December 17, 2012

National Transportation Safety Board
Office of General Counsel
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594-2003

Re: Docket Number NTSB-GC-2011-0001: Interim final rule; request for comments

The National Business Aviation Association (NBAA) represents the interests of more than 9,000 Member companies who operate general aviation aircraft as a solution to some of their business travel challenges. Over NBAA's 65-year history, the Association and our Membership have been fundamental participants in the development, analysis and implementation of numerous regulatory initiatives that have impacted the business aviation community. We believe that this involvement has helped to produce sound and effective safety policy related to the operation of general aviation aircraft for business purposes. The business aviation community's commitment to reasonable and effective safety standards and practices has led to a safety record for corporate aviation that is equal to, and sometimes better than that for the scheduled airlines. This safety record results from the business aircraft operators' applying practical safety strategies to manage and mitigate risk. The business aviation community has a long and demonstrated history of partnership with government safety and security regulatory agencies. These partnerships are based on common objectives and underscore our preference for working cooperatively with these agencies to jointly develop solutions. It is in that spirit that the NBAA offers these comments on Docket Number NTSB-GC-2011-0001 published on October 16, 2012, entitled Interim final rule; request for comments.

I. History with Safety Enforcement Proceedings

NBAA in the past has participated in many rulemaking efforts involving aviation safety enforcement proceedings. NBAA and our Members seek to ensure that air safety is preserved and enhanced through rigorous safety enforcement efforts and procedures that are meaningful, fair, reasonable and evenly applied to both FAA and those accused of wrongdoing. NBAA welcomes and appreciates the NTSB's current review of its regulations dealing with the rules of practice in air safety proceedings and the Equal Access to Justice Act of 1980, with a view towards ensuring that they are fair and appropriate. For ease of reference, NBAA's comments to the earlier NPRM and ANPRM are attached hereto following the within comments.

II. Issues raised in the October 16, 2012 Federal Register notice

The October 16, 2012 federal register notice bearing Docket ID Number NTSB-GC-2011-0001 contains two parts. They are (i) interim final rules and request for comments [77 FR 63242], and (ii) final rules [77 FR 63245]. Under the Regulatory Changes portion of the interim final rules (Section IV thereof), NBAA has no comment upon the specific changes stated. With respect to the final rules portion of the notice beginning at 77 FR 63245, NBAA disagrees with the Board's position that an NTSB law judge must continue to assume that the FAA's allegations are true. Nonetheless, NBAA's comments on that issue were submitted at the ANPRM and at the NPRM level, hence the within Docket bearing a 2011 designation. Copies are annexed for ease of reference. At the core of NBAA's comments here is whether the Board correctly implemented the Pilots Bill of Rights statute (PBOR) and whether it followed both proper administrative procedure as well as Congressional intent when it refused to alter the assumption of truth standard in its interim and final rules. To that end, NBAA's comments are addressed in the following order:

I. Forcing NTSB law judges to assume that the FAA's ***factual*** allegations are true is fundamentally unfair and is contrary to all notions of due process;
II. The Board failed to follow Congressional intent; and
III. The Board failed to follow appropriate administrative procedure.

III. Forcing NTSB law judges to assume that the FAA's *factual* allegations are true is fundamentally unfair and is contrary to all notions of due process

Following the positions taken in response to the earlier ANPRM and NPRM, NBAA believes that the airman appeals process is fundamentally unfair if the FAA's factual allegations against an airman are assumed by the Board to be true during any review, emergency or otherwise. In short, the FAA need do nothing more than carefully draft the factual allegations in its complaint so as to prevail in any challenge to its emergency determination. The overwhelming percentage of cases decided by the Board in favor of the FAA on this issue proves the point.

NBAA's comments on this issue filed in response to the ANPRM and NPRM remain unchanged and are incorporated herein by reference. Since the time that those comments were submitted, however, PBOR was signed into law. NBAA takes issue with the Board's stated policy following PBOR that it intends to continue to assume that the FAA's allegations of fact are true when reviewing FAA emergency actions.

Raised for the first time by the Board in its October 16, 2012 notice at 77 FR 63248, the Board states that if it held a hearing in each petition challenging the FAA's determination that an emergency exists (which immediately deprives an airman of his or her certificate), the Board "could not fulfill its obligation to rule on the merits of the case within the statutorily required 60-day time frame." The Board proceeds to discuss how it is hampered by a lack of resources in order to review petitions for review of FAA emergency determinations, stating "The NTSB currently does not have the resources to hold hearings on petitions contesting emergency determinations, given the expedited time frame." The Board further states that it has "only four administrative law judges, all of whom …. [have other work to do]."

With all due respect to the Board and its resources (or lack thereof), a lack of resources is an inappropriate and improper excuse to deny fair and meaningful review of an FAA decision. The Board is confronted with a fair number of FAA emergency certificate actions. In many of those cases, the FAA's emergency decision is challenged by the airman. This was not always the case. For many decades following creation of the Board's airman appeals function and oversight of FAA decision making, FAA determinations that an emergency existed were few. It was only after an FAA policy change at one point caused all certificate revocation actions to automatically be initiated as emergencies. It was at that point where the Board's emergency caseload saw a marked increase. What NBAA sought in its comments to the ANPRM and in the NPRM, and what it believes that Congress intended when passing PBOR, is that an airman subject to certificate enforcement action have a meaningful opportunity to challenge the FAA's factual determination that an emergency exists. By choosing to retain the "assuming the truth" standard of review in 49 CFR 821.54(e), the Board is precluding any meaningful review of the facts as alleged by the FAA in its emergency determination.

The Board's discussion of the issue at 77 FR 63248 provides additional reasons to support its rationale for refusing to change the standard even in the face of a statute (PBOR). The Board goes so far as to argue that by providing an affidavit to support its emergency determination, the FAA's emergency determination can always be trusted and should be subject to no further factual review. It then analogizes this concept to the four prong standard applicable to preliminary injunctions and temporary restraining orders used by Federal Courts. The Board's logic fails, however, when it misses a step. When referring to Federal Courts, the Board provides an example. It states

> "they [Federal Courts] do not have time for a trial on the merits of the case wherein they apply a preponderance of the evidence standard. Instead, the courts must weigh the facts in favor of the party seeking action in analyzing the four prongs to determine whether short-term, immediate legal action is appropriate. The NTSB law judges' review of emergency challenges is similar to this analysis."

While the Board is correct that Federal Courts "do not have time for a trial on the merits," the Board fails to acknowledge that Federal Courts allow evidence to be presented and evaluate and test both sides' evidence – often in an abbreviated evidentiary hearing. In determining the likelihood of success, courts do not assume the truth of the plaintiff's allegations (as they do when considering a defendant's motion to dismiss). Rather, when considering whether to issue a preliminary injunction or stay pending review, courts weigh the evidence presented by both sides, on their merits. There is no reason why NTSB law judges cannot or should not review a complainant's factual allegations just like any federal court or other administrative agency - on its merits based on a meaningful record.

The Board's position at 77 FR 63248, however, concludes that it cannot provide the meaningful review offered by Federal Courts in any fashion because its resources are limited. That position is inconsistent with due process and any notion of either meaningful review or fair play. For each of these reasons, NBAA respectfully asks the Board to discontinue use of the "assuming the truth" standard consistent with PBOR, and withdraw that language from 49 CFR 821.54(e).

IV. The Board failed to follow Congressional intent

The legislative history associated with PBOR demonstrates that there was no debate regarding what Congress intended.

> The purpose of these changes is simply to make the statute consistent with the laws governing all other Federal agencies. Thus, it is the intention of the Senate that the NTSB, in reviewing FAA cases, will apply principles of judicial deference to the interpretations of laws, regulations, and policies that the Administrator carries out in accordance with the Supreme Court's ruling in Martin v. OSHRC, 449 U.S. 114 (1991). 158 Cong Res S 4733, *4733.

Congress addressed deference to FAA's "interpretations of laws, regulations, and policies." Congress did not sanction deference to the FAA's factual allegations of

wrongdoing against an airman. As stated by Sen. Rockefeller, "….the Pilot's Bill of Rights, takes several steps to protect the rights of pilots, including modifications to the appeals process, …." Id. Congress did not intend to remove deference to FAA's interpretation of its own rules. Rather, Congress intended to ensure that a mechanism exists for meaningful review of FAA's factual allegations/charges of wrongdoing – just as with any other review within our legal system.

V. The Board failed to follow appropriate administrative procedure

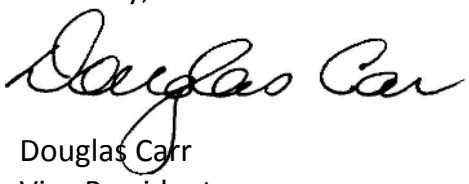
In its October 16, 2012 notice, the Board improperly combines two issues. A timeline is therefore in order. Specifically, the Board began a process in 2011 to consider changes to its rules of practice in in air safety proceedings. That process began with an ANPRM and followed with an NPRM. Comments were submitted. Before final rules were promulgated, Congress enacted a statute entitled the Pilot's Bill of Rights (PBOR). PBOR was signed into law on August 3, 2012. The Board did not issue an NPRM to implement changes to its rules necessitated by PBOR. Nor did the Board implement ***all*** of PBOR by promulgating interim final rules and inviting comment thereafter. Rather, the Board created ***interim final rules*** that addressed most of PBOR and requested comment on those interim final rules. The most controversial portion of the rules, that being the "assuming the truth" standard, did not make it into the interim final rules and thereby allow comment. Instead, the Board moved forward with its original plan under the 2011 docket, the effect of which was issuing final rules that closed the docket to further comment. The Board further mentioned in the comments to that final rule that it was aware of the recent enactment of PBOR. It also discussed PBOR at some length, including addressing its own lack of resources to complete certain tasks as part of the review process. By precluding public comment on its implementation of PBOR, the Board usurped its authority and prevented the public from participating in the appropriate administrative process following enactment of a statute.

The procedural error here is especially important with respect to the lack of fundamental fairness in the airman certificate enforcement appeals process, exemplified in the Board's "assuming the truth" standard. The appropriate remedy for this procedural error is for the Board to withdraw its final rules at least with respect to the "assuming the truth" standard and to then allow an opportunity to comment on the "assuming the truth" standard as the Board views it following PBOR. The Board's suggestion at 77 FR 63248 that it will "consider this analysis anew in light of any petition for rulemaking" amounts to tacit acknowledgement by the Board that the process it followed on this issue is flawed.

VI. Summary and Conclusion

NBAA truly appreciates the NTSB's willingness to revisit the appropriateness and effectiveness of its regulations dealing with the rules of practice in air safety proceedings and the Equal Access to Justice Act of 1980, as well as the NTSB's providing the opportunity to comment on those regulations. We continue to stand ready to support any NTSB efforts to update and improve these regulations; including participating in a rulemaking committee should the Board see fit to establish one. Please contact us if you require any additional information.

Sincerely,



Douglas Carr
Vice President
Safety, Security & Regulation

Attachments: Three examples of a workable process
NBAA Comments to NTSB ANPRM
NBAA Comments to NPRM

Attachment: Three examples of a workable process

I. The FAA issues an emergency order revoking an airman's certificate for taking off without a trim tab attached. Under current regulations and policy, the NTSB law judge must assume that those facts are true and there is no meaningful review of the FAA's factual allegation. Let's assume that the airman also has video of the aircraft taking off with the trim tab attached at the time and place the FAA alleges that the aircraft took off without it. By motion to vacate the FAA's determination of an emergency, the airman can submit in admissible form, under cover of declaration or affidavit, the photo or video disproving the FAA's allegation. The law judge would have the discretion to dismiss the case in its entirety, weigh the FAA's response to determine whether a non-emergency hearing on the merits is justified, hold a telephonic conference call among counsel to determine what evidence would be elicited in an evidentiary hearing, or the law judge could decide to hold a limited evidentiary hearing on the record with strict time constraints for each party via recorded telephonic conference call or via recorded videoconference. Since the Board has long used court monitors for its hearings rather than court reporters (the court monitors merely recording the proceedings through electronic rather than through stenotype means), the same record could easily be achieved in an expedited proceeding as the Board already uses in non emergency cases. Most importantly, the FAA's allegations of fact will no longer be impervious to review. The NTSB law judge will have discretion to determine an appropriate process for review based on the evidence presented by motion, and in cases where the law judge believes a limited evidentiary hearing on the record will assist in the just administration of the law, a process will be available to conduct a limited evidentiary hearing that fairly meets the needs of the accused airman, the FAA and the Board without undue burden on any of these interests.

II. The FAA issues an emergency order accusing an airman of falsifying records. Based on FAA's policy that all allegations of falsification require emergency revocation, there is no discretion or opportunity for thought in the process within FAA, nor review of the FAA's factual allegations of falsification. Assume that an airman is accused of falsification of a training record, showing that air carrier recurrent training was completed. FAA challenges that it was not, and that the form testifying to the completion was therefore falsified. The airman has evidence to show that the training was completed in a slightly different, but similar aircraft. Unbeknownst to the investigating inspector and FAA prosecuting attorney, FAA's

handbook on point actually contemplates what it calls "differences training" and thereby permits the airman to certify recurrent training exactly as written and as the FAA alleges was falsified. By current regulation and policy, the FAA's factual allegations in this scenario are assumed to be true, and as a matter of law, there is no review of the FAA's factual allegations that an emergency exists. If a law judge were not required to assume that the FAA's factual allegations are true, the law judge could then lawfully determine on the papers that the issues involve a demonstrated procedural conflict within FAA that cannot legitimately be considered an emergency. Such a review could easily be accomplished and decided on the papers by motion. If the law judge determines that additional caution is required, a conference call could be held among counsel – no differently than a federal judge routinely conducting a conference in chambers to help determine whether an evidentiary hearing is necessary and appropriate in a given matter. If absolutely necessary, an evidentiary hearing of limited duration, on the record via recorded conference call or video chat, could also be accomplished with minimal disruption or cost to either the Board or FAA. Such a process would simultaneously provide for the meaningful review of FAA governmental action that due process demands.

III. Following review of an airman's medical certificate application, the FAA requests additional information. The airman responds, providing everything that the FAA requests. The airman retains the receipt from the overnight delivery service showing a signature from an FAA employee in the office identified in the FAA's letter. FAA misplaces the response, and assumes that the airman did not respond. FAA then issues an emergency order of revocation against the airman's medical certificate and all other pilot certificates held. The airman moves to vacate the FAA's determination that an emergency exists, providing an affidavit or declaration with the overnight delivery service receipt attached. An NTSB law judge could comfortably and appropriately determine on the papers that no emergency exists, thereby providing meaningful and appropriate review of the FAA's factual determinations. While no further proceedings would appear to be necessary in this example, the law judge would have the ability to hold a conference call among counsel if he or she deemed it necessary, or even a recorded telephone or videoconference to establish a record. Justice would be preserved while maintaining the flexibility required to accommodate the Board's available resources

February 22, 2011

Gary L. Halbert, Esq., General Counsel
National Transportation Safety Board
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594-2000

Re: Advance Notice of Proposed Rulemaking (ANPRM) re Rules of Practice in Air Safety Proceedings and Implementing the Equal Access to Justice Act of 1980

Dear Mr. Halbert:

The National Business Aviation Association (NBAA) represents the interests of 8,000 Member companies who operate general aviation aircraft as a solution to some of their business travel challenges. Over NBAA's 60-year history, the Association and our Membership have been fundamental participants in the development, analysis and implementation of numerous regulatory initiatives that have impacted the business aviation community. We believe that this involvement has helped to produce sound and effective safety policy related to the operation of general aviation aircraft for business purposes.

The business aviation community's commitment to reasonable and effective safety standards and practices has led to a safety record for corporate aviation that is equal to, and sometimes better than that for the scheduled airlines. This safety record is not a product of government oversight. Rather, it results from the business aircraft operators' applying practical safety strategies to manage and mitigate risk.

The business aviation community has a long and demonstrated history of partnership with government safety and security regulatory agencies. These partnerships are based on common objectives and underscore our preference for working cooperatively with these agencies to jointly develop solutions. It is in that spirit that the NBAA offers these comments on the Advance Notice of Proposed Rulemaking ("ANPRM") on Rules of Practice in Air Safety Proceedings and implementing the Equal Access to Justice Act of 1980.

I. History with Safety Enforcement Proceedings

NBAA in the past has participated in many rulemaking efforts involving aviation safety enforcement proceedings. NBAA and our Members seek to ensure that air safety is preserved and enhanced through rigorous safety enforcement efforts and procedures that are meaningful, fair, reasonable and evenly applied to both FAA and those accused of wrongdoing. NBAA welcomes and appreciates the NTSB's current review of its regulations dealing with the rules of practice in air safety proceedings and the Equal Access to Justice Act of 1980, with a view towards insuring that they are fair and appropriate.

II. Four issues raised by the ANPRM

The ANPRM raises four issues on which the Board seeks specific comments. These issues are:

1. The standard for the NTSB's review of the FAA's "emergency" determinations;
2. Discovery and exchange of documents in air safety proceedings;
3. Suggestions concerning electronic filing of documents in such cases; and
4. Updates to the procedural rules governing EAJA claims.

The ANPRM further asks that comments include a reference to a specific section of the rules, explain the reason for any recommended change, and include supporting data or rationale. NBAA's comments are set forth in that order and format below, with the portion of the relevant rule edited in redline format to show NBAA's proposed modifications, followed by the reason for the recommended change and supporting data/rationale.

For greater detail on, and citations to, the legislative and regulatory history of the so called "Emergency Rules", please see Appendix A.

III. Standard for NTSB review of the FAA's "emergency" determinations

Rule section(s) involved:

§ 821.54 Petition for review of Administrator's determination of emergency.
(e) Disposition. Within 5 days after the Board's receipt of the petition, the chief law judge (or, if the case has been assigned to a law judge, the law judge to whom the case is assigned) shall dispose of the petition by written order, and, in so doing, shall consider whether, based on the pleadings and evidence presented , and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal. The law judge may consider, but shall not be required to follow, the Administrator's interpretations of the Federal Aviation Regulations.

Reason for recommended change:

The NTSB, inexplicably, and without any legislative mandate to do so, included in its current rules of practice in emergency proceedings a requirement that the NTSB Administrative Law Judge ("ALJ") hearing the matter must assume that all the facts alleged in the FAA's complaint are true, must defer to the FAA's interpretation of FAA rules, and must refuse to consider facts other than what the FAA chooses to include in its complaint. As it stands now, the certificate holder is not permitted, during consideration of the emergency nature of the FAA action, to mount a challenge to facts contained in the FAA complaint that the certificate holder believes to be untrue or inaccurate. Moreover, the certificate holder is prevented from supporting its position by pointing to facts outside the FAA's complaint that the certificate holder believes to be important. Such important facts can include the sometimes significant amount of time that the FAA was aware of the allegations prior to initiating emergency action. Congress intended that certificate holders be provided a thorough, independent and meaningful NTSB review of FAA emergency orders, and the facts and regulatory interpretations on which they are based. NBAA believes that that review should utilize a standard that permits the ALJ to fully and realistically review the determination that an emergency exists, rather than requiring the ALJ to simply rubber stamp the FAA's determination.

NBAA proposes that when reviewing the FAA's determination that an emergency exists, the NTSB ALJ's should not be required to assume that all the facts alleged in the FAA's complaint are true, and should be able to consider facts not alleged in the FAA's complaint that the certificate holder believes are important. One such fact in particular that the NTSB ALJ's should be able to consider, regardless of whether it is mentioned in the FAA's complaint, is the length of time the FAA was aware of the alleged facts on which it bases its determination before the FAA initiated emergency action.

Supporting data/rationale:

A complete legislative and regulatory history of the current rules on this issue is set forth in Appendix A to these comments. Congressional intent in passing the statute that mandated the development of the current rules was to afford a meaningful and independent review of FAA determinations that an emergency exists. It is difficult to imagine how any meaningful review of that FAA determination can take place when the FAA is free in its Emergency Order to choose what facts to allege and what interpretation

to apply to the relevant rules, and the ALJ is required to assume the truth of the facts the FAA prosecutor chooses to allege, to consider no other facts, and to accept without question the interpretation the FAA is applying to the relevant rules.

IV. Discovery and exchange of documents in air safety proceedings

Rule section(s) involved:

§ 821.53 Appeal.
(a) Time within which to file appeal. An appeal from an emergency or other immediately effective order of the Administrator must be filed within 10 days after the date on which the Administrator's order and related Enforcement Investigative Report, less portions thereof to which a privilege or exemption is claimed, was served on the respondent. The respondent shall simultaneously serve a copy of the appeal on the Administrator.

§ 821.55 Complaint, answer to complaint, motions and discovery.
(d) Discovery. Discovery is authorized in proceedings governed by this subpart. Given the short time available for discovery, the parties shall cooperate to ensure timely completion of the discovery process prior to the hearing. Within three (3) days of the filing of respondent's appeal, the parties shall confer and file a proposed discovery plan. The proposed discovery plan shall address the items identified in Federal Rule of Civil Procedure 26(f)(3). Within one (1) day following filing of the discovery plan, the parties shall make initial disclosures consistent with Federal Rules of Civil Procedure 26(a)(1)(A)(i) and (ii), and 26(a)(3)(A) without awaiting a discovery request. Discovery requests shall be served by the parties as soon as possible. A motion to compel discovery should be expeditiously filed where any dispute arises, and the law judge shall promptly rule on such a motion. Time limits for compliance with discovery requests shall be set by the parties so as to accommodate, and not conflict with, the accelerated adjudication schedule set forth in this subpart. The provisions of 821.19 shall apply, modified as necessary to meet the exigencies of this subpart's accelerated timeframes.

Reason for recommended change:

The NTSB's rules of practice in emergency proceedings are woefully out of date with respect to discovery. Traditional notions of basic due process contemplate that a person should have the right to see the evidence that the government relies on to support a government action taken against that person. Despite this, discovery in NTSB proceedings involving appeals of FAA determinations of an emergency is often quite limited, and the expedited nature of the proceedings unfairly permits the FAA a greater opportunity to prepare its case than the certificate holder has to defend against it. Regardless of whether the FAA believes an emergency exists, the certificate holder should have a full opportunity to view and confront the evidence that the FAA points to as justifying emergency action.

The NTSB rules of practice in emergency proceedings should be modernized "to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information." This quoted language is from a recommendation contained in the Advisory Committee Notes to the ***1993*** amendments to the Federal Rules of Civil Procedure. These 1993 amendments to the Federal Rules of Civil Procedure added requirements for automatic disclosures of certain information and a prompt, mandatory discovery planning conference between the parties in order to reach a case management plan. Because of the accelerated nature of NTSB proceedings on appeal of FAA emergency determinations, there is even more of a need for automatic disclosures of certain information and for a mandatory case planning conference between the parties in these types of proceedings. Such required automatic disclosures of information should include a requirement that the FAA's Enforcement Investigative Report ("EIR") must be served on the certificate holder when the FAA emergency order is served. Given the extremely short time period permitted for appeal, the EIR often is almost never available to the certificate holder until after the time to challenge the emergency determination has expired. The effectiveness and efficiency of NTSB proceedings on appeal of FAA emergency determinations would be greatly increased by the incorporation of these mechanisms into the process, and their incorporation would significantly lessen the amount of time that NTSB personnel must spend addressing discovery motions and disputes in such proceedings.

Supporting data/rationale:

In 1993, Rule 26 of the Federal Rules of Civil Procedure modernized discovery proceedings in civil litigation, and eighteen (18) years of practice have proven their worth. Having the benefit of automatic disclosures in NTSB emergency proceedings would provide not only for a meaningful review of FAA action, but minimize the time and expense associated with discovery for both Respondent and the Board. Respondents inevitably obtain the FAA's Enforcement Investigative Report (EIR) prior to a hearing, but that production is typically delayed by FAA as long as possible and to varying degrees to Respondent's disadvantage. Requiring automatic disclosures at the very outset of the matter, preferably in digital format, would eliminate the need for the Board to waste time with discovery disputes regarding production of the EIR, and allow Respondents a meaningful opportunity to see the evidence that FAA gathered against them, and do so in a manner that requires neither additional work nor costs for the FAA.

V. Suggestions concerning electronic filing of documents in such cases

Rule section(s) involved:

§ 821.7(a)(3) and (4) [Filing of Documents with the Board]; and § 821, Subpart I generally
Various portions of the above-referenced rules provide for service and filing via overnight delivery and/or facsimile. Should an electronic docket management system be implemented, these provisions should add references to also permit filing and service by electronic means.

§ 821.57 Procedure on appeal.
(a) Time within which to file notice of appeal. A party may appeal from a law judge's initial decision or appealable order by filing with the Board, and simultaneously serving on the other parties, a notice of appeal, within 2 days after the date on which the initial decision was orally rendered or the appealable order was served.

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

Reason for recommended change:

Time is of the essence in emergency proceedings, and an electronic docket management system would be a significant step forward in the meaningful review of emergency certificate actions. Not only would it permit Respondents to view FAA discovery responses sooner, but it would also eliminate the time and effort associated with faxing, which is heavily utilized by the Board in emergency cases out of necessity. The Board would similarly save significant postage associated with mailing, particularly with respect to heavy hearing transcripts. Lastly, a tried and true mechanism is already in place for an electronic docket management system through the use of PACER. Even if logistical impediments materialize, other transportation matters already use an electronic docket management system that is publicly accessible.

Supporting data/rationale:

Many years ago, the United States Courts created an electronic docketing system called Public Access to Court Electronic Records, commonly known as PACER. A portion of the PACER system is electronic court filing, or ECF. PACER has been in existence for many years, and is a tried and true system that has revolutionized the practice of law and drastically increased the ability of litigants to obtain information, communicate with one another, and ultimately to have a full, fair and meaningful opportunity to be heard by the Court. NTSB would similarly benefit from modernizing its docket control system in similar fashion.

Electronic docketing would not only assist with discovery at the hearing level, but would also assist at the appellate level. Certificate holders who do not prevail at a hearing before an NTSB ALJ on an FAA emergency determination, and who appeal the ALJ's ruling to the full NTSB, should have the same right

to the hearing transcript as the FAA enjoys when it opposes the appeal. Instead, 49 C.F.R. Section 821.57(a) of the NTSB's rules of practice in emergency proceedings currently states in pertinent part: "The time limitations for the filing of documents respecting appeals governed by this subpart will not be extended by reason of the unavailability of the hearing transcript." While time is certainly of the essence in emergency proceedings, forcing a certificate holder to appeal without the benefit of the transcript places that certificate holder at a distinct disadvantage. This is particularly so given that the FAA virtually always has access to the transcript by the time the FAA is required to file its opposition to the appeal. 49 C.F.R. Section 821.57 was last updated prior to the advent of electronic mail. Given the NTSB's ability to forward a copy of the hearing transcript to a certificate holder via e-mail in literally seconds, the time has come for certificate holders to be treated equally with the FAA with regard to having access to the transcript to support their position on appeal. In short, when a certificate holder appeals from an NTSB ALJ's ruling after a hearing, the certificate holder should have the same right to the hearing transcript as is enjoyed by the FAA when it opposes the appeal.

VI. Updates to the procedural rules governing EAJA claims

Rule section(s) involved:

§ 826.40 Payment of Award

Reason for recommended change:

The responsible FAA office information contained therein is outdated.

Supporting data/rationale:

The ANPRM sets forth the NTSB's intent to update that information so that it remains current. NBAA supports that effort and proposed change.

VII. Summary and Conclusion

NBAA appreciates the NTSB's willingness to revisit the accuracy and currency of its regulations dealing with the rules of practice in air safety proceedings and the Equal Access to Justice Act of 1980, as well as having the opportunity to comment on those regulations. We stand ready to support any NTSB efforts to update and improve these regulations, including participating in a rulemaking committee should the Board see fit to establish one. Please contact us if you require any additional information.

Sincerely,

Ed Bolen
President and CEO

Appendix A

Legislative and Regulatory History of the so called "Emergency Rules"

The Federal Aviation Administration (FAA) has the authority to amend, modify, suspend, or revoke certificates issued by the FAA. 49 U.S.C §44709(b). Certificate holders have the right to challenge such an FAA action by appealing to the National Transportation Safety Board (NTSB). 49 U.S.C §44709(d). Ordinarily, such an appeal automatically stays the effect of the FAA's certificate action until after the matter is fully adjudicated by the NTSB. 49 U.S.C §44709(e)(1). In appropriate cases, the FAA has the authority to declare that an emergency exists, in which event, an appeal to the NTSB does not stay the effect of the FAA's certificate action. 49 U.S.C §44709(e)(2). When the FAA declares an emergency and the certificate holder appeals to the NTSB, the NTSB is required to make a final disposition of the appeal within 60 days. 49 U.S.C §44709(e)(4).

The FAA has always had the authority to take certificate action and to declare such actions emergencies. Certificate holders affected by an FAA declaration of an emergency have always had a right to challenge the emergency declaration. In 2000, however, there was a change in the mechanism by which such challenges can be made.

Prior to 2000, a declaration of an emergency by the FAA was not a determination which was reviewable by the NTSB. While the NTSB had the authority to review the merits of the FAA's certificate actions, the NTSB had no authority to review the propriety of a decision by the FAA to declare an emergency. As such, the FAA's decision to declare an emergency was a final agency determination which was subject to review by the United States Courts of Appeal. See e.g. Nevada Airlines, Inc. v. FAA, 622 F.2d 1017 (9th Cir. 1980). In connection with a petition for judicial review such as that in Nevada Airlines, a petitioner had the right to raise all of the issues set out in 5 U.S.C §709. The available issues included whether or not the FAA's finding was supported by substantial evidence and whether or not the finding was an abuse of discretion.

While judicial review was always available, it was not a very practical remedy. It was extremely difficult for the affected certificate holder to litigate the propriety of the emergency determination in court while simultaneously litigating the merits of the certificate action before the NTSB. This was especially true since the NTSB adjudication is required to be completed within 60 days. Due to the cumbersomeness of litigating simultaneously in two different forums, relief was beyond the means of most certificate holders. Consequently, few judicial challenges of FAA determinations of emergencies were brought and fewer were successful.

In recognition of the need to provide certificate holders with a more meaningful way to challenge FAA emergency determinations, Congress acted in 2000. On April 6, 2000, Section 716 of the Aviation Investment and Reform Act for the 21st Century ("AIR 21"), Public Law 106-181, amended 49 U.S.C §44709 to add subsection (e)(3) which provides as follows:

> Review of emergency order. — A person affected by the immediate effectiveness of the Administrator's order under paragraph (2) may petition for a review by the Board, under procedures promulgated by the Board, of the Administrator's determination that an emergency exists. Any such review shall be requested not later than 48 hours after the order is received by the person. If the Board finds that an emergency does not exist that requires the immediate application of the order in the interest of safety in air commerce or air transportation, the order shall be stayed, notwithstanding paragraph (2). The Board shall dispose of a review request under this paragraph not later than 5 days after the date on which the request is filed.

The NTSB issued interim procedural rules to implement its new review authority on July 11, 2000 which were published at 65 Fed. Reg. 42637. The procedural rules are in 49 C.F.R. §821.52 et. seq. The interim rules contained a surprising restriction on the review process mandated by Congress. 49 C.F.R. §821.54(e) of the interim rules provided as follows:

> Disposition. Within 5 days after receipt of the petition, the chief judge (or, if the case has been assigned, the law judge to whom the case is assigned) shall dispose of the petition by written order, finding whether the Administrator abused his or her discretion in determining that there exists an emergency requiring the order to be immediately effective, based on the acts and omissions alleged in the Administrator's order, ***assuming the truth of such factual allegations***. (emphasis added).

It is not clear why the NTSB chose to severely restrict the right to challenge emergency determinations by requiring that the NTSB judge assume all of the FAA factual allegations to be true. The only clue provided by the NTSB is found in the preamble to the interim rules where the NTSB stated as follows:

> Since issues of fact are properly resolved at an evidentiary hearing, challenges to the truthfulness of the factual allegations appearing in the Administrator's order are not appropriate for this preliminary inquiry; thus, paragraph (e) provides that, for purposes of deciding this emergency issue, the law judge is to assume the truth of the factual allegations stated in the order. 65 Fed. Reg. at 42638.

This cavalier pronouncement by the NTSB as to what is appropriate during the review of the propriety of an emergency determination is not supported by the legislative history. The restriction imposed by the NTSB greatly diminishes the effectiveness of the review process envisioned by Congress.

The NTSB received public comments on its interim rules and then published its final rules at 68 Fed. Reg. 22623(April 29, 2003). In the final rules, 49 C.F.R. §821.54(e) provides as follows:

> Disposition. Within 5 days after the Board's receipt of the petition, the chief law judge (or, if the case has been assigned to a law judge, the law judge to whom the case is assigned) shall dispose of the petition by written order, and, in so doing, shall consider whether, based on the acts and omissions alleged in the Administrator's order, and ***assuming the truth of such factual allegations***, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal. (emphasis added).

In the final rules, the language of 49 C.F.R. §821.54(e) differs from that in the interim rules. In the preamble to the final rules, the NTSB explained that the change was intended to broaden the scope of the NTSB's review of emergency determinations. The interim rules provided that the standard of review was whether or not the FAA abused its discretion by declaring an emergency. In the final rules, the "abuse of discretion" standard has been replaced by an "appropriateness" standard, i.e. "whether the determination was appropriate under circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay " The discussion in the preamble of the NTSB's rationale for this change is at 68 Fed. Reg. 22623 to 22624.

While the NTSB's language change was purportedly intended to broaden the scope of review, the NTSB did not achieve its goal because the final rules still contain the requirement that the NTSB must assume all of the FAA factual allegations to be true. Nothing in the preamble to the final rules sheds any further light on why the NTSB thinks such a requirement is necessary or appropriate except the following statement by the NTSB.

> An emergency determination is not, as we see it, a finding or conclusion that easily lends itself to evidentiary proof. And the right to challenge an emergency determination before the Board should neither be seen as, nor be allowed to become, an opportunity to contest the factual predicate underlying the Administrator's judgment that considerations of aviation safety require an individual or an entity to be deprived of certificate privileges pending adjudication of the charges. 68 Fed. Reg. at 22624.

The use by the NTSB of a phrase like "as we see it," shows that the NTSB substituted its own views for the will of Congress. It was Congress' intent that there be a meaningful right of review. It is difficult for

there to be any meaningful review if the NTSB Administrative Law Judge's hands are tied by a requirement that all of the FAA's factual allegation be taken as true.

April 4, 2012

NTSB Office of General Counsel
490 L'Enfant Plaza East, SW.
Washington, DC 20594-2003

Re: Docket Number NTSB-GC-2011-0001: Notice of Proposed Rulemaking, Rules of Practice in Air Safety Proceedings and Implementing the Equal Access to Justice Act of 1980

The National Business Aviation Association (NBAA) represents the interests of 8,000 Member companies who operate general aviation aircraft as part of their transportation needs. Over NBAA's 65-year history, the Association and our Membership have been fundamental participants in the development, analysis and implementation of numerous regulatory initiatives that have impacted the business aviation community. We believe that this involvement has helped to produce sound and effective safety policy related to the operation of general aviation aircraft for business purposes. The business aviation community's commitment to reasonable and effective safety standards and practices has led to a safety record for corporate aviation that is equal to, and sometimes better than, that for the scheduled airlines. This safety record is not a product of government oversight. Rather, it results from the business aircraft operators' applying practical safety strategies to manage and mitigate risk. The business aviation community has a long and demonstrated history of partnership with government safety and security regulatory agencies. These partnerships are based on common objectives and underscore our preference for working cooperatively with these agencies to jointly develop solutions. It is in that spirit that the NBAA offers these comments on the Notice of Proposed Rulemaking ("NPRM") on Rules of Practice in Air Safety Proceedings and implementing the Equal Access to Justice Act of 1980.

We appreciate the opportunity that the Board has provided through this rulemaking process to provide more transparency to a process that has affected thousands of FAA certificate holders.

I. History with Safety Enforcement Proceedings

NBAA has participated in many rulemaking efforts involving aviation safety enforcement proceedings. NBAA and our Members seek to ensure that air safety is preserved and enhanced through rigorous safety enforcement efforts and procedures that are meaningful, fair, reasonable and evenly applied to both FAA and those accused of wrongdoing. NBAA welcomes and appreciates the NTSB's current review of its regulations dealing with the rules of practice in air safety proceedings and the Equal Access to Justice Act of 1980, with a view towards ensuring that they are fair and appropriate.

II. Four issues raised by the NPRM

The NPRM raises four categories of proposed rule changes. These issues are identified in the NPRM as follows:

A. Electronic Filing;
B. Emergency Cases;
C. Equal Access to Justice Act (EAJA); and
D. Miscellaneous Technical Changes.

Each of these items will be addressed individually below.

III. Electronic Filing

The NPRM discusses only electronic filing of documents, and does not in any way address an electronic docket management system such as PACER or even the public docket used for rulemaking. NBAA comments in response to the ANPRM specifically address the need for an electronic docket management system (as opposed simply to electronic filing) so that hearing transcripts are more quickly available to respondents when seeking to appeal from an ALJ determination. These comments are set forth in greater detail within NBAA's comments to the ANPRM, a copy of which is annexed. In short, however, appeals in emergency cases typically require a respondent to file an appeal brief without benefit of the hearing transcript, while the Administrator virtually always has benefit of the transcript to oppose the appeal. It is axiomatic that being able to cite to exact testimony, by page and line, is more persuasive and naturally more heavily weighted upon review than a brief missing that level of detail. To be clear, NBAA has no objection to an email filing system that contains proof of receipt. What NBAA seeks is a level playing field that provides respondents with a hearing transcript sufficiently early so that respondent has adequate time to review it and refer to it in the respondent's appeal brief before that brief is due. The Administrator virtually always receives the transcript in time to review it and refer to it in the Administrator's brief opposing the appeal. An electronic docket management system would provide for posting of a transcript immediately upon receipt by the board, and receipt of the transcript by a respondent immediately thereafter, thereby eliminating a day's worth of time associated with sending the transcript overnight during an already extremely compressed time frame. Procedural fairness with respect to receipt of the hearing transcript by the respondent could be greatly enhanced simply by using an already established docket management system, such as PACER.

IV. Emergency Cases

The NPRM addresses two issues under this heading, namely "assuming the truth of the [factual] allegations" and provision of the releasable portions of the FAA's enforcement investigative report with the order.

With respect to the former, the NPRM states that "…. the NTSB currently does not intend to remove the 'assuming the truth of the [factual] allegations' language from section 821.54(e), but proposes including explicit language permitting the respondent to present evidence challenging the emergency nature of the proceedings in the form of affidavits or other records." NBAA strongly disagrees with this proposed approach, and respectfully asks the Board to reconsider its position for the following reasons.

First, it bears noting that the FAA's comments to the ANPRM failed to identify any statutory basis for the existing rule that the ALJ must assume the FAA's factual allegations against respondent as true. The legislation underlying the Board's rules of practice contains no requirement that the NTSB must assume the truth of the FAA's allegations. In addition, nothing in the legislation or legislative history indicates any Congressional intent that the NTSB not review in full the truth and accuracy of the FAA's allegations. This requirement was created by the NTSB and the NTSB alone, and it is fully within the power of the NTSB to change it. NBAA strongly believes that it is fundamentally unfair to accord ***either*** party a presumption that what they allege in their pleadings is true.

Second, there is no mistaking that respondents are substantially harmed when the FAA takes emergency action against them. Moreover, the very nature of an expedited review favors the FAA over a respondent. While the NBAA believes that the FAA should have emergency powers to protect public safety, the NBAA also believes that the FAA's decisions with regard to the existence of an emergency should be subject to a meaningful, impartial, and independent review, as the Congress clearly intended. As a matter of due process and good government, it is absolutely imperative that agency actions be reviewable in a meaningful way by an impartial and independent body.

If the NTSB is required to assume, as a matter of law, that FAA factual allegations are true, no amount or quality of other evidence submitted to, or considered by, the Board can logically result in a determination that FAA factual allegations are anything other than truthful. NBAA strongly believes that, in order for the NTSB review proceeding to clearly provide due process and the type of meaningful, impartial, and independent review that Congress clearly intended, the NTSB should make no presumption with regard to the FAA factual allegations. If, despite NBAA's opposition, the NTSB determines to create such a presumption, then the NTSB regulations should provide that the presumption may be rebutted by evidence and/or arguments submitted by the certificate holder. The use of a rebuttable presumption, and the ability of the certificate holder to introduce, and have considered without restriction, rebutting evidence and arguments, would provide at least some argument to the NTSB that it is providing some semblance of a meaningful and impartial review, something that the NTSB has not provided under the current rules, and will not be able to provide in the future so long as an unrebuttable presumption of truth standard is used. While NBAA believes that the NTSB should create no presumption with regard to the FAA's factual allegations, we believe that a rebuttable presumption standard is the absolute minimum review standard necessary to provide to the NTSB at least some argument that it is providing due process, appropriate checks and balances,

and the type of meaningful, impartial and independent review of FAA's emergency determination that Congress intended.

NBAA also would like to remind the Board of the longstanding proposition that it must defer to the FAAs interpretation of its own rules. Garvey v. NTSB, 190 F.3d 571 (D.C. Cir, 1999); Administrator v. Merrell, NTSB Order No. EA-4814 (2000). When a requirement that the FAA's allegations of fact must be deemed true is combined with the requirement that the NTSB must defer to the FAA's interpretations of its own rules, there can be no meaningful, impartial, and independent review of the FAA's determination that an emergency exists. For example, even where it is clear that the FAA knew for months the facts that the FAA alleges constitute the current emergency, an "assume the facts to be true" rule precludes a meaningful, impartial, and independent NTSB review of whether the determination of an emergency is correct. Regardless of how important the issue, no governmental decision should be beyond review.

Moreover, use of a review standard under which the FAA's factual allegations must be presumed to be true regardless of the contradicting evidence and arguments provided by the certificate holder raises at least two serious legal questions. First of all, such a standard of review raises a question as to whether the NTSB review process is contrary to the statutory mandate, because that process does not provide a meaningful, impartial, and independent review. Second, where the certificate holder introduces in the NTSB proceeding compelling evidence that the FAA's factual allegations are not true, and despite that the NTSB makes a decision that is grounded on those factual allegations being true anyway (based on the presumption), the NTSB's decision might well be regarded by a reviewing court as being "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." Nevada Airlines, Inc. v. Bond, 622 F.2d 1017 (9th Cir. 1980).

With respect to the Board's proposal that the releasable portions of the enforcement investigative report be provided with the order, NBAA supports the proposed change.

V. Equal Access to Justice Act (EAJA)

NBAA has no objection to the proposed changes in this regard.

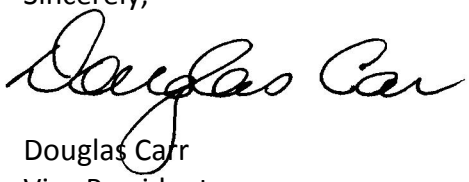
VI. Miscellaneous Technical Changes

NBAA has no objection to the proposed changes in this regard.

VII. Summary and Conclusion

NBAA truly appreciates the NTSB's willingness to revisit the appropriateness and effectiveness of its regulations dealing with the rules of practice in air safety proceedings and the Equal Access to Justice Act of 1980, as well as the NTSB's providing the opportunity to comment on those regulations. We stand ready to support any NTSB efforts to update and improve these regulations, including participating in a rulemaking committee should the Board see fit to establish one. Please contact us if you require any additional information.

Sincerely,



Douglas Carr
Vice President
Safety, Security & Regulation

Attached: NBAA Comments to NTSB ANPRM