DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 193

[Docket No. FAA–1999–6001; Notice No. 99–14]

RIN 2120–AG36

Protection of Voluntarily Submitted Information

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to add a new part to provide that certain information submitted to the FAA on a voluntary basis would not be disclosed. This proposal would implement a new statutory provision. It is intended to encourage people to provide information that will assist the FAA in carrying out its safety and security duties.

DATES: Comments must be received on or before September 24, 1999.

ADDRESSES: Comments on this proposed rulemaking should be mailed or delivered, in duplicate, to: U.S. Department of Transportation Dockets, Docket No. FAA–1999–6001, 400 Seventh Street, SW, Room Plaza 401, Washington, DC 20590. Comments may also be sent electronically to the following Internet address: 9–NPRM–CMTS@faa.gov. Comments may be filed and/or examined in Room Plaza 401 between 10 a.m. and 5 p.m. weekdays except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Marisa Mullen, Office of Rulemaking, ARM–205, or Mardi Thompson, Office of Assistant Chief Counsel, AGC–200, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267–7653 or (202) 267–3073, respectively.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Comments relating to the environmental, energy, federalism, or economic impact that might result from adopting the proposals in this notice are also invited. Substantive comments should be accompanied by cost estimates. Comments must identify the regulatory docket or notice number and be submitted in triplicate to the Rules Docket address specified above.

All comments received, as well as a report summarizing each substantive public contact with FAA personnel on this rulemaking, will be filed in the docket. The docket is available for public inspection before and after the comment closing date.

The Administrator will consider all comments received on or before the closing date before taking action on this proposed rulemaking. Late-filed comments will be considered to the extent practicable. The proposals contained in this notice may be changed in light of the comments received.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a pre-addressed, stamped postcard with those comments on which the following statement is made: ''Comments to Docket No. FAA–1999–6001.'' The postcard will be date stamped and mailed to the commenter.

Availability of NPRM

An electronic copy of this document may be downloaded using a modem and suitable communications software from the FAA regulations section of the FedWorld electronic bulletin board service (telephone: (703) 321–3339) or the Government Printing Office's (GPO) electronic bulletin board service (telephone: (202) 512–1661).

Internet users may reach the FAA's web page at http://www.faa.gov/avr/arm/nprm/nprm.htm or the GPO's web page at http://www.access.gpo.gov/nara for access to recently published rulemaking documents.

Any person may obtain a copy of this document by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Communications must identify the notice number or docket number of this NPRM.

Persons interested in being placed on the mailing list for future rulemaking documents should request from the above office a copy of Advisory Circular No.11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

Statement of the Problem

The FAA is committed to make continuing improvements in aviation safety and security. To do so, the FAA must have an increasing amount of information regarding current safety and security systems and how they are functioning today. The FAA is developing data sharing programs in which persons in the aviation community, such as air carriers, would share with the FAA information related to safety and security. In one such program, Flight Operations Quality Assurance (FOQA), in-flight data is collected during normal flights and aggregate trend analyses from that data are made available for FAA inspection. In Aviation Safety Action Programs (ASAP), the FAA and entities of the air transportation industry have entered into programs intended to generate safety information that may not otherwise be obtainable. ASAP is described in Advisory Circular 120–66.

An impediment to further development of these programs is the reluctance of some persons to share information that, when in the hands of a government agency, may be required to be released to the public through the Freedom of Information Act (FOIA) (5 U.S.C. § 552) or other means.

The Federal Aviation Reauthorization Act of 1996 (Pub. L. 104–264) provides relief from these concerns by adding new § 40123 to Title 49, United States Code. The new section provides:

> (a) *In General.*—Notwithstanding any other provision of law, neither the Administrator of the Federal Aviation Administration, nor any agency receiving information from the Administrator, shall disclose voluntarily-provided safety or security related information if the Administrator finds that—
>
> (1) The disclosure of the information would inhibit the voluntary provision of that type of information and that the receipt of that type of information aids in fulfilling the Administrator's safety and security responsibilities; and
>
> (2) Withholding such information from disclosure would be consistent with the Administrator's safety and security responsibilities.
>
> (b) Regulations.—The Administrator shall issue regulations to carry out this section.

In the legislative history, Congress cited the data-sharing programs being developed that could help improve safety by allowing the FAA to spot trends before they result in accidents. It noted the concern in the aviation community about the confidentiality of the data. ''Much of the information could be incomplete, unreliable, and quite sensitive. There will be a reluctance to share such information if it will be publicly released because it could easily be misinterpreted, misunderstood, or misapplied.'' H.R. Rep. No. 104–714, 104th Cong., 2d Sess. 41. Congress noted that protecting this information from public disclosure will not reduce the information available to the public, because the information is not provided to the public now. It further noted that the information

''should be useful in the development of safety policies and regulations.'' H.R. Rep. No. 104–714, 104th Cong., 2d Sess. 42.

In addition, the White House Commission on Aviation Safety and Security issued a recommendation on this subject. In Recommendation 1.8 the Commission noted that the most effective way to identify problems is for the people who operate the system to self-disclose the information, but that people will not provide information to the FAA unless it can be protected. It recommended that the FAA expeditiously complete rulemaking to implement the legislation for protecting *voluntarily provided* information.

This notice contains proposals to carry out § 40123. The FAA anticipates that information received in programs under this part will be used to carry out the FAA's safety and security responsibilities in a number of ways, including identifying potentially unsafe conditions and appropriate corrective action, identifying a need for and the contents of rulemaking, identifying a need for and the contents of policies, and identifying a need for an investigation or inspection.

General Discussion of the Proposals

The proposed rule is intended to furnish a way for people to provide information to the FAA for safety or security purposes, yet protect the information from disclosure to others (with exceptions discussed below).

There is a strong public policy in favor of Federal agencies releasing information to the public, to ensure that the public is informed as to how the government is doing business. Section 40123, however, reflects a recognition that there is a significant benefit to providing exceptions to this policy in order for the FAA to receive additional safety and security related information that it is not now receiving.

Section 40123 requires that the FAA and other agencies not release information that meets the standards in the statute and implementing rules. The information that is subject to this protection is defined in § 40123 as information that is voluntarily provided and that is safety or security related. Section 40123 requires that certain findings be made by the Administrator before its protections apply. The FAA proposes to add a new part 193 that would describe how the Administrator would determine that the requirements of § 40123 are met, thereby making the information protected from disclosure.

Not all information that is voluntarily provided to the FAA meets the standards in § 40123, and, therefore, is not protected from disclosure under § 40123. The FAA often receives information from persons who are willing to provide it without the nondisclosure protections in § 40123. For instance, persons may call an FAA field office to report possible violations such as low flight, or may approach inspectors who are at an airport with information on possible violations. Such information generally does not meet the requirements in § 40123 because the disclosure of the information generally does not inhibit the voluntary provision of that type of information. Indeed, the person often expects disclosure of the information when the FAA acts to address the apparent violation.

Under proposed part 193, the only information to be protected would be information specifically designated as protected in accordance with the procedures in §§ 193.9 or 193.11. Other voluntarily provided information would not be protected under this part. Part 193 would provide for specific findings to be made by the Administrator as to the elements in § 40123. In the ordinary case, the Administrator would publish in the **Federal Register** a proposed designation for specified types of information and request comments. After review of the comments, the FAA could publish a designation protecting the information from disclosure. However, when there is an immediate need for the FAA to provide protection in order to receive information, this rule would also permit the Administrator to designate the information as protected without notice to the public.

Section 40123 and this proposed rule represent a new effort to encourage the aviation community to share information with the FAA. As a developing project, it is not clear how best to structure programs to maximize the benefits. Accordingly, this proposal is written to provide many options for future development and tailoring of individual programs. In all cases except those where there is an immediate need for the information, the FAA would publish notice of these developments and any expansion of the non-disclosure policies in the **Federal Register** and invite comment.

Section-by-Section Analysis

Section 193.1 Scope and Delegations

This section would explain that part 193 implements 49 U.S.C. 40123, protection of voluntarily submitted information.

This section also would provide for delegation of the authority under this part. It would state that the authority of the Administrator to issue, amend, and withdraw designations under this part may be delegated to Associate Administrators and Assistant Administrators and to the Chief Counsel, their deputies, and any individual formally designated to act in their capacity. For instance, if an Associate Administrator were on leave, the person designated as Acting Associate Administrator would have the authority under this part. This section would further state that the authority of the Administrator to issue proposed designations under this part may be further delegated, which could be below the level of Associate Administrator. This would allow the Administrator to delegate to other officials the authority to sign proposed and final designations to be published in the **Federal Register** under §§ 193.9 and 193.11. Because of the strong public policy in favor of disclosure of information held by a Federal agency, authority to grant the final designations, with their extensive non-disclosure protections under this part, should be the decision of senior officials in the agency.

Section 193.3 Definitions

This section would define some of the terms used in part 193.

Section 40123 refers to ''any agency receiving information from the Administrator,'' but does not define ''agency.'' There are many definitions of that term in the United States Code. It appears that in this context, the most appropriate definition is essentially the one in the Administrative Procedures Act, 5 U.S.C. § 551(1). The FAA proposes to use a simplified version of that definition and to define ''agency'' as each authority of the Federal Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia; or (E) court martial and military commissions. This definition would permit the FAA to give information to the National Transportation Safety Board (NTSB), and to other agencies such as the FBI, in the interest of safety or security. See the discussion of § 193.5(d).

As explained below, the proposed rule would provide for some limited disclosure of ''de-identified'' information, which would be defined to mean that the identity of the source of the information and the names of persons are removed from the information. Under Part 1, ''person'' is broadly defined to include not only

individuals, but also such entities as companies and firms. Thus, information from an air carrier that was ''de-identified'' would not include the name of the air carrier or the names of any crewmembers, maintenance personnel, repair stations, or other persons that may have been in the original information.

Section 40123 provides that ''notwithstanding any other provision of law,'' the FAA and other agencies shall not ''disclose'' information under specified circumstances. By referring to ''any other provision of law,'' it appears that ''disclose'' was meant to be read broadly to cover all circumstances under which the FAA and other agencies might otherwise be required or permitted to disclose information. ''Disclose'' would be defined broadly under this proposal to mean the release of information or a portion of information to other than another agency. Release to another agency, such as the NTSB, would not be considered disclosure under this rule, because § 40123 states that other agencies are under the same requirements as the FAA not to disclose the information.

The most common definition of disclosing agency information generally arises in connection with release under the FOIA. ''Disclose'' in this regulation would also include release in rulemaking proceedings, in a press release, or to a party in a legal action. Note that in some legal actions, such as some enforcement actions or criminal prosecutions, the rule would permit disclosure of the information. See the discussions of proposed §§ 193.5(f) and 193.7(a).

''Information'' would mean data, reports, source, and other information. It is intended to be inclusive. The word ''information'' would be used to describe all or a part of a submission of information.

''Summarized'' information would mean that individual incidents are not specifically described, but are presented in statistical or other more general form. Summarized information might be used in rulemaking, for instance, to explain the need for the rule.

Section 40123 protections apply only to information submitted voluntarily. ''Voluntary'' would be defined to mean that the information was submitted without mandate or compulsion, and not as a condition of doing business with the government. It would not include information submitted as part of a means of complying with statutory, regulatory, or contractual requirements. Under this proposed definition, information that is required to be submitted under a regulation would not be considered voluntarily provided. If a regulation gives several options for compliance, information provided as part of complying with any option chosen would not be voluntarily provided.

The definition of ''voluntary'' also provides that a program under this part may be published in the Code of Federal Regulations (CFR) and the information submitted under it will considered ''voluntarily provided.'' The FAA anticipates that some programs adopted under § 193.9 may be published in title 14 of the Code of Federal Regulations. Other programs may be adopted as notices that are published in the **Federal Register** but not incorporated into the CFR. The definition is intended to make clear that a part 193 program can be published in the CFR without destroying its voluntary nature.

This definition is based in part on the views expressed by courts as to the nature of a ''voluntary'' submission of information in cases under Exemption 4 to the FOIA (5 U.S.C. 552(b)(4)). Under that exemption, certain voluntarily provided trade secrets and commercial or financial information are exempt from disclosure under FOIA.

The FAA has various arrangements under which it receives information from foreign authorities, generally under a bilateral agreement. Whether such information would be considered to be ''voluntarily-provided'' would depend on all of the circumstances. For instance, in some cases the foreign country inspects an FAA-certificated repair station, production certificate holder, or other FAA-regulated party to determine whether it is in compliance with applicable rules and requirements, and forwards its findings to the FAA. The regulated party is required to submit to such inspections, and thus the information is not voluntarily-provided by the regulated party any more than information obtained during an inspection by FAA personnel would be voluntarily-provided. In other cases, the information provided by a foreign authority might be considered voluntarily provided.

Section 193.5 Withholding Information From Disclosure

This section would state the general provisions for withholding information from disclosure. Section 193.5(a) would provide that, except as provided in this part and in individual programs, the Administrator does not disclose voluntarily provided safety or security information that has been designated as protected under this part.

As discussed above, the protections of this part would apply only to information covered under a designated program, because the Administrator must make findings in accordance with § 40123 before the protections of that section are invoked.

Section 193.5(b) would set forth the basic elements for the Administrator's designation of a program under this part covering a type of information. It includes the elements that are in § 40123.

Section 193.5(b)(1) would require a finding that the information would be provided voluntarily. As noted above, only information that is provided voluntarily may be protected under § 40123. Some information that is provided other than voluntarily may receive protection under other laws, such as exemptions to the FOIA.

Section 193.5(b)(2) would require a finding that the information is safety or security related.

Section 193.5(b)(3) would require a finding that the disclosure of the information would inhibit the voluntary provision of that type of information. The FAA anticipates that this normally would be based in part on statements from the aviation community that they are unwilling to provide the information unless the protections of § 40123 are ensured. The FAA would conduct an analysis to determine whether the possibility of disclosing the information would sufficiently inhibit the provision of the information to warrant granting the protections of § 40123.

In most cases the designation would apply only to information provided after the designation is made. There may be instances, however, when information of that type has been provided in the past, but that future submissions may be inhibited without further protection. This may be true, for instance, where employees have experienced reprisals for submitting adverse information regarding their employers. In such cases the FAA might consider designating as protected information that it has received already.

The FAA notes that § 40123 refers to whether disclosure would ''inhibit'' the voluntary provision of information. In this context, the FAA interprets ''inhibit'' to mean to discourage or to repress or restrain, but not to mean prevent the provision of information. The FAA need only find that the provision of information would be discouraged, repressed, or restrained, but not necessarily altogether prevented, to designate it as protected under part 193. This is consistent with the legislative history that refers to the FAA withholding voluntarily provided information if disclosure would ''discourage'' people from providing it.

H.R. Rep. No. 104–714, 104th Cong., 2d Sess. 49.

Section 193.5(b)(4) would require a finding that the receipt of that type of information aids in fulfilling the Administrator's safety and security responsibilities. This generally would be done by describing how the FAA intends to use the information.

Section 193.5(b)(5) would require a finding that withholding such information from disclosure, under the circumstances stated in the program, would be consistent with the Administrator's safety and security responsibilities. There may be circumstances under which disclosure would be consistent with safety and security. These would be described in the designation. See the discussion of § 193.7(b).

Section 193.5(c) would clarify that only information submitted under a program designated under this part would be protected from disclosure as described in this part. The FAA may receive information on a particular incident both under a designated program and from another unrelated source. Information received by the Administrator through another means is not protected as described in this part. For instance, the FAA might receive information about an airspace deviation both from air traffic control (ATC) and from a part 193 designated program. The information received from ATC would not be protected under this part while the information received under part 193 would be protected from disclosure. Another example would be where information provided under a part 193 program led the FAA to conduct an investigation. If the investigation led to additional information, the additional information would not be protected under part 193, but the original information would continue to be protected.

Section 193.5(d) would make clear that nothing in this part prevents the Administrator from giving information provided in a program under this part to other agencies with safety or security responsibilities. Section 40123 specifically makes such agencies subject to its requirements regarding nondisclosure of information, and thus clearly contemplates that the FAA may give information to such agencies. For instance, at times it may promote safety to share information with the NTSB, and it may be important for security to share information with the FBI or other agencies with security responsibilities. As another example, if the FAA drafts a regulation based on voluntarily submitted information, the FAA may provide that information to the Department of Transportation or the Office of Management and Budget in connection with their review of draft FAA rulemaking documents. (See also the discussion of proposed § 193.7(a)(1).) Further, if information received suggests that there have been criminal violations, the FAA may refer the matter to the Department of Justice or other appropriate agency. Section 40123 supersedes other laws in granting protection to information, when it states that the information shall not be disclosed ''Notwithstanding any other provision of law.* * *''

The Administrator would only give the information to another agency if the other agency provides adequate assurance, in writing, that it will protect the information from disclosure as required. The FAA expects that ''adequate assurance'' usually will include a description of the procedures the other agency will use to ensure that the information is protected from disclosure. This will further promote the purpose of § 40123, which is to give people confidence that they can provide information to the FAA without fear of inappropriate disclosure.

Section 193.5(e) would provide that the nondisclosure protections described in this part do not apply when the person who provided the information agrees to its disclosure.

Section 193.5(f) would provide a specific procedure in the event that the FAA received a subpoena for protected information. This might happen, for instance, in litigation between an air carrier and an individual who alleges he was harmed by the air carrier's negligence. Proposed § 193.5(f) would provide that when the FAA receives a subpoena for information designated as protected under this part, the FAA would contact the person who submitted the information to determine whether the person objects to disclosure of the information or wishes to participate in responding to the subpoena. If the person had no objection the FAA would have the option of disclosing the information. If the person wanted the information to continue to be protected, that person would have the option of participating in the response to the subpoena such as by filing an appropriate motion with the court. The person would not be required to participate, however, and may not wish to if that person wishes to remain anonymous.

The FAA would decide based on all the circumstances how to respond to a subpoena. If the person did not object to releasing the information that likely would be the response, however, there may be instances in which the person who provided particular material may not object to its release but release may compromise other aspects of the program, in which case the FAA may decide to continue to protect it from release.

The FAA represents the government in administrative litigation such as many enforcement actions. The FAA does not represent the United States government in litigation in Federal or state court, rather the Department of Justice (DOJ) provides representations. The FAA would either make an appropriate response to a subpoena or request that DOJ make an appropriate response, such as to resist disclosing the protected information by filing a motion for a protective order or a motion to quash the subpoena, or by releasing the requested information. In limited circumstances, the government may be required to disclose some protected information to a judge so that the judge can determine whether the government is properly withholding information under the law.

Section 193.7 Disclosure of Information

Section 40123(a)(2) requires that, for information to be protected, the Administrator must find that withholding the information would be consistent with safety and security. If all other requirements in § 40123 are met, it will be infrequent that the FAA will find it advisable to disclose the information. However, there are some circumstances under which it would be consistent with safety or security to disclose at least portions of an information submission, which circumstances would be stated in the proposed regulation and in the individual program. Where disclosure would be necessary, attempts would be made to limit the disclosure to the extent practicable, such as releasing only de-identified and summarized information.

Some reasons for disclosing information apply to all FAA programs and activities and are set forth in proposed § 193.7(a). They involve developing new policies and regulations (§ 193.7(a)(1)), evaluating or correcting current deficiencies (§ 193.7(a)(2)), conducting criminal investigations or prosecutions (§ 193.7(a)(3)), and complying with 49 U.S.C. 44905, regarding information about threats to civil aviation (§ 193.7(a)(4)).

Proposed § 193.7(a)(1) would provide for the disclosure of limited information to explain the need for changes in policies and regulations. As is explained in the legislative history for § 40123, the information collected in these voluntary

programs ''could help to improve air safety by helping safety officials identify trends before they cause accidents.'' H.R. Rep. No. 104–714, 104th Cong., 2d Sess. 41. ''The data and information that would be available to the FAA as a result of this provision * * * should be very useful in the formulation of the FAA's safety policy and regulations.'' Id. at 42.

Generally, during rulemaking the agency is required to make data available that it relied on in developing the proposed rule and is required to give the public an opportunity to comment on the proposal. Providing the data gives the public a chance to look at how the agency analyzed and interpreted the data and provides an opportunity to comment on the conclusions reached. See 5 U.S.C. 553. Such informed comment assists the agency in developing rules that best promote safety and security. Commenters are able to better understand the reasons for the proposed rule, offer alternate interpretations of the underlying data, and offer solutions that they feel would better address the safety or security problem.

Section 40123, however, specifically provides that information voluntarily provided under that section shall not be disclosed ''notwithstanding any other provision of law * * *.'' Another provision of law includes the provisions of 5 U.S.C. § 553 that otherwise would call for full disclosure of data supporting a proposed rulemaking. It would not be consistent with the intent of § 40123 for the FAA to make available to the public all of the raw data on which it relied, if that data was submitted voluntarily in a program under this proposed part. It also would not be consistent with safety and security for the FAA to completely forego the benefits of informed comment on a proposed rule that comes with releasing the data supporting the proposed rule.

The FAA proposes, therefore, that if it enters into rulemaking or policy making based on data submitted voluntarily under this part, it would not release all of the data. Rather, it would release only data that is de-identified and that is summarized. In this way, the source of the data would not be revealed, but enough information would be made available to explain to the public how the FAA made its decisions on the proposed changes. This proposed approach attempts to balance the public's interest in understanding the basis for agency rulemaking and policy making, and the need to encourage the submission of voluntarily provided safety and security information.

In providing de-identified, summarized information, the FAA would provide in the rulemaking sufficient information to permit meaningful comment. Data could be summarized in a number of ways, depending on the rulemaking. For instance, charts might show how often a specific maintenance problem was discovered in different air carriers, without revealing the names of the air carriers. This would show how the maintenance problem was distributed across the industry, leading the FAA to propose a general rulemaking instead of a correction for one air carrier. This approach is similar to that currently used with information that is of a very personal or private nature. Rulemaking based on a review of medical records, for instance, may provide summarized findings without revealing individuals' names.

Proposed § 193.7(a)(2) would provide for disclosure of information received in a program under this part to evaluate or correct a condition that may compromise safety or security. There are a number of instances in which this might occur. Examples include evaluating airworthiness conditions, assuring that the holder of an FAA certificate is qualified for that certificate, and preventing on-going violations of the safety or security regulations.

The FAA may need to make a limited disclosure to evaluate airworthiness conditions. If, for instance, information indicates an unsafe condition in a type of aircraft, engine, or other product, the FAA may consider issuing an Airworthiness Directive (under part 39) to require that the deficiency be corrected. The FAA works with design and production approval holders, such as holders of type certificates or production certificates under part 21, to identify the need for action to correct airworthiness problems and to develop what that action should be. The holders of design and production approvals have expertise in their own products that the FAA does not have, and it is important that their expertise be available to help the FAA analyze potential airworthiness problems. Under proposed § 193.7(a)(2), the FAA could disclose voluntarily-provided information to a design or production approval holder to assist the FAA in assessing the need for, and the content of, required corrective action. The FAA requests comments on whether the holder or other person receiving the information under similar circumstances should be required to protect the information from further disclosure.

Also under § 193.7(a)(2), the FAA would disclose information to assure that the holder of an FAA certificate continues to be qualified to hold the certificate. The FAA issues a certificate (such as for an air carrier, a producer of aircraft, or an airman) when the applicant has shown that all safety and security requirements for that certificate are met. If it later becomes evident that the certificate holder is unable or unwilling to continue to meet the safety and security requirements, that person is no longer qualified to hold the certificate. It would be inconsistent with safety or security for that person to continue to hold the certificate and exercise its privileges.

Section 193.7(a)(2) would be used when the FAA receives information in a program under part 193 that a certificate holder may not be qualified for the certificate. The FAA would first investigate the matter. Generally that investigation would include approaching the certificate holder to attempt to resolve the matter. If the lack of qualifications was confirmed, or if there was a reasonable question as to whether the certificate holder was qualified, and no corrective action was taken, the FAA might have to resort to remedial action. Such remedial action may include an order of compliance or a cease and desist order (§ 13.20), requiring changes to the certificate holder's procedures, or remedial enforcement action. The latter may include suspending the certificate until the holder shows that it is qualified or revoking the certificate. In taking remedial action the FAA may have to disclose some information that was submitted in a part 193 program. In remedial enforcement action, for instance, the certificate holder would have the right to appeal the suspension or revocation to the NTSB. The appeal process, except in very limited circumstances, is a public process, and evidence used in the case is available for inspection and copying by the public. Depending on the case, the voluntarily-provided information that gave rise to the investigation may or may not be used by the FAA to show that the enforcement action was warranted, and may or may not be disclosed in the course of the proceeding. This is consistent with the legislative history for § 40123, which provides: ''Examples of information the withholding of which would be inconsistent with the FAA's safety and security responsibilities (and thus still could be disclosed) are information required in an enforcement action to prosecute safety or security violations.

* * *'' H.R. Rep. No 104–714, 104th Cong., 2d Sess. 49.

Section 193.7(a)(2) also would provide for disclosure to prevent continuation of an on-going violation of the Federal Aviation Regulations (14 CFR Parts 1 through 199), the Hazardous Materials Regulations as they relate to air transportation (49 CFR Part 171 *et seq.*), and the relevant statutes. This would occur when the information reveals that a violation was continuing to occur and thus remedial enforcement action was necessary to correct the violation.

Section 193.7(a)(3) would provide for disclosure of information to conduct a criminal investigation or prosecution. While the FAA does not prosecute criminal actions, in those rare circumstances in which it is appropriate the agency refers such matters to the Department of Justice or other appropriate agency. For instance, in recent years there have been some criminal prosecutions involving counterfeit aircraft parts. Such parts can present a danger to the traveling public, and it is important that those responsible for such crimes be brought to justice. The FAA anticipates that, in those few instances in which part 193 information is provided to a law enforcement agency, it would be used mostly to develop leads and otherwise assist in the investigation. The part 193 information might not be used as evidence in the prosecution and therefor might not be disclosed. However, it might be necessary to disclose the information during the prosecution.

Finally, § 193.7(a)(4) would provide for disclosure of information to comply with 49 U.S.C. 44905 regarding information about threats to civil aviation. That section requires that public notice be made in specified circumstances about threats to civil aviation, generally involving possible terrorist threats. The legislative history makes clear that such information should be disclosed even if voluntarily provided under § 40123. H.R. Rep. No. 104–714, 104th Cong., 2d Sess. 49.

Section 193.7(b) would provide for other circumstances in which withholding information provided under this part would not be consistent with the Administrator's safety and security responsibilities. These circumstances may be different depending on the program. It is proposed that those circumstances be described in the designation for that program. The FAA cannot predict how information programs may develop in the future. As the FAA develops uses for the information that may require some disclosure, these uses would be proposed in individual programs. Possible examples include disclosure to foreign aviation authorities, disclosure after a period of time in which the information would no longer be protected, and disclosure in punitive enforcement actions.

As to enforcement actions, note that this proposed rule speaks only to when information may be disclosed in connection with an enforcement action. It does not describe what enforcement policy may be applied for each designated program. Each program would have different goals and provisions for such policies.

Section 193.9 Designating Information as Protected Under This Part: Notice Procedure

This section would describe the procedure normally used to designate information as protected under this part. This procedure would be for use where there is not an immediate need for the information. It generally would be used for programs in which a specific type of information is to be provided by types of persons on an on-going basis. For instance, under FOQA, flight recorder data is made available by air carriers on an on-going basis. ASAP programs, which are entered into by the FAA and entities of the air transportation industry, are intended to generate safety information that may not otherwise be obtainable.

The scope of § 193.9 programs would vary. One way would be for FAA to create a national program that is national in scope and that is available to all individuals or companies that meet the basic requirements of that program. For a national program, the FAA would designate the entire national program as protected under § 40123. Then different persons would have the option of participating in the program without obtaining an individual designation under this part.

Examples of national programs are FOQA and ASAP. The FAA anticipates that it will propose to designate the national FOQA and ASAP programs as protected under § 40123. The proposed designations would include all of the items in § 193.9, such as a description of the type of information that may be voluntarily provided. If, after public comment, the FAA decides to designate these programs for protection under § 40123, then individual air carriers would receive the protections of § 40123 without each obtaining a designation under part 193 for their individual FOQA and ASAP programs.

Another way to have an information program designated as protected under § 40123 would be for an air carrier or other person to submit an application for an individual program. The FAA would evaluate the application and either publish a proposed designation based on the application for public comment or deny the application. Any person would be able to apply to have information designated as protected under this part. If the applicant is an air carrier or another certificate holder with an FAA principal inspector, the application would be sent to the principal inspector. If the applicant has no principal inspector, the application would be sent to the local FAA Field Office.

The application would include the designation described in paragraph (c) that the applicant would like to be issued. The Administrator would evaluate the application, and may issue a proposed designation based on the application or may deny the application.

The Administrator may decide to issue a proposed designation based either on an application or the FAA's internal decision. The FAA would publish a proposed designation in the **Federal Register** and request comment. After comments were received, the FAA would review them and evaluate whether the elements in § 193.5 were met. The Administrator would designate information as protected under this part only if the elements in § 193.5 were met.

If the Administrator found that the elements in § 193.5 were met, an order designating the information as protected would be published in the **Federal Register**. The order would include summaries of why the Administrator found that the elements were met. By publishing the order in the **Federal Register**, all interested persons would be able to see that they could provide information under the program and receive the protection described in § 40123 and this part.

The first five items in the order would be the elements of § 40123. Section 193.9(c)(1) would provide for a summary of why the Administrator finds that the information will be provided voluntarily. Paragraph (2) of that section would provide for a description of the type of information that may be voluntarily provided under the program and a summary of why the Administrator finds that the information is safety or security related. Paragraph (3) would call for a summary of why the Administrator finds that the disclosure of the information would inhibit the voluntary provision of that type of information. Paragraph (4) would be for a summary of why the receipt of that type of information aids in fulfilling the Administrator's safety and security

responsibilities. Paragraph (5) would call for a summary of why withholding such information from disclosure would be consistent with the Administrator's safety and security responsibilities, including a statement as to the circumstances under which, and a summary of why, withholding such information from disclosure would not be consistent with the Administrator's safety and security responsibilities, as described in § 193.7.

Proposed § 193.9(c)(6) would provide for a summary of how the Administrator will distinguish information protected under this part from other information. This might include such items as the method for persons to become involved in the program, how information is submitted under that program, and how the information is segregated within the FAA to ensure that it is handled properly. It might also include such procedures as marking documents as protected under part 193.

The FAA anticipates that the designation published in the **Federal Register** may not contain all the details, conditions, and procedures that apply to the program. For instance, a designation for FOQA might contain only the elements contained in § 193.9(c), such as a description of the information that may be provided under the program. That designation may require each interested air carrier to apply for its own FOQA approval, which would provide particular procedures for that air carrier. The approvals for each air carrier would not need to be published in the **Federal Register** as long as they are consistent with the designation that was published.

Under § 193.9(d), the FAA could amend a designation in the same way it was first adopted.

Section 193.9(e) would provide for withdrawal of the designation if the FAA determines that the program no longer meets the required elements in § 193.5, or if the requirements of the individual program are not met. The withdrawal would be published in the **Federal Register** and would state the effective date of the withdrawal. Information that was received under the program while the designation was effective would remain protected even after the program was discontinued. No newly received information would receive the protection of § 40123 and part 193.

Section 193.11—Designating Information as Protected Under This Part: No Notice Procedure

This proposed procedure is intended for situations in which there was an immediate need for the FAA to receive safety or security information. The FAA might need to obtain the information quickly in order to evaluate the need for immediate remedial or corrective action. The process in this section would be a way that the FAA could assure the source that the information would be protected under this part, but would not require publication in the **Federal Register** and a comment period.

The FAA anticipates using this procedure in rare circumstances. For instance, there may be a serious safety or security violation that an air carrier is unwilling to address, and an employee wishes to report it. If the information would prove to be correct, enforcement action against the air carrier may be likely. The employee may wish for his or her name to be protected from disclosure from the air carrier for fear of being fired or otherwise suffering reprisals. The protection under this part would permit the FAA to withhold the employee's name from disclosure.

The FAA would protect information under this section only when the Administrator has found that the elements of § 193.5 were met, and that there was an immediate need to obtain the information without carrying out the more time-consuming procedures in § 193.9. The designation would be in writing.

This procedure generally would involve an individual who had information regarding a specific condition that could be provided all at once or over a short time, rather than on-going information sharing programs. Section 193.11(c) would contain limitations on the length of time these procedures could be used, and generally would provide that such an information collection could be used only for 60 days. If an enforcement or criminal investigation was underway, the information could continue to be provided under the protection of part 193. However, we do not rule out the possibility that there may arise a critical safety or security need to immediately adopt a program and begin collecting information in a program that normally would be under § 193.9. In that case, the FAA could use § 193.11 to begin obtaining the information right away, and initiate the procedure in § 193.9 to adopt a long-term program.

Section 193.11(d) would describe those circumstances under which the information could be disclosed. This is in addition to the circumstances listed in § 193.7(a), which would apply to all information received under this part. The special circumstances would include use in enforcement actions. As noted above, under the rare circumstances in which this procedure might be used, enforcement action may be the likely result.

Section 193.11(e) would provide for amending the designation in the same way that the designation originally was made.

Finally, proposed § 193.11(f) would state how the designation would be withdrawn. This would be by written notice to the person providing the information.

Paperwork Reduction Act

This proposal contains the following new information collection requirements subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). The title, description, number of respondents, and estimate of the annual total reporting and recordkeeping burden are shown below.

Title: Protection of Voluntarily Submitted Information.

Summary: The FAA proposes to add a new part (part 193) to provide that certain information submitted to the FAA on a voluntary basis would not be disclosed. This proposal would implement a new statutory provision. The purpose of this proposed rule is to encourage the aviation community to voluntarily share information with the FAA so that the agency may work cooperatively with industry to identify modifications to rules, policies, and procedures needed to improve safety, security and efficiency of the National Airspace System.

Use of: To encourage people to voluntarily submit desired information, § 40123 was added to Title 49, United States Code, in the Federal Aviation Reauthorization Act of 1996. Section 40123 allows the Administrator, through FAA regulations, to protect from disclosure voluntarily provided information relating to safety and security issues.

The White House Commission on Aviation Safety and Security issued a recommendation on this subject. In Recommendation 1.8, the Commission noted that the most effective way to identify problems is for the people who operate the system to self-disclose the information, but that people will not provide information to the FAA unless it can be protected. It recommended that the FAA expeditiously complete rulemaking to implement the legislation for protecting voluntarily provided information.

Respondents (including number of): Those individuals, organizations, or businesses that submit information regarding safety or security issues,

including aircraft operators, manufacturers, repair stations, and airports.

Annual Burden Estimate: This proposal would impose a negligible paperwork burden for air carriers that choose to participate in this program. The air carrier would submit a letter notifying the Administrator that they wish to participate in a current program. The FAA believes this letter will cost approximately $100 to generate. The FAA also believes that approximately 10 air carriers would prepare one application each. Assuming that each of the 10 air carriers file one application divided by 10 years equals approximately one (1) hour per application times five (5) programs equals a total of 5 hours each year. The estimated hour burden is 5 hours (one time application). The FAA anticipates approximately five (5) programs within the next 10 years. The total cost to the industry of notifying the Administrator concerning the air carriers' participation in these programs would be $5,000 over 10 years.

Occasionally, an air carrier may want to propose a program to the FAA that would require voluntarily submitted information that would have to be protected. The FAA anticipates that it would cost approximately $1,000 to develop such a proposal, and we anticipate that there would only be one (1) such proposal per decade.

The agency solicits public comment regarding the number of applications, proposals, and cost of each on the information collection requirements to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Individuals and organizations may submit comments on the information collection requirement by September 24, 1999, to the address listed in the **ADDRESSES** section of this document.

Persons are not required to respond to a collection of information unless it displays a currently valid OMB control number. The burden associated with this proposal has been submitted to OMB for review. The FAA will publish a notice in the **Federal Register** notifying the public of the approval number.

Compatibility With ICAO Standards

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no conflicts in these proposed amendments and the foreign regulations.

Regulatory Evaluation Summary

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980, as amended, requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Office of Management and Budget directs agencies to assess the effects of regulatory changes on international trade. And fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation).

In conducting these analyses, the FAA has determined that the economic impact of this proposed rule does not meet the standards for a ''significant regulatory action'' under section 3(f) of Executive Order 12866 and under the Department of Transportation's Regulatory Policies and Procedures for Simplification, Analysis, and Review of Regulations (44 FR 11034, February 26, 1979). However, the FAA has determined that this proposed regulation is significant due to the public interest in this rulemaking and, therefore, is subject to review by the Office of Management and Budget. Additionally, this proposed rule would not have a significant impact on a substantial number of small entities, would not constitute a barrier to international trade, and does not contain a significant intergovernmental or private sector mandate.

The FAA has determined that since the proposed rule has only a negligible economic impact, positive or negative, on the aviation industry, a full regulatory evaluation is not necessary.

The FAA invites the public to provide comments and supporting data on the assumptions made in the evaluation analyses below. All comments received will be considered in the final regulatory evaluation.

The proposed action is initiated in response to requirements of the Federal Aviation Authorization Act of 1996 which requires, in part, that the Federal Aviation Administration issue regulations to carry out a provision of the Act that certain information provided to the FAA on a voluntary basis would not be disclosed. The proposal is intended to encourage people to voluntarily provide information that will assist the FAA in carrying out its safety and security duties.

The purpose of this rule is to encourage the aviation community to voluntarily share information with the FAA so that the agency may work cooperatively with industry to identify modifications to rules, policies, and procedures needed to improve safety, security, and efficiency of the National Airspace System (NAS). To facilitate this process, the FAA has initiated a number of programs designed to capture safety and security related information normally not available to the public or to governmental agencies.

One such program envisioned under this proposal is the Flight Operational Quality Assurance Program (FOQA), which entails the routine extraction and analysis of digital flight data from line operations. The program enables collection of objective information that can be used to identify trends relating to the safety and efficiency of the NAS. Voluntary sharing of such information with the FAA could accelerate agency decision making in many areas of mutual interest, for example, published airport area arrival and departure procedures, air traffic control data, updates to certification criteria for aircraft, agency guidance for the use and performance of key aircraft subsystems, i.e., Traffic Alert and Collision Avoidance System (TCAS) and Global Positioning System (GPS), or the approval under the Advanced Qualification Program of departures from traditional pilot training methods and media. Another benefit of data sharing programs envisioned through the proposed rule is that it provides an objective tool by which the FAA could improve its safety surveillance. For example, voluntarily shared data could

provide the FAA and industry with an alternative means of monitoring the continued safety of Reduced Vertical Separation Maneuvers (RVSM).

Under current FOQA guidelines, an FAA inspector may review data and information while at the operator's facility. The inspector is not authorized to remove either a paper or electronic copy of data provided under the program from an operator's premises. Not having a voluntarily provided copy of the information severely limits the ability of the FAA to use the information in agency decision making. This circumstance is not always in the interest of the FAA, the airline industry, or the public as it can preclude timely realization of a safety problem or potential efficiency benefits that might otherwise be realized from the shared information.

Adopting this proposed rule would encourage data sharing by ensuring that the information shared is protected from public disclosure, even if requested under the Freedom of Information Act (FOIA). The proposed rule would protect the confidentiality of the individual submitting the information and, therefore, alleviate aviation industry fears that information provided would be used by the public, competitors, or other government agencies for purposes other than those related to safety and security of the aviation system.

In order to participate in any FAA sponsored program where voluntarily submitted information is protected, the air carrier will have to submit a letter notifying the Administrator that the air carrier wishes to participate in the program. The FAA believes that this letter will cost approximately $100 to generate. The FAA also believes that approximately 10 air carriers may participate. The FAA anticipates approximately five(5) new programs will be in existence within the next 10 years. The total cost to the industry of notifying the Administrator concerning the air carriers participation in these programs would be $5,000 over 10 years. Occasionally, an air carrier may want to propose a program to the FAA that would require voluntarily submitted information that would have to be protected. The FAA anticipates that it would cost approximately $1,000 to develop such a proposal, and we anticipate that there would only be one(1) such proposal per decade. We solicit industry comments regarding the number of applications, proposals, and cost of each.

The benefits of this proposed rule are unquantifiable, but nevertheless are positive because the protected information can be used proactively to correct safety concerns, thus preventing avoidable accidents and potentially saving many lives and millions of dollars.

There are negligible application costs associated with implementing the proposed rule. The proposal, if adopted, imposes no reporting requirements on the aviation community and would assure aviation interests such as air carrier operators, pilot associations, airframe manufacturers, and trade associations that voluntarily submit proprietary information would be protected from public disclosure. The cost to the public of having this data or information protected from public disclosure is considered negligible.

On the other hand, the benefit to the FAA of voluntarily submitted sensitive, proprietary, safety, and security information protected from public disclosure outweighs any potential costs to the public of being denied access to this information.

The White House Commission on Aviation Safety and Security noted in its recommendations to the FAA that the most effective way to identify problems is for the people who operate the system to self-disclose the information, but that people will not provide information to the FAA unless it can be protected. The Commission recommended that the FAA complete rulemaking to implement the legislation for protecting voluntarily provided information.

Initial Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.'' To achieve that principle, the Act requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The Act covers a wide range of small entities, including small business, not-for profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule will have a significant economic impact on a substantial number of small entities. If the determination is that it will, the agency must prepare a regulatory flexibility analysis (RFA) as described in the Act.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, § 605(b) of the 1980 Act provides that the head of the agency may so certify and an RFA is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The FAA conducted the required review of this proposal and determined that it would not have a significant economic impact on a substantial number of small entities. Accordingly, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Federal Aviation Administration certifies that this proposed rule will not have a significant impact on a substantial number of small entities. However, the FAA solicits comments from the public regarding this determination of non-significant impact.

International Trade Impact Statement

The FAA has determined that the proposed rule would have no impact on trade for both United States (U.S.) firms doing business in foreign countries or on foreign firms doing business in the U.S.

Federalism Implications

The regulations proposed herein would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Unfunded Mandates Reform Act Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (the Act), codified as 2 U.S.C. 1501–1571, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any one year.

This proposal does not meet the thresholds of the Act. Therefore, the requirements of Title II of the Act do not apply.

Environmental Analysis

FAA Order 1050.1D defines FAA actions that may be categorically excluded from preparation of a National

Environmental Policy Act (NEPA) environmental assessment or environmental impact statement. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(j), this rulemaking action qualifies for a categorical exclusion.

Energy Impact

The energy impact of the proposed rule has been assessed in accordance with the Energy Policy and Conservation Act (EPCA) and Pub. L. 94–163, as amended (42 U.S.C. 6362). It has been determined that it is not a major regulatory action under the provisions of the EPCA.

List of Subjects in 14 CFR Part 193

Air transportation, Aircraft, Aviation safety, Safety, Security.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to add part 193 to Title 14, Code of Federal Regulations (14 CFR part 193) as follows:

PART 193—PROTECTION OF VOLUNTARILY SUBMITTED INFORMATION

Sec.
193.1 Scope and delegations.
193.3 Definitions.
193.5 Withholding information from disclosure.
193.7 Disclosure of information.
193.9 Designating information as protected under this part: Notice procedure.
193.11 Designating information as protected under this part: No notice procedure.

Authority: 49 U.S.C. 106(g), 40113, 40123.

§ 193.1 Scope and delegations.

(a) This part implements 49 U.S.C. 40123, protection of voluntarily submitted information.

(b) The authority of the Administrator to issue, amend, and withdraw designations under this part may be delegated to Associate Administrators and Assistant Administrators and to the Chief Counsel, their Deputies, and any individual formally designated as Acting Associate or Assistant Administrator, Acting Chief Counsel, or Acting Deputy of such offices. The authority of the Administrator to issue proposed designations under this part may be further delegated.

§ 193.3 Definitions.

Agency means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(1) The Congress;

(2) The courts of the United States;

(3) The governments of the territories or possessions of the United States;

(4) The government of the District of Columbia;

(5) Courts martial and military commissions.

De-identified means the identity of the source of the information, and the names of persons, are removed from the information.

Disclose means to release information to other than another agency, such as under a request under the Freedom of Information Act (5 U.S.C. 552), in rulemaking proceedings, in a press release, or to a party to a legal action.

Information means data, reports, source, and other information. ''Information'' may be used to describe the whole or a portion of a submission of information.

Summarized means individual incidents are not specifically described, but are presented in statistical or other more general form.

Voluntary means that the information was submitted without mandate or compulsion, and not as a condition of doing business with the government. ''Voluntarily-provided information'' does not include information submitted as part of a means of complying with statutory, regulatory, or contractual requirements. However, a program under this part may be published in the Code of Federal Regulations and the information submitted under it will considered ''voluntarily provided.''

§ 193.5 Withholding information from disclosure.

(a) Except as provided in this part, the Administrator does not disclose voluntarily provided safety or security information that has been designated as protected under this part.

(b) The Administrator designates information as protected under this part when the Administrator finds that—

(1) The information is provided voluntarily;

(2) The information is safety or security related;

(3) The disclosure of the information would inhibit the voluntary provision of that type of information;

(4) The receipt of that type of information aids in fulfilling the Administrator's safety and security responsibilities; and

(5) Withholding such information from disclosure, under the circumstances provided in this part, would be consistent with the Administrator's safety and security responsibilities.

(c) Only information designated as protected under this part is protected from disclosure as described in this part. Information obtained by the Administrator through another means is not protected as described in this part.

(d) Nothing in this part prevents the Administrator from giving information designated as protected under this part to other agencies with safety or security responsibilities. Such agencies are subject to the requirements of 49 U.S.C. 40123 regarding nondisclosure of information. The Administrator will not give the information to another agency unless the other agency provides the Administrator with adequate assurance, in writing, that it will protect the information from disclosure as required in 49 U.S.C. 40123, this part, and the terms of the specific program.

(e) The nondisclosure protections described in this part do not apply when the person who provided the information agrees to its disclosure.

(f) When the Administrator receives a subpoena for information designated as protected under this part, the Administrator contacts the person who submitted the information to determine whether the person objects to disclosure of the information or wishes to participate in responding to the subpoena. Based on all the circumstances, including the person's response, the Administrator requests the Department of Justice to make an appropriate response to the subpoena, or the Administrator files an appropriate response, such as filing a motion for a protective order or a motion to quash the subpoena, or release of the information.

§ 193.7 Disclosure of information.

Withholding information that is designated as protected under this part would not be consistent with the Administrator's safety and security responsibilities, and therefore may be disclosed, as follows:

(a) *Disclosure in all programs.*

(1) De-identified, summarized information provided under this part may be disclosed to explain the need for changes in policies and regulations.

(2) Information provided under this part may be disclosed to correct a condition that may compromise safety or security.

(3) Information provided under this part may be disclosed to carry out a criminal investigation or prosecution.

(4) Information provided under this part may be disclosed to comply with 49 U.S.C. 44905, regarding information about threats to civil aviation.

(b) *Disclosure in particular programs.* In individual programs, the Administrator may find that there are additional circumstances under which withholding information provided

under this part would not be consistent with the Administrator's safety and security responsibilities. Those circumstances are described in the designation for that program.

§ 193.9 Designating information as protected under this part: Notice procedure.

This section provides the procedure for the Administrator to designate information provided under specific programs as protected under this part, other than when there is an immediate safety or security need for the information. These programs generally specify a type of information that will be provided by types of persons on an on-going basis.

(a) *Application.* Any person may apply to have information designated as protected under this part by submitting an application addressed to the person's FAA principal inspector. If the person has no FAA principal inspector, the application should be submitted to the local FAA field office. The application shall include the designation described in paragraph (c) of this section that the applicant requests be issued. The Administrator may issue a proposed designation based on the application or may deny the application.

(b) *Proposed designation.* Before making a designation under this section, either based on an application or otherwise, the Administrator publishes a proposed designation in the **Federal Register** and requests comment.

(c) *Designation.* The Administrator designates information provided under a program as protected under this part if, after review of the comments, the Administrator finds that the elements in § 193.5 are met. An order designating the information provided under the program to be protected under this part is published in the **Federal Register**. The designation includes at least the following:

(1) A summary of why the Administrator finds that the information will be provided voluntarily.

(2) A description of the type of information that may be voluntarily provided under the program and a summary of why the Administrator finds that the information is safety or security related.

(3) A summary of why the Administrator finds that the disclosure of the information would inhibit the voluntary provision of that type of information.

(4) A summary of why the receipt of that type of information aids in fulfilling the Administrator's safety and security responsibilities.

(5) A summary of why withholding such information from disclosure would be consistent with the Administrator's safety and security responsibilities, including a statement as to the circumstances under which, and a summary of why, withholding such information from disclosure would not be consistent with the Administrator's safety and security responsibilities, as described in § 193.7 of this part.

(6) A summary of how the Administrator will distinguish information protected under this part from other information.

(d) *Amendment of designation.* The Administrator may amend a designation under this section in the same manner as an original designation is made.

(e) *Withdrawal of designation.* The Administrator may withdraw a designation under this section at any time the Administrator finds that continuation of the designation does not meet the elements of § 193.5, or if the requirements of the individual program are not met. The Administrator withdraws the designation by publishing a notice in the **Federal Register**. The withdrawal is effective on the date of publication or such later date as the notice may state. Information provided during the time the program was designated remains protected under this part and the program. Information provided after the withdrawal of the designation is effective is not protected under this part or the program.

§ 193.11 Designating information as protected under this part: No notice procedure.

This section provides the procedure for the Administrator to designate information as protected under this part when there is an immediate safety or security need for the information. This section generally is used for provision of specific information on a short-term basis by a specific person.

(a) *Application.* A person may request that the Administrator designate information the person is offering as protected under this part. The person shall state at least the general nature of information and whether the person will provide the information without the protection of this part.

(b) *Designation.* An order designating information provided under this section as protected under this part is in writing. The Administrator designates the information as protected under this part if the Administrator finds that—

(1) The elements of § 193.5 are met, and

(2) There is an immediate safety or security need to obtain the information without carrying out the procedures in § 193.9 of this part.

(c) *Time limit.* Except as provided in paragraphs (c)(1) and (c)(2) of this section, no designation under this section shall continue in effect for more than 60 days after the date of designation. Information provided during the time the designation was in effect remains protected under this part. Information provided after the designation ceases to be in effect is not protected under this part. The designation remains in effect for more than 60 days if—

(1) The procedures to designate such information under § 193.9(a) have been initiated, or

(2) There is an ongoing enforcement or criminal investigation, in which case the designation may continue until the investigation is completed.

(d) *Disclosure.* Unless otherwise provided in the designation, withholding information provided under this section from disclosure in the conduct of enforcement actions would not be consistent with the Administrator's safety and security responsibilities and, therefore, the information may be disclosed.

(e) *Amendment of designation.* The Administrator may amend a designation under this section in the same manner as an original designation is made.

(f) *Withdrawal of designation.* The Administrator may withdraw a designation under this section at any time the Administrator finds that continuation does not meet the elements of § 193.5, or if the requirements of the individual program are not met. The Administrator withdraws the designation by notifying the person in writing that the designation is withdrawn. The withdrawal is effective on the date of receipt of the notice or such later date as the notice may state. Information provided during the time the designation was in effect remains protected under this part. Information provided after the withdrawal is effective is not protected under this part.

Issued in Washington, DC on July 16, 1999.

Ida M. Klepper,

Acting Director, Office of Rulemaking.

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