules.”

Several commenters requested the NTSB adopt a formal procedure when removal of a party is found necessary.

This final rule does not include a formal removal procedure nor, in our view, is removal of a party a deprivation of a significant property interest that implicates due process rights that would necessitate a hearing. See, *Cleveland Bd. Of Educ. V. Loudermill*, 470 U.S. 532 (1985). Removal is a tool of last resort that the NTSB has found to be rarely necessary. Further, any number of actions might precipitate removal. The NTSB’s *Certification of Party Representative* addresses the possibility of removal, stating: “I understand that as a party participant, I and my organization shall be responsive to the direction of NTSB personnel and *may lose party status* for conduct that is prejudicial to the investigation or inconsistent with NTSB policies or instructions.” If a party continues to fail to abide by NTSB rules, we inform the party that the agency may exercise its removal authority. Each investigation is unique, and the exact course of action

will vary depending on the facts and circumstances. Adopting a formal procedure in a regulation that would apply to all circumstances would be so general as to be no more informative than the statements in the Certification document and in the regulation as adopted. Removal remains an option available to the IIC when no other solution has worked.

#### 4. Internal, Independent Reviews

Commenters, including A4A, Boeing, Textron, GE, and DOT, expressed concerns with the proposal the IIC be informed of a party's internal review. Specifically, Textron found a discrepancy in the NPRM, stating that the preamble to our NPRM said that parties should seek approval from the IIC before undertaking an internal review, while the proposed regulatory text stated parties "shall inform the [IIC] in a timely manner of the nature of its inquiry or review to coordinate such efforts with the NTSB's investigation."

DOT suggested we add "consistent with applicable law" to the end of § 831.11(d) of the NPRM since some internal reviews may involve personnel investigations or attorney-client privileged communications. DOT cited the example of an aviation accident necessitating a "prompt evaluation by the FAA of the Government's civil liability exposure," which would consist of attorney work product and information subject to attorney-client privilege. GE requested we clarify that nothing in § 831.11(d) of the NPRM would require a party to inform the IIC of a review to which attorney-client or work product privileges would apply. In general, the commenters requested we further define the scope of materials to which this provision would apply. The NBAA questioned whether we have the authority to enforce such a requirement.

Boeing, Textron and GE expressed concern about the impact of the proposed regulation on their operations, and suggested that if companies have to obtain approval to conduct a review, safety improvements could be delayed. Textron noted "this new level of approval/rejection authority over post-accident activity would create a new arm of regulatory oversight and control that even the FAA does not have." Textron acknowledged that our "concern about so-called 'parallel' or 'rogue' investigations is legitimate," but § 831.11(d) of the NPRM should not obstruct a party's "continuous, daily operation" or normal business processes.

Commenters requested that we clarify what information from internal reviews we would seek, indicating that the

receipt of irrelevant data and information could hinder our investigation. Commenters also expressed concern about this proposal in the context of voluntary disclosure reporting programs. Commenters asserted that our definition may be too broad and may inhibit the utilization of voluntary safety programs such as ASAP and FOQA.

The Families of Continental Flight 3407 submitted a comment expressing support for our proposed requirement to ensure parties inform us of ongoing internal reviews that may overlap with our investigations, stating "[t]o our group, this section perfectly illustrates the importance of requiring complete transparency on the part of all parties to the investigation in the interest of safety over all other considerations."

Similarly, NADAF supported broad disclosure of information we might collect from parties. NADAF stated we should disclose "all names of those participating in the party process, who they are representing, and breakdown of who is serving on which sub-groups or sub-committees, and when the sub-groups met, who was in attendance, and who chaired the individual working group meetings, and who wrote the summary of those meetings." NADAF added that we should consider including, as party participants, individuals who represent "a family member organization, an incorporated 501(c)(3) non-profit public interest organization with long term credentials in promoting aviation safety and security." These participants, NADAF stated, should be considered "technical experts" whose participation would counter the perception that a "conflict of interest" exists "with the party process, dominated by industry representatives who have a strong economic interest in the outcomes" of NTSB investigations. To this end, NADAF recommended we remove the proposed phrase "only those" from the proposed description of party participants, to broaden the availability of party status to anyone who may have been involved in the accident or who can offer experience and expertise to the investigation. NADAF characterized our proposed language as an attempt to "limit participation in disaster investigation, but in conflict with allowing each member to include a wide range of others from his/her company." NADAF recommended we permit family member organizations to take part in our investigations, because "[a]n air crash investigation can be a long process, and family member representatives could be helpful in assuring victims' families that

a thorough investigation is working for them."

We recognize that organizations that have participated in our investigations as parties believe the proposed text could create an impediment to their internal reviews or act as a barrier to their taking actions to improve safety of their products or operations. We strongly support all actions to make safety improvements and will not hinder such improvements based on information in internal reviews or audits. We have no intention of preventing parties from the conducting such reviews, nor will we in any way impede communications parties have with other Federal agencies in the course of making safety improvements.

In this final rule, § 831.11(a)(4) has been redesignated as § 831.11(b) and §§ 831.11(b),(c), and (d) in the NPRM have been redesignated as §§ 831.11(c),(d), and (e), respectively. Section 831.11(e)(1) states that a party conducting or authorizing an inquiry or review of its own processes and procedures as a result of a transportation accident the NTSB is investigating must *inform* the NTSB IIC in a timely manner of the nature of its inquiry or review as a means of coordinating such efforts with the NTSB's investigation, and must provide the IIC with the findings of such review.

Our awareness of such internal reviews and/or audits is important for ensuring we remain abreast of all information that could impact our investigation. The NTSB's goal is to assure coordination of concurrent efforts while an investigation is ongoing. Accordingly, § 831.11(e) refers to such coordination, and gives more specific meaning to the statement already present in the party certification document.<sup>11</sup> The regulation now clearly states that signing the agreement means the party agrees to provide information regarding any internal reviews to the IIC.

The NTSB is generally not interested in obtaining information that would be considered privileged in litigation as it would usually have no purpose in an investigation. Paragraph (d)(2) instructs parties on how to inform the IIC that material being submitted contains privileged information, such that it may be properly reviewed for whether it is

<sup>11</sup> The party agreement includes the statements "No information pertaining to the accident, or in any manner relevant to the investigation, may be withheld from the NTSB by any party or party participant," and "[T]his includes, but is not limited to, the provisions of 49 CFR 831.11 and 831.13, which, respectively, specify certain criteria for participation in NTSB investigations and limitations on the dissemination of investigation information."

even relevant to the investigation. If it is not relevant, it will be excluded from the submission. If included in the submission, it will also be evaluated against the need for disclosure beyond the NTSB (referencing § 831.6).

Paragraph 831.11(d)(4) states that investigations performed by other Federal agencies are addressed in § 831.5.

The NTSB recognizes NADAF's concerns regarding the needs of victims and their families for information following an accident. The agency has a division whose responsibility is to ensure victims and family members are aware of factual developments in investigations, the overall status of the investigation, and other relevant information. However, we disagree with NADAF that representatives from family-member organizations and 501(c)(3) charitable organizations should be considered technical experts as that term is understood in our investigations. We also disagree that there is a conflict of interest in the party process. NTSB investigations are factual and not adversarial, and no legal consequences result from an NTSB investigation. NTSB parties participate in the fact gathering process, but the analysis and determination of probable cause are NTSB responsibilities.

*L. Section 831.12 Access to and Release of Wreckage, Records, Mail and Cargo*

In the NPRM, we proposed removing from § 831.12 the reference to a specific form that the NTSB completes upon the return of wreckage to its owner. We determined that reference to a specific form number was unnecessary.

We also discussed a comment previously received from A4A that suggested we revise § 831.12 to allow for remote read-outs of digital flight data recorders and cockpit voice recorders as a means to preclude the need for transporting recorders to NTSB Headquarters. A4A also recommended we "establish a firm deadline for returning [recorders] to the [air] carrier." We did not propose any language as a result of this comment, having found that no regulatory change was necessary to adopt any specific procedures related to our possession, review of data from recorders, or release of wreckage. We reiterate that such suggested changes are more appropriate for internal agency policies and procedures and will be reviewed in that context.

1. Wreckage

Several commenters suggested we adopt a standardized practice of providing documentation when we obtain material, components, and parts from parties, and when we return such items to parties. United suggested language directing investigators "to always provide receipting for material obtained and returned" and that "the receipting should clearly document from whom the items were received or returned as well as clear description of the material including part/serial number when appropriate."

Commenters disagreed with our proposed removal of the reference to the Release of Wreckage form. Textron stated it had experienced cases which NTSB investigators have not communicated the release of wreckage to owners or operators. Textron stated that use of the form could specify such release has occurred, and that if confusion exists about whether wreckage has been released, "critical safety evidence could be obscured or lost if the wreckage is disturbed prior to the appropriate phase of the investigation." Comments support retaining the sentence.

Commenters who mentioned our procedures for releasing wreckage recommended we formally indicate our release of wreckage via NTSB Form 6120.15 as standard practice.

Elimination of the reference to a specific form should not be interpreted as indicating the NTSB intends to not use some type of form to confirm release of wreckage. Our practice is to document release of wreckage, though our specific procedures or form may change. We have added a statement that recipients of released wreckage must sign a form provided by the NTSB, but we must retain flexibility regarding the process and the form itself as investigations vary considerably and the information needed on forms evolves.

2. Return of Recorders

We did not propose any regulatory language that changed how recorders are obtained, the data extracted, or recorders returned. A4A, however, suggested we adopt a remote readout program for flight recorders that would eliminate the need to physically remove the recorders and transport them. A4A stated that "most operators" have established readout capability networks, some of which work in conjunction with information submitted via FOQA programs, that a chain of custody of the data could be documented, that remotely reading out the data would not jeopardize its integrity, and that data on

the recorder remains on the device until it is replaced. These factors, they contend, counsel in favor of the NTSB adopting a practice of "assuring speedy access to the [digital flight data recorder] uniformly occurs." A4A recommended the NTSB work with air carriers to establish a protocol permitting such readouts. The IPA disagreed with A4A's suggestions concerning the processes for examining and testing equipment such as FDRs and CVRs. The IPA states the NTSB "has a highly talented and experienced group of engineers in the NTSB Recorder Labs," and the NTSB maintains "processes, procedures and protocol (controls)" to handle sensitive information. The IPA "strongly opposes" using different technologies to provide remote readouts of flight data from FDRs, and suggests that bypassing NTSB procedures and facilities would be simply for an air carrier's convenience or economic gain. The IPA also believes the current language of § 831.12 as it applies to release of recorders is adequate, and states we should not release such items prior to the conclusion of the investigation.

We have reviewed the commenters' concerns regarding recorder readouts. While immediate readouts and timely return of recorders are important issues, we cannot find that recorder handling procedures belong in our regulations. Rather, such matters are better placed in NTSB practice manuals where they can be fine-tuned to the needs of a particular investigation. Moreover, the NTSB did not propose to include recorder readouts at the scene of an accident as an option. The suggested change would be beyond the scope of the NPRM to include in a rulemaking, and might require changes to companion regulations by other Federal agencies.

*M. Section 831.13 Flow and Dissemination of Investigative Information*

Our proposed revisions to this section included edits such as removing the reference to a "field investigation," and substantive proposals addressing the circumstances when a party may share and release investigative information. We also proposed including a statement that § 831.13 applies from the time an investigation commences until the NTSB completes its investigation.

Regarding the release of investigative information, we stated that we need to remain the sole disseminator of that information. We remain concerned that a premature release of information during an investigation could result in the release of incorrect or incomplete information requiring additional effort

to correct, possibly impeding the progress of an investigation, and eroding public confidence in the credibility of an investigation.

The NPRM also addressed that a party may need to share information with another Federal agency in response to that agency's need. We stated we would not prohibit or seek to impede the sharing of such information while noting that the IIC should be informed when records and information are provided to another agency and should be included in communications concerning the existence of records or information relevant to the investigation. We stated we will work with other agencies to share information obtained in the course of the NTSB investigation to minimize duplicative requests to NTSB parties and others for information.

#### 1. Definition of "Investigative Information"

Sikorsky suggested we add the phrase "relevant to the investigation" in both § 831.13(b) and (c), as follows "[a]ll information *relevant to the investigation* obtained by any person or organization during the investigation, as described in paragraph (a) of this section, must be provided to the NTSB," and "Parties are prohibited from publicly releasing information *relevant to the investigation* obtained. . . ." Sikorsky stated these suggested additions would clarify that we are intending paragraphs (b) and (c) to apply to the investigative information, as defined in paragraph (a).

Other comments suggested our proposed definition of investigative information is too broad. SWAPA's comment stated our proposed text might be interpreted to include "reports submitted through codified and established voluntary safety programs including, but not limited to, ASAP and FOQA." SWAPA is concerned with the disclosure of such information because the NTSB does not have the authority the FAA has to protect the information from disclosure. SWAPA stated that this lack of protection "compromises the integrity of these programs." As a result, SWAPA recommended we amend § 831.13(a) to include an "express exemption of voluntary safety reports submitted through codified and established voluntary safety programs including, but not limited to, ASAP and FOQA."

The Kettles Law Firm suggested we add the following regarding record release: "Parties are allowed to release records and documents that existed before the NTSB commenced its investigation and such information is not subject to the restrictions on the

release of information in 49 CFR 831." The commenter sent a copy of a letter from an NTSB General Counsel dated October 31, 2008, stating records that pre-existed the commencement of the NTSB investigation are not considered investigative information subject to the restrictions of § 831.13. In referring to this letter, the commenter described investigative material subject to § 831.13 as "documents, e.g., analyses or data compilations . . . created after the accident at the request of NTSB staff—solely by virtue of the [entity's] status as a party the NTSB investigation." The firm suggested we clearly articulate this concept in the text of § 831.13, to resolve the question of whether the regulation applies to records that existed "before the accident sequence" or records that existed "at the time" the accident occurred. The firm contends these two phrases could be subject to varying interpretations; hence, the need for clarity.

In defining investigate information, the NTSB is not limiting the scope of information the agency may obtain or consider under its statutory authority. The NTSB has broad authority to require the production of evidence it deems necessary for the investigation. 49 U.S.C. 1113(a)(1). The regulatory definition of investigative information limits the scope of information that may be released outside the investigation. The scope of investigative information depends on the nature of the accident or incident. An accident may be the result of a series of events or actions, and is not defined exclusively by the time of impact. For example, if the NTSB is conducting a limited investigation, the investigative information may be limited to information created or originating immediately prior to impact. If the NTSB, however, is conducting a major investigation in which it is examining potential causes of the accident that include a number of complex safety issues, investigative information could include documents and data leading up to the accident. Crewmember training records and maintenance records may be critical to such an investigation, even though they pre-date the accident or incident. Determining the probable cause of an accident or incident, in lieu of simply describing what happened, expands what the NTSB considers investigative information. The NTSB has determined the definition of investigative information must therefore be flexible.

In response to the concerns regarding release of ASAP or FOQA data, the NTSB recognizes that these data are VSI. Although the agency may rely on these and other types of data and VSI during

the course of an investigation, as discussed in reference to § 831.6, the NTSB is prohibited by statute from releasing such information.

In this final rule, we have redrafted § 831.13 to more clearly describe the applicability of the NTSB's regulations on the release of investigative information. Paragraph (a) describes the applicability of the section and more clearly limits it to information relevant to an investigation. The timeframe covered by the definition will necessarily be flexible based on the circumstances of each investigation. For this reason, coordination with the IIC is important. Revised § 831.9(a)(5) makes clear that an NTSB investigator is authorized to examine records regardless of the date they were created if necessary for the investigation.

#### 2. IIC Approval

Several commenters opposed our proposal regarding restriction on information release within a party organization, stating that we should permit release of information within an organization more freely when the goal is safety improvement.

Comments supported the principle that maximizing the flow of useful information between the NTSB and parties is critical to ensure safety improvements can occur. Commenters stated that the changes we proposed create requirements that are cumbersome and may be contrary to the duties outlined in our Statement of Party Representatives. Commenters emphasized that dissemination of investigative information within party organizations is often necessary to advance the investigation. GE recommended that parties should not be required to notify the NTSB IIC when internally disseminating information for purposes of the investigation. GE suggested that we add language restricting the dissemination to "those possessing technical expertise and/or product knowledge whose participation is beneficial to the investigation." ATA requested that we adopt language allowing disclosure of information to owner-operators, independent drivers, and outsourced drivers.

DOT stated that our proposed rule could prohibit non-Federal entities from providing information to DOT's OAs. DOT acknowledged, however, the release of investigative information prior to the conclusion of an investigation "could impact the investigation" and stated "not every corrective measure ordered by the Department must contain detailed information gathered during an investigation." DOT did not present

specific text, but noted it will continue its “past practice of closely coordinating with the NTSB, to ensure that its investigation is not compromised.”

Commenters raised concerns that parties may disseminate investigative information only to decision-makers within the party organization. Boeing and ATA suggested we permit dissemination to individuals with a “need to know.”

Commenters were concerned that the proposed language could have a chilling effect on the flow of safety information within a party. GAMA recommended we maintain the existing regulation and policies concerning dissemination of information, stating that manufacturers “monitor, maintain, and upgrade their products on a daily basis,” and “some of these activities could be construed as overlapping an NTSB investigation, but in reality, have nothing to do with the findings or probable cause of an accident or incident.”

The regulation has been revised to more clearly state our intent to balance the interest of improved safety through timely sharing of information with the need to ensure such sharing does not compromise the integrity of the investigation. The large number and widely varying size and character of parties to NTSB investigations has led us to conclude that decisions on dissemination of investigative information within an organization cannot be left completely to parties as was suggested by commenters.

The reformatting of § 831.13 includes a detailed paragraph (c) on the release of investigative information. Paragraphs (c)(1) and (2) describe release of information at the scene of an accident investigation by the NTSB. Paragraph (c)(3) describes the dissemination of information by the parties to persons in its organization that have a need to know for the purpose of addressing a safety issue or planned improvement. As stated in paragraph (c)(4) any other release of information must be coordinated with the IIC including within a party’s organization for a reason other than specified in (c)(3).

The NTSB and commenters agree that a release of information should not cause public confusion and speculation. The regulations promulgated here balance the need to know for certain persons inside a party organization with the general rule that investigative information is not to be released publicly. The NTSB does not seek to inhibit the flow of information where a safety purpose is served, but the IIC, as the primary director of an investigation, needs to remain cognizant of the information flow. Since investigations

can differ dramatically in their scope and timing, we retain the right to direct the flow of information except in the limited case stated in the regulation. This final rule does not adopt the proposed term “decision-makers;” we agree with the commenters that it could inhibit the appropriate persons from taking remedial action.

The regulation is adopted to include the revised format of this section and the comments as discussed.

#### *N. Section 831.14 Proposed Findings*

The NTSB did not propose any substantive changes to § 831.14, “Proposed findings.” In the preamble to the NPRM, we summarized A4A’s prior suggestion that we include a statement that the NTSB will provide a copy of the NTSB draft final report, including analytical conclusions (but not necessarily probable cause and recommendations), before the Board schedules a meeting on an investigation. A4A had recommended that the NTSB adopt the practice of ICAO Annex 13 regarding the release of draft reports to accredited representatives of the States participating in an aviation investigation who often seeks the input of their technical advisers.

In the NPRM, we disagreed with A4A’s comment regarding rule text in § 831.14, but said that we would consider such a practice to be addressed outside a regulation and that any such sharing would involve timely notice to party representatives.

##### **1. Sharing of Draft Reports**

Fourteen commenters to the NPRM addressed the sharing of draft reports.

We maintain that the most appropriate means to undertake such a change would be through internal agency policies. While we appreciate consistency with the best practices of ICAO, § 831.14 applies to investigations in all modes of transportation and the sharing of draft reports may not be workable across all modes. Further, the NTSB needs to consider the specific circumstances of an investigation before we can determine whether such advance sharing would be a benefit. We will continue to examine our policies with regard to sharing draft reports and we will share them when we determine it would benefit an investigation. We will use the comments received on this issue when revising our internal policies and study whether such sharing might be most appropriate in a certain category of investigation.

##### **2. Timing of Submissions**

While we did not propose any change to the language on timing of

submissions from parties, we received comment on it. Textron noted that the proposed rule states that submissions “must be received before the matter is announced in the **Federal Register** for consideration at a Board meeting. All written submissions shall be presented to staff in advance of the formal scheduling of the meeting. This procedure ensures orderly and thorough consideration of all views.” Textron requested that we establish a predictable deadline for the timing of submissions, and suggests that we provide advance notice of the announcement of a Board meeting in the **Federal Register**, since preparing a submission can take considerable time and would be done before the meeting is formally announced.

Both GAMA and Airbus agreed that we should provide a means of advance notice to provide sufficient time to develop their submissions.

We have revised § 831.14 based on the comments. Paragraph (a) now refers to submissions by a party rather than “any person,” since it is parties who have access to the information at issue and are in a position to be notified of the scheduled date of a Board meeting. Paragraph (b) has been revised to include the statement that the IIC will inform parties when submissions are due, and that such submissions must be received by the IIC before the matter is formally announced.

We have removed paragraph (c) because the limitation provision was found to be confusing, since by its terms, safety enforcement cases are already handled under Part 821 of this chapter, which contains *ex parte* rules in subpart J. Repeating this information in paragraph (c) was not appropriate.

#### *O. Comments on Mode-Specific Sections*

We received seven comments addressing proposed Subpart B on regulations specific to aviation investigations. We received one comment addressing Subpart E specific to marine investigations.

We did not receive any comments on proposed § 831.20 addressing the responsibility of the NTSB, or on § 831.21 regarding the authority of NTSB representatives in aviation investigations.

We have revised § 831.20 to more clearly present the scope of the NTSB’s authority based on the type of aircraft involved in an accident. We have also included the authority of NTSB representatives as paragraph (b) of this section, rather than as a separate section in the subpart. Therefore, we have renumbered sections 831.22 and 831.23 to 831.21 and 831.22, respectively. The

changes were intended to be stylistic and not substantive.

*P. Section 831.21 [NPRM § 831.22]  
Aviation Investigations: Other  
Government Agencies*

A4A stated that it is important to air carriers to know which government agency is responsible for an investigation, and the responsible agency's supporting and reporting functions. A4A stated "[o]f particular importance to us is the need for the NTSB to underscore that it, and not any other agency, is responsible for the retrieval and custody of aircraft cockpit voice and data recorders." A4A requests that this concept be "broadly communicated to other agencies."

A4A stated that describing the FAA as conducting fact-gathering "on behalf of" the NTSB introduces confusion because both act as parties to an investigation, and each fulfills a role in COS. A4A stated that the NTSB does not delegate investigations to the FAA and that the text of § 831.22 (now § 831.21) should not suggest any delegation. Other commenters acknowledged similar concerns. United asked how an operator is to know whether an FAA employee at the scene of an accident or incident is working on behalf of the NTSB. United indicated it has encountered situations where FAA employees have been mistaken in this capacity and have impeded access to the site by the carrier. United suggested we add a statement to § 831.22(c) (now § 831.21(c)) to clarify how an FAA employee is granted authority to act on behalf of the NTSB, or whether parties should assume the FAA employee arriving at the site "automatically possesses this authority." United said a similar concern exists for the Federal Bureau of Investigation and questioned whether its employees are considered representatives of the NTSB. United is concerned that each agency differs in the way it handles information it obtains.

The comments concerning § 831.22 (now § 831.21) echo many of the concerns expressed in comments to § 831.5 regarding the scope of authority of various agencies at an aviation accident site. We reiterate here that DOT employees, including those employed by the FAA, do not become NTSB employees during an investigation. Instead, DOT employees participate in our investigations and are able to collect evidence and question witnesses when participating in our investigations under the direction of the IIC.

Similarly, there should be no confusion regarding which government agency is responsible for an

investigation—the NTSB is responsible by statute for investigating *all* civil aviation accidents and certain aviation incidents. The FAA participates in—but does not oversee—each investigation. In some limited investigations in which the NTSB has not launched a full inquiry, the FAA may collect evidence and gather various types of information for its own purposes, which the FAA then shares with the NTSB. For larger-scale investigations, the FAA only collects information and evidence at the request of the NTSB.

The request for the assistance of the Secretary of the Department of Transportation and the FAA reaches back to an NTSB letter from 1977, which appears as an appendix to 49 CFR part 800. The NTSB remains mindful of the important role the FAA maintains in ensuring aviation safety. Given the varying nature of aviation accidents and incidents, maintaining flexibility allows for the most efficient use of investigative resources. The NTSB appreciates the FAA's and parties' respect for this model.

In response to the comment we received from the DOT, and concerns recently expressed by the FAA to the NTSB, we have redrafted NPRM § 831.22 (now § 831.21) to clarify that we provide for FAA participation in aviation accident investigations as a matter of statute; that the FAA has the same rights and privileges as other parties to an investigation; that the FAA may obtain information from others as part of its statutory responsibilities; that an FAA employee may have the same authority as an NTSB investigator when granted such by the IIC for purposes of the NTSB investigation; and that the FAA is expected to timely share information and coordinate its activities with the NTSB during an accident investigation. We remain cognizant that aviation accidents result in significant overlap of the NTSB's and FAA's need for information to satisfy statutory responsibilities. Our regulations seek to acknowledge this overlap, while affirming the investigative priority granted to the NTSB by statute. The NTSB and FAA share the goal of improving aviation safety.

*Q. Section 831.22 [NPRM § 831.23]  
International Aviation Investigations*

We received six comments on proposed § 831.23 (now § 831.22), international aviation investigations.

United observed occasions in which the NTSB representative appeared to have a "reduced interest in supporting a foreign investigation" and requested that our regulations specify that we will

give sufficient support to affected airlines.

Textron agreed with our proposed reorganization of the text, but stated that we are "over reaching [our] authority by stating '[t]he NTSB considers the provisions of § 831.13 to apply to U.S. advisers working under the supervision of the U.S. accredited representative.'" Textron stated that the NTSB is attempting to interject itself between an adviser and a foreign authority, and that Textron is unaware of "any statutes that allow the NTSB to limit and control the communication an entity has with a foreign authority." GAMA reacted to the same proposed language, stating that it "seems to infer that the NTSB desires to apply its authority when an investigation is conducted by a foreign state under its authority." GAMA does not believe § 831.13 "and its surrounding policy framework" can be applied to foreign aviation investigations.

In commenting on international investigations, GE referred to its comment on § 831.6 which requested we make the protections afforded to trade secrets apply to both domestic and international investigations. In the alternative, GE suggested we include in § 831.23 a description of how we will handle information subject to protection as a trade secret or as confidential commercial information.

Boeing asserts our proposed version of § 831.23(c)(1) (now § 831.22(c)(1)) is inconsistent with ICAO Annex 13 in that NTSB regulations require technical advisors to "work at the direction and under the supervision of the NTSB accredited representative." Boeing stated that "[w]hile these advisors certainly perform their function under the supervision of the accredited representative," the foreign state's IIC is the person who remains in control of the investigation and directs the investigative work. Accordingly, Boeing suggested the following language for paragraph (c)(1): "Such technical advisors *shall perform their role* under the supervision of the NTSB accredited representative." [Italics in original].

Boeing also commented on the proposed application of § 831.13 to foreign investigations, stating that Annex 13 recognizes the State responsible for conducting the investigation with the responsibility for determining the circumstances and content of information that will be released. As a result, the NTSB's regulation can apply only to accidents that occur in the United States and not to technical advisors in a foreign investigation.

NADAF supported the proposed application of § 831.13 to foreign investigations as providing “a way of releasing information and documents to promote global aviation safety and is an important part of Investigation Procedures.”

We have reformatted NPRM § 831.23 (now § 831.22) to clarify the application of ICAO Annex 13, the role and responsibility of the NTSB and the position of appointed technical advisers.

We agree with Boeing that § 831.22 should indicate that technical advisers work under the supervision of the NTSB accredited representative and we have revised the language of § 831.22(c) accordingly. We use a common understanding of the term “supervision,” that of having oversight and direction of. Thus, an NTSB accredited representative receives direction from a foreign state’s IIC, and in turn the NTSB oversees both the conduct of its technical advisers during the investigation and the responses the technical advisers provide to foreign states’ IICs. We consider this practice consistent with the process described in Annex 13, and most effective in ensuring a fully coordinated investigation. U.S. technical advisers are generally already familiar with the NTSB’s manner of conducting investigations and the NTSB’s expectations.

We agree that the application of § 831.13 to foreign investigations needs clarification. We have revised § 831.22(c)(2) to state that the proscription on release of information from § 831.13 applies to U.S. advisers invited by the NTSB to participate and work under the supervision of the NTSB as the U.S. accredited representative in an international investigation. For example, if a foreign state’s IIC contacts a U.S. technical adviser directly and instructs the adviser to collect certain documents or engage in certain work, the adviser should respond to the request by informing the NTSB accredited representative and then directly providing the information to both the foreign state’s IIC and the NTSB accredited representative. We do not interpret § 831.13 as preventing the sharing of information between the foreign state’s IIC and a U.S. technical adviser.

We proposed that § 831.13 apply to foreign investigations because technical advisers have disseminated information to organizations that were not participating in the investigation. In one instance, a technical adviser’s organization disseminated information to the media without informing the

NTSB accredited representative or the foreign state’s IIC of its plan to share the information. To prevent any recurrence of this situation, we find that the provisions of § 831.13 are appropriate for and can be effectively applied to U.S. technical advisers invited by the NTSB to participate in a foreign investigation without unduly delay to the investigation.

We received no comments regarding proposed subparts C and D. We have reformatted the proposed language to be consistent with subpart B, but otherwise adopt the language as proposed.

## VI. Regulatory Analysis

This rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866, “Regulatory Planning and Review,” and does not require an assessment of the potential costs and benefits under section 6(a)(3) of that Order. As such, the Office of Management and Budget has not reviewed this rule under Executive Order 12866. Likewise, this rule does not require an analysis under the Unfunded Mandates Reform Act, 2 U.S.C. 1501–1571, or the National Environmental Policy Act, 42 U.S.C. 4321–4347.

In addition, the NTSB has considered whether this rule would have a significant economic impact on a substantial number of small entities, under the Regulatory Flexibility Act (5 U.S.C. 601–612). The NTSB certifies under 5 U.S.C. 605(b) that this rule would not have a significant economic impact on a substantial number of small entities. Moreover, in accordance with 5 U.S.C. 605(b), the NTSB will submit this certification to the Chief Counsel for Advocacy at the Small Business Administration.

Moreover, the NTSB does not anticipate this rule will have a substantial, direct effect on state or local governments or will preempt state law; as such, this rule does not have implications for Federalism under Executive Order 13132, Federalism. This rule also complies with all applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, “Civil Justice Reform,” to minimize litigation, eliminate ambiguity, and reduce burden. In addition, the NTSB has evaluated this rule under: Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights”; Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks”; Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”; Executive Order 13211, “Actions Concerning

Regulations That Significantly Affect Energy Supply, Distribution, or Use”; and the National Technology Transfer and Advancement Act, 15 U.S.C. 272 note. The NTSB has concluded this rule does not contravene any of the requirements set forth in these Executive Orders and statutes, nor does this rule prompt further consideration with regard to such requirements.

## List of Subjects in 49 CFR Part 831

Aircraft accidents, Aircraft incidents, Aviation safety, Hazardous materials transportation, Highway safety, Investigations, Marine safety, Pipeline safety, Railroad safety.

For the reasons discussed in the preamble, the NTSB amends Title 49 of the CFR by revising part 831 to read as follows:

## PART 831—INVESTIGATION PROCEDURES

### Subpart A—General

- Sec.
- 831.1 Applicability of this subpart.
  - 831.2 Responsibility of the NTSB.
  - 831.3 Authority of Directors.
  - 831.4 Nature of investigation.
  - 831.5 Priority of NTSB investigations.
  - 831.6 Request to withhold information.
  - 831.7 Representation during an interview.
  - 831.8 Investigator-in-charge.
  - 831.9 Authority during investigations.
  - 831.10 Autopsies and postmortem testing.
  - 831.11 Parties to the investigation.
  - 831.12 Access to and release of wreckage, records, mail, and cargo.
  - 831.13 Provision and dissemination of investigative information.
  - 831.14 Proposed findings.

### Subpart B—Aviation Investigations

- 831.20 Authority of NTSB in aviation investigations.
- 831.21 Other Government agencies and NTSB aviation investigations.
- 831.22 International aviation investigations.

### Subpart C—Highway Investigations

- 831.30 Authority of NTSB in highway investigations.

### Subpart D—Railroad, Pipeline, and Hazardous Materials Investigations

- 831.40 Authority of NTSB in railroad, pipeline, and hazardous materials investigations.

Authority: 49 U.S.C. 1113(f).

### Subpart A—General

#### § 831.1 Applicability of this subpart.

(a) Except as provided in Subpart E of this part regarding marine casualties, and unless specified by the National Transportation Safety Board (NTSB), the provisions of this subpart apply to all NTSB investigations conducted under its statutory authority.

(b) Consistent with its statutory authority, the NTSB conducts investigations of transportation accidents that include, but are not limited to: accidents, collisions, crashes, derailments, explosions, incidents, mishaps, ruptures, or other similar accidents. Use of the term “accident” throughout this part includes all such occurrences.

(c) Throughout this part, the term “IIC” means the NTSB investigator-in-charge.

#### § 831.2 Responsibility of the NTSB.

The NTSB is required to investigate—

(a) Aviation accidents as described in subpart B of this part;

(b) Highway accidents as described in subpart C of this part;

(c) Railroad, pipeline, and hazardous materials accidents as described in subpart D of this part; and

(d) Any accident that occurs in connection with the transportation of people or property that, in the judgment of the NTSB, is catastrophic, involves problems of a recurring nature or would otherwise carry out the intent of its authorizing statutes. This authority includes selected events involving the transportation of hazardous materials, including their release.

#### § 831.3 Authority of Directors.

Subject to the provisions of § 831.2 of this part and part 800 of this chapter, the Directors of the Office of Aviation Safety, Office of Highway Safety, or Office of Railroad, Pipeline and Hazardous Materials Investigations, may order an investigation into any transportation accident.

#### § 831.4 Nature of investigation.

(a) *General.* The NTSB conducts investigations, or has them conducted, to determine the facts, conditions, and circumstances relating to an accident. The NTSB uses these results to determine one or more probable causes of an accident, and to issue safety recommendations to prevent or mitigate the effects of a similar accident. The NTSB is required to report on the facts and circumstances of accidents it investigates. The NTSB begins an investigation by monitoring the situation and assessing available facts to determine the appropriate investigative response. Following an initial assessment, the NTSB notifies persons and organizations it anticipates will be affected as to the extent of its expected investigative response.

(b) *NTSB products.* An investigation may result in a report or brief of the NTSB’s conclusions or other products designed to improve transportation

safety. Other products may include factual records, safety recommendations, and other safety information.

(c) NTSB investigations are fact-finding proceedings with no adverse parties. The investigative proceedings are not subject to the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), and are not conducted for the purpose of determining the rights, liabilities, or blame of any person or entity, as they are not adjudicatory proceedings.

#### § 831.5 Priority of NTSB investigations.

(a) *Relationships with other agencies.*

(1) Except as provided in 49 U.S.C. 1131(a)(2)(B) and (C) regarding suspected criminal actions, an investigation conducted under the authority of the NTSB has priority over any investigation conducted by another Federal agency.

(2) The NTSB will provide for appropriate participation by other Federal agencies in any NTSB investigation. Such agencies may not participate in the NTSB’s probable cause determination.

(3) The NTSB has first right to access wreckage, information, and resources, and to interview witnesses the NTSB deems pertinent to its investigation.

(4) As indicated in § 831.9(c) of this part, the NTSB has exclusive authority to decide when and how the testing and examination of evidence will occur.

(5) The NTSB and other Federal agencies will exchange information obtained or developed about the accident in the course of their investigations in a timely manner. Nothing in this section prohibits the NTSB from sharing factual information with other agencies.

(6) *Incident command system.* The NTSB recognizes the role of incident command systems to address emergencies. The NTSB does not assume the role of a first responder agency.

(i) The NTSB IIC or his designee will participate in the incident command system to identify and coordinate investigative needs related to the preservation and collection of information and evidence.

(ii) The NTSB may collect information and evidence from the incident command in a timely and reasonable manner so as not to interfere with its operations.

(b) *Investigations by other Federal agencies.* (1) Nothing in this section limits the authority of any Federal agency to conduct an investigation of an accident or incident under applicable provisions of law or to obtain information directly from parties

involved in, and witnesses to, a transportation accident. Other agencies are expected to coordinate with the NTSB IIC to avoid interference with, and duplication of, the NTSB’s investigative efforts. These agencies will not participate in the NTSB’s probable cause determination.

(2) The NTSB recognizes that state and local agencies may conduct activities related to an accident under investigation by the NTSB. These agencies will not participate in the NTSB’s probable cause determination.

(3) Except as described in § 831.30 of this part regarding highway investigations, the NTSB may request that a Federal agency provide to the NTSB the results of that agency’s investigation of an accident when such investigation is intended to result in safety improvements or remedial action. The NTSB will not routinely request regulatory enforcement records or investigation results.

#### § 831.6 Request to withhold information.

(a) *Applicability.* This section applies to information the NTSB receives from any source that may be subject to the Trade Secrets Act (18 U.S.C. 1905) or the Freedom of Information Act (FOIA, 5 U.S.C. 552).

(b) *Disclosure.* The NTSB is authorized by 49 U.S.C. 1114(b) to disclose, under certain circumstances, confidential commercial information that would otherwise be subject to penalties for disclosure under the Trade Secrets Act, or excepted from disclosure under FOIA. The NTSB may exercise this authority when disclosure is necessary to support a key finding, a safety recommendation, or the NTSB’s statement of probable cause of an accident.

(c) *Disclosure procedures.* Information submitted to the NTSB that the submitter believes qualifies as a trade secret or as confidential commercial information subject either to the Trade Secrets Act or Exemption 4 of FOIA must be so identified by the submitter on each page that contains such information. In accordance with 49 U.S.C. 1114(b), the NTSB will provide the submitter of identified information (or information the NTSB has reason to believe qualifies as subject to the Trade Secrets Act or Exemption 4 of FOIA) the opportunity to comment on any disclosure contemplated by the NTSB. In all instances in which the NTSB decides to disclose such information pursuant to 49 U.S.C. 1114(b) or 5 U.S.C. 552, the NTSB will provide at least 10 days’ advance notice to the submitter.

(d) *Voluntarily provided safety information.* (1) The NTSB will not disclose safety-related information voluntarily submitted to the NTSB if the information is not related to the exercise of the NTSB's investigation authority, and if the NTSB finds disclosure of the information might inhibit the voluntary provision of that type of information.

(2) The NTSB will review voluntarily provided safety information for confidential content, and will de-identify or anonymize any confidential content referenced in its products.

(e) *Other.* Any person may make written objection to the public disclosure of any other information, such as interview summaries or transcripts, contained in any report or document filed, or otherwise obtained by the NTSB, stating the grounds for such objection. The NTSB 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 FOIA (see part 801 of this chapter), and its release is found not to be in the public interest.

#### **§ 831.7 Representation during an interview.**

(a) Any person interviewed in any manner by the NTSB has the right to be accompanied during the interview by no more than one representative of the witness's choosing. The representative—

- (1) May be an attorney;
- (2) May provide support and counsel to the witness;
- (3) May not supplement the witness's testimony; and
- (4) May not advocate for the interests of a witness's other affiliations (*e.g.*, the witness's employer).

(b) An investigator conducting the interview may take any necessary action (including removal of the representative from the interview) to ensure a witness's representative acts in accordance with the provisions of paragraph (a) of this section during the interview, and to prevent conduct that may be disruptive to the interview.

#### **§ 831.8 Investigator-in-charge.**

In addition to the subpoena and deposition authority delegated to investigative officers under this chapter, a person designated as IIC for an investigation is authorized to—

- (a) Organize, conduct, control, and manage the field phase of an investigation, even when a Board Member is present;
- (b) Coordinate all resources and supervise all persons (including persons

not employed by the NTSB) involved in an on-site investigation; and

(c) Continue his or her organizational and management responsibilities through all phases of the investigation, including consideration and adoption of a report or brief determining one or more probable causes of an accident.

#### **§ 831.9 Authority during investigations.**

(a) *General authority of investigators.* To carry out the statutory responsibilities of the agency, an NTSB investigator may—

- (1) Conduct hearings;
- (2) Administer oaths;
- (3) Require, by subpoena or otherwise, the production of evidence and witnesses;
- (4) Enter any property where an accident subject to the NTSB's jurisdiction has occurred, or wreckage from any such accident is located, and take all actions necessary to conduct a complete investigation of the accident;
- (5) Inspect, photograph, or copy any records or information (including medical records pursuant to paragraph (b)(2) of this section), and correspondence regardless of the date of their creation or modification, for the purpose of investigating an accident;
- (6) Take possession of wreckage, records or other information if it determines such possession is necessary for an investigation; and
- (7) Question any person having knowledge relevant to a transportation accident.

(b) *Subpoenas.* The NTSB may issue a subpoena, enforceable in Federal District Court, to obtain testimony or evidence related to an accident, including but not limited to personal electronic devices.

(1) The NTSB's authority to issue subpoenas includes access to medical records and specimens.

(2) For purposes of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191, and the regulations promulgated by the DHHS, 45 CFR 164.501 *et seq.*, the NTSB is a "public health authority" to which protected health information may be disclosed by a HIPAA "covered entity" without the prior written authorization of the subject of the records. In addition, the NTSB may issue a subpoena to gain access to such information.

(c) *Examination of evidence.* In accordance with 49 U.S.C. 1134(d), the NTSB has exclusive authority to decide timing, manner and method of testing and examination of evidence, and extraction of data.

#### **§ 831.10 Autopsies and postmortem testing.**

When a person dies as a result of having been involved in a transportation accident within the jurisdiction of the NTSB—

(a) The NTSB is authorized to obtain, with or without reimbursement, a copy of a report of autopsy performed by a State or local authority on such person.

(b) The NTSB may order an autopsy or other postmortem tests of any person as may be related to its investigation of a transportation accident. The IIC may direct that an autopsy or other test be performed if necessary for an investigation. Provisions of local law protecting religious beliefs with respect to autopsies shall be observed to the extent they are consistent with the needs of the investigation.

#### **§ 831.11 Parties to the investigation.**

(a) *Participants.* (1) The IIC may designate one or more entities to serve as parties in an investigation. Party status is limited to those persons, Federal, state, or local government agencies and organizations whose employees, functions, activities, or products were involved in the accident and that can provide suitable qualified technical personnel to actively assist in an investigation. To the extent practicable, a representative proposed by party organizations to participate in the investigation may not be a person who had direct involvement in the accident under investigation.

(2) Except for the FAA, no entity has a right to participate in an NTSB investigation as a party.

(3) The participation of the Administrator of the FAA and other Federal entities in aviation accident investigations is addressed in § 831.21 of this part.

(4) Participants in an investigation (*e.g.*, party representatives, party coordinators, and/or the larger party organization) must follow all directions and instructions from NTSB representatives. Party status may be revoked or suspended if a party fails to comply with assigned duties and instructions, withholds information, or otherwise acts in a manner prejudicial or disruptive to an investigation.

(b) *Prohibitions on serving as party representatives.* (1) In accordance with § 845.6 of this chapter, no party representative may occupy a legal position or be a person who also represents claimants or insurers.

(2) Failure to comply with these provisions may result in sanctions, including loss of party status.

(c) *Disclosures.* (1) The name of a party and its representative may be

disclosed in documents the NTSB places in the public docket for the investigation.

(2) The NTSB may share information considered proprietary or confidential by one party with other parties during the course of an investigation, but will preserve the confidentiality of the information to the greatest extent possible.

(3) Section 831.6(d) of this part describes how the NTSB will handle voluntarily submitted safety information, and the NTSB's determination whether to share any such information. The NTSB will de-identify the source of such information when deciding to share it.

(d) *Party agreement.* Except for representatives of other Federal agencies, all party representatives must sign the "Statement of Party Representatives to NTSB Investigation" (Statement) upon acceptance of party status. Failure to timely sign the statement may result in sanctions, including loss of party status. Representatives of other Federal agencies, while not required to sign the Statement, will be provided notice of and must comply with the responsibilities and limitations set forth in the agreement.

(e) *Internal review by a party.* (1) To assure coordination of concurrent efforts, a party to an investigation that conducts or authorizes a review of its own processes and procedures as a result of an accident the NTSB is investigating, by signing the party agreement, agrees to, in a timely manner—

(i) Inform the IIC of the nature of the review; and

(ii) Provide the IIC with the findings from the review.

(2) If the findings from a review contain privileged information—

(i) The submitting party must inform the IIC that the review contains privileged information;

(ii) The submitting party must identify the privileged content at the time of submission to the IIC; and

(iii) The NTSB must, if informed that such information is being submitted, review the information for relevancy to the investigation, and determine whether public disclosure of the information is necessary for the investigation.

(3) The NTSB may use the protections described in § 831.6 of this part, as applicable, to protect certain findings from public disclosure.

(4) Investigations performed by other Federal agencies during an NTSB investigation are addressed in § 831.5 of this part.

#### **§ 831.12 Access to and release of wreckage, records, mail, and cargo.**

(a) Only persons authorized by the NTSB IIC may be permitted access to wreckage, records, mail, or cargo.

(b) Wreckage, records, mail, and cargo in the NTSB's custody will be released when the NTSB determines it has no further need for such items. Recipients of released wreckage must sign an acknowledgement of release provided by the NTSB.

#### **§ 831.13 Provision and dissemination of investigative information.**

(a) *Applicability.* This section applies to:

(1) Information related to the accident or incident;

(2) Any information collected or compiled by the NTSB as part of its investigation, such as photographs, visual representations of factual data, physical evidence from the scene of the accident, interview statements, wreckage documentation, flight data and cockpit voice recorder information, and surveillance video; and

(3) Any information regarding the status of an investigation, or activities conducted as part of the investigation.

(b) *Provision of information.* All information described in paragraph (a) of this section and obtained by any person or organization participating in the investigation must be promptly provided to the NTSB, except where the NTSB authorizes the party to retain the information.

(c) *Release of information.* Parties are prohibited from releasing information obtained during an investigation at any time prior to the NTSB's public release of information unless the release is consistent with the following criteria:

(1) Information released at the scene of an accident—

(i) Is limited to factual information concerning the accident and the investigation released in coordination with the IIC; and

(ii) Will be made by the Board Member present at the scene as the official spokesperson for the NTSB. Additionally, the IIC or representatives from the NTSB's Office of Safety Recommendations and Communications may release information to media representatives, family members, and elected officials as deemed appropriate.

(2) The release of information described in paragraph (a)(1) of this section by the NTSB at the scene of an accident does not authorize any party to the investigation to comment publicly on the information during the course of the investigation. Any dissemination of factual information by a party may be made only as provided in this section.

(3) A party may disseminate information related to an investigation to those individuals within its organization who have a need to know for the purpose of addressing a safety issue including preventive or remedial actions. If such internal release of information results in a planned safety improvement, the party must inform the IIC of such planned improvement in a timely manner before it is implemented.

(4) Any other release of factual information related to the investigation must be approved by the IIC prior to release, including:

(i) Dissemination within a party organization, for a purpose not described in paragraph (b)(3) of this section;

(ii) Documents that provide information concerning the investigation, such as written directives or informational updates for release to employees or customers of a party;

(iii) Information related to the investigation released to an organization or person that is not a party to the investigation;

(d) The release of recordings or transcripts from certain recorders may be made only in accordance with the statutory limitations of 49 U.S.C. 1114(c) and (d).

#### **§ 831.14 Proposed findings.**

(a) *General.* Any party to the investigation designated under § 831.11 may submit to the NTSB written proposed findings to be drawn from the evidence produced during the course of the investigation, a proposed probable cause, and/or proposed safety recommendation(s) designed to prevent future accidents.

(b) *Timing of submissions.* The IIC will inform parties when submissions are due. All written submissions must be received by the IIC by the due date. If there is a Board meeting, the due date will be set prior to the date the matter is published in the **Federal Register**.

### **Subpart B—Aviation Investigations**

#### **§ 831.20 Authority of NTSB in aviation accident investigations.**

(a) *Scope.* The NTSB is authorized to investigate—

(1) Each accident involving a civil aircraft in the United States, and any civil aircraft registered in the United States when an accident occurs in international waters;

(2) Each accident involving a public aircraft as defined in 49 U.S.C. 40102(a)(41), except for aircraft operated by the U.S. Armed Forces or by an intelligence agency of the United States;

(3) With the participation of appropriate military authorities, each

accident involving a military aircraft and—

- (i) a civil aircraft; or
- (ii) certain public aircraft as described in paragraph (a)(2) of this section.

(b) *Authority to examine or test.*

Pursuant to § 831.9 of this part, a credentialed employee of the NTSB is authorized to examine or test any civil or certain public aircraft, aircraft engine, propeller, appliance, or property aboard such aircraft involved in an accident or incident subject to the NTSB's authority.

#### **§ 831.21 Other Government agencies and NTSB aviation investigations.**

(a) Pursuant to 49 U.S.C. 1132(c) and 106(g)(1)(A), the NTSB will provide for the participation of the Administrator of the FAA in the investigation of an aircraft accident when participation is necessary to carry out the duties and powers of the FAA Administrator.

(b) Title 49 U.S.C. 1131(a)(2) provides for the appropriate participation by other departments, agencies, or instrumentalities of the United States Government in the investigation of an aircraft accident by the NTSB.

(c) *Rights and duties of other Federal agencies.* (1) The FAA and other Federal agencies named as parties to an aircraft accident investigation will be accorded the same rights and privileges, and are subject to the same limitations, as other parties. Participation in an investigation includes the duty to timely share with the NTSB any information that has been developed by the FAA or other Federal agency in the exercise of that agency's investigative authority.

(2) In exercising its authority, the FAA or other Federal agency may obtain information directly from a party to an accident or incident under investigation by the NTSB.

(3) Information obtained by another Federal agency must be timely shared with the NTSB.

(4) Investigative activities by another Federal agency must be coordinated to ensure that they do not interfere with the NTSB's investigation.

(5) Under no circumstances may an NTSB aviation accident investigation for which the FAA or any other Federal agency has conducted fact-finding be considered a joint investigation with shared responsibility. Decisions about what information to include in the public docket will be made by the NTSB.

(6) Notwithstanding the rights and duties described in paragraphs (c)(1) through (5) of this section, determining the probable cause of an accident is exclusively the right and duty of the NTSB.

(d) An FAA employee designated to act by the NTSB IIC has the same authority as an NTSB investigator when conducting activities under this part. The investigation remains that of the NTSB.

(e) Nothing in this section may be construed as inhibiting the FAA from proceeding with activities intended to fulfill a statutory requirement or objective, including the collection of data for safety management or enforcement purposes. Section 831.5 of this part also applies to the investigation of aviation accidents.

#### **§ 831.22 International aviation investigations.**

(a) *General.* (1) Annex 13 to the Convention on International Civil Aviation, *Aircraft Accident and Incident Investigation* (Annex 13) contains standards and recommended practices for the notification, investigation, and reporting of certain accidents involving international civil aviation.

(2) Annex 13 provides that the state of occurrence of an accident or incident is responsible for the investigation when the state is a signatory to the Convention.

(b) The NTSB—

(1) Is the U.S. agency that fulfills the obligations of the United States under Annex 13, in coordination with and consistent with the requirements of the United States Department of State.

(2) Participates in the investigation as the accredited representative to an international investigation when the accident involves a civil aircraft—

- (i) of a U.S. operator;
- (ii) of U.S. registry;
- (iii) of U.S. manufacture; or

(iv) when the U.S. is the state of design or manufacture of the aircraft or parts thereof.

(c) *Technical advisers.* Once designated the accredited representative in an international investigation, the NTSB may elect to receive assistance by appointing one or more advisers to serve under the NTSB's direction. Such technical advisers—

(1) Work at the direction and under the supervision of the NTSB accredited representative.

(2) Are subject to the provisions of § 831.13 of this part while working under the supervision of the NTSB accredited representative.

(d) If an accident occurs in a foreign state that is not a signatory to the Convention, or if an accident or incident involves an aircraft that is not a civil aircraft, the NTSB will participate in the investigation in accordance with any agreement between the United States and the foreign state that addresses such occurrences.

(e) The NTSB's disclosure of records of a foreign investigation is limited by statute (49 U.S.C. 1114(f)) and by § 831.6 of this part.

#### **Subpart C—Highway Investigations**

##### **§ 831.30 Authority of NTSB in highway investigations.**

(a) *Scope.* The NTSB is responsible for the investigation of selected highway accidents (e.g., collisions, crashes and explosions), including at railroad grade-crossing accidents. Such investigations will be conducted in cooperation with the designated authorities of the state or local jurisdiction in which the accident occurred.

(b) *Authority to examine or test.* Pursuant to § 831.9 of this part, a credentialed employee of the NTSB is authorized to examine or test any item, including any vehicle, part of a vehicle, equipment, or contents of any vehicle or equipment involved in an accident subject to the NTSB's authority. Examination or testing will be conducted—

(1) To the extent practicable, so as to not interfere with or obstruct the transportation services provided by the owner or operator of a vehicle or equipment; and

(2) In a manner that preserves evidence relating to the transportation accident, in cooperation with the owner or operator of the vehicle or equipment, and consistent with the needs of the investigation.

(c) Any Federal, state, or local agency that conducts an investigation of the same highway accident the NTSB is investigating shall provide the results of its investigation to the NTSB.

#### **Subpart D—Railroad, Pipeline, and Hazardous Materials Investigations**

##### **§ 831.40 Authority of NTSB in railroad, pipeline, and hazardous materials investigations.**

(a) *Scope.* (1) *Railroads.* Consistent with its statutory authority, the NTSB is responsible for the investigation of railroad accidents, collisions, crashes, derailments, explosions, incidents, and releases in which there is a fatality, substantial property damage, or which involve a passenger train, as described in part 840 of this chapter.

(2) *Pipelines.* The NTSB is responsible for the investigation of pipeline accidents, explosions, incidents, and ruptures in which there is a fatality, significant injury to the environment, or substantial property damage. This excludes accidents involving pipelines only carrying water or sewage.

(3) *Hazardous Materials.* The NTSB is responsible for evaluating the adequacy

of safeguards and procedures for the transportation of hazardous materials, and the performance of other entities of the Federal government responsible for the safe transportation of hazardous materials. Such evaluations may take place as part of the investigation of a transportation accident subject to the NTSB's authority and include applicable regulations in other subparts of this part.

(b) *Authority to examine or test.*

Pursuant to § 831.9 of this part, during an investigation, a credentialed employee of the NTSB is authorized to examine or test any rolling stock, track, or pipeline component, or any part of any such item (or contents therein) when such examination or testing is determined to be required for purposes of such investigation. Examination or testing will be conducted—

(1) To the extent practicable, so as to not interfere with or obstruct the transportation services provided by the owner or operator of such rolling stock, track, signal, rail shop, property, or pipeline component; and

(2) In a manner that preserves evidence relating to the transportation accident consistent with the needs of the investigation.

**Robert L. Sumwalt, III,**  
*Acting Chairman.*

[FR Doc. 2017-12988 Filed 6-28-17; 8:45 am]

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## NATIONAL TRANSPORTATION SAFETY BOARD

### 49 CFR Part 831

[Docket No. NTSB-GC-2012-0002]

RIN 3147-AA01

### Investigation Procedures: Marine Investigations

**AGENCY:** National Transportation Safety Board (NTSB).

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** The NTSB adds to its accident investigation procedures regulations a new subpart for marine casualty investigations. This interim final rule adopts a number of substantive and technical changes the NTSB proposed in its August 12, 2014 Notice of Proposed Rulemaking (NPRM), as those proposals were intended to apply to marine investigations. It also sets forth several changes specific to marine casualty investigations.

**DATES:** This rule is effective July 31, 2017. Comments must be received by

July 31, 2017. Comments received after the deadline will be considered to the extent possible.

**ADDRESSES:** A copy of this interim final rule, published in the **Federal Register**, is available for inspection and copying in the NTSB's public reading room, located at 490 L'Enfant Plaza SW., Washington, DC 20594-2003. Alternatively, a copy is available on the government-wide Web site on regulations at <http://www.regulations.gov> (Docket ID Number NTSB-GC-2012-0002).

You may send comments identified by Docket ID Number NTSB-GC-2012-0002 using any of the following methods:

**Federal eRulemaking Portal:** Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

**Mail:** Send comments to NTSB Office of General Counsel, 490 L'Enfant Plaza East SW., Washington, DC 20594-2003.

**Facsimile:** Fax comments to 202-314-6090.

**Hand Delivery:** Bring comments to 490 L'Enfant Plaza East SW., 6th Floor, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**PRIVACY:** We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Ann Gawalt, Deputy General Counsel, 202-314-6088.

### SUPPLEMENTARY INFORMATION:

#### I. Background

##### *A. Justification for Use of an Interim Final Rule*

The NTSB issues this interim final rule to create a distinct set of regulations for NTSB marine casualty investigations. As explained in further detail below, marine accident investigations involve unique factors that are not present in other NTSB investigations. To address these differences, NTSB promulgates several changes to subpart E that did not appear in the NPRM for part 831. 79 FR 47064 (Aug. 12, 2014).

The Administrative Procedure Act (APA) generally requires an agency to provide notice of proposed rulemaking and a period of public comment before the promulgation of a new regulation. 5 U.S.C. 553(b) and (c). Section 553(b) of the APA provides that notice and comment requirements do not apply when the agency, for good cause, finds that notice and public comment procedure are impracticable,

unnecessary, or contrary to the public interest. The NTSB will issue an interim final rule when it is in the public interest to promulgate an effective rule while keeping the rulemaking open for further refinement. 49 CFR 800.45.

The interim final rule procedure is appropriate for this new subpart involving marine casualty investigations. Many provisions of subpart E, as implemented in this interim final rule, are similar to those the NTSB proposed in the NPRM dated August 12, 2014. When the NTSB solicited comments concerning its proposed changes to part 831, it received one comment specific to marine casualty investigations, submitted by the United States Coast Guard (USCG). As a result, utilizing the notice and comment rulemaking process anew for this subpart is unnecessary.

#### *B. NTSB and USCG: Statutory and Regulatory Considerations*

In accordance with NTSB statutory authority (49 U.S.C. 1131(a)(1)(E)) and USCG statutory authorities (46 U.S.C. Chapters 61 and 63, and 14 U.S.C. 141)), for investigations involving any major marine casualty or any casualty involving public and nonpublic vessels, the NTSB works closely with the USCG, pursuant to the joint USCG-NTSB Marine Casualty Investigation Regulations. The NTSB's version of the joint regulations is codified at 49 CFR part 850 and the USCG's version is codified at 46 CFR subpart 4.40. Also as provided in those regulations, either agency may conduct investigations of certain types of marine casualties on its own, or with assistance from the other. As a result, the NTSB's relationship with the USCG during marine casualty investigations is distinct from the NTSB's relationship with other Federal agencies for investigations of transportation accidents in other modes, as described at § 831.5 of this part.

In addition, because of their separate authorities, NTSB and USCG investigations differ in some significant ways. The NTSB has the responsibility to evaluate the effectiveness of USCG regulations, policies, and practices in preventing casualties and examine the transport of hazardous materials. In addition to reporting on the probable cause, facts and circumstances of certain types of marine casualties, the NTSB also makes safety recommendations to reduce the likelihood of future casualties. The USCG is responsible for reporting on the cause of the casualty and identifying certification and licensure issues and potential criminal conduct. Specifically, Congress charged the USCG with the responsibility of