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"VALIDLY ADOPTED INTERPRETATIONS": DEFINING THE DEFERENCE STANDARD IN AVIATION CERTIFICATE ACTION APPEALS

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Abstract: The split-enforcement model of agency administration creates a dilemma for the adjudicating agency regarding how much deference it should allot interpretive documents promulgated by the agency with rulemaking authority. In 1992, Congress sought to resolve this problem in the area of aviation safety by statutorily mandating that the adjudicating agency, the National Transportation Safety Board (NTSB), defer to "validly adopted" interpretations generated by the rulemaking agency, the Federal Aviation Administration (FAA). Ironically, the statute created even more uncertainty because the term "validly adopted" is vague and remains undefined. Subsequent decisions have not clarified exactly when the NTSB considers itself bound. This Comment examines the realm of possible FAA interpretations that could be determined to be "validly adopted" in the context of aviation safety certificate action appeals. This Comment argues that regardless of form, FAA interpretations that meet uniformity and notice criteria and are not arbitrary or capricious should be considered "validly adopted" and bind the NTSB.

Aviation safety is administered according to the split-enforcement model, which involves two federal agencies administering one particular industry or area. The Federal Aviation Administration (FAA), a component of the Department of Transportation, is the primary administrative agency in aviation safety. The FAA performs two regulatory functions: promulgating Federal Aviation Regulations in accordance with the Administrative Procedure Act (APA)[1] and enforcing those regulations. The National Transportation Safety Board (NTSB), an independent agency, fulfills three roles in aviation safety: investigating accidents,[2] making safety recommendations to the Secretary of Transportation after determining the probable cause of accidents,[3] and conducting de novo appellate review of FAA safety enforcement orders.[4]

This separation of functions complicates interpretive issues. As the rulemaking agency, the FAA's responsibilities include interpreting its own rules and regulations.[5] In fact, most FAA field offices receive daily

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1. 5 U.S.C. §§ 551–559 (1994, Supp. I 1995 & Supp. II 1996).

2. 49 U.S.C. § 1131(a)(1)(A) (1994).

3. 49 U.S.C. § 1131(a)(1)(A).

4. 49 U.S.C. § 1133 (1994).

5. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 153 (1990) (holding interpretive power rests with administrative agency possessing familiarity and

requests for interpretations of regulations.[6] To fulfill its interpretation responsibility, the FAA produces a variety of documents, including interpretive rules, Advisory Circulars, opinion letters, and memos. As the appellate adjudicating body in certificate actions, the extent to which the NTSB must defer to these interpretations is unclear.

Congress attempted to clarify the deference standard in the FAA Civil Penalty Administrative Assessment Act of 1992 (Civil Penalty Act).[7] The Act directs that the NTSB, when adjudicating aviation safety enforcement actions, shall be bound by all "validly adopted" FAA interpretations not "arbitrary, capricious, or otherwise not according to law."[8] The term "validly adopted" has not been defined by Congress, courts, the NTSB, or the FAA. Thus, the question remains: which interpretations should be recognized as "validly adopted" and, as such, bind the NTSB?

Validly adopted interpretations could conceivably fall anywhere on a continuum ranging from any statement, in any context, addressing the meaning of a rule, to only those interpretations promulgated in accordance with the notice and comment provisions of the APA.[9] The degree of deference accorded FAA interpretations should be resolved for the benefit of both agencies and the affected public, each of which deserves some certainty about which FAA interpretations will provide reliable guidance to future NTSB decisions.

This Comment explores possible definitions of "validly adopted" and recommends which FAA interpretations should bind the NTSB in accordance with the relevant provisions of the Civil Penalty Act. This Comment argues that interpretations that are substantively fair (not

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policymaking expertise); *see also* 51 Fed. Reg. 46,985, 46,986 (1986); Administrative Conference of the United States, *Recommendations and Reports 1986, Recommendation 86-4: The Split-Enforcement Model for Agency Adjudication* 20 [hereinafter *ACUS Recommendation 86-4*] (describing that in split-enforcement scheme, adjudicating agency must defer to rulemaking agency's interpretations).

6. Interview with Karl Lewis, Supervising Attorney, FAA, in Renton, Wash. (Feb. 20, 1998).

7. Pub. L. No. 102-345, 106 Stat. 923 (1992) (codified as amended at 49 U.S.C. §§ 44703, 44709, 46301(d) (1994)).

8. When conducting a hearing under this subsection, the Board is not bound by findings of fact of the Administrator but is bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law.

FAA Civil Penalty Administrative Assessment Act § 3(a)(1), 49 U.S.C. § 44709(d)(3).

9. *See* 5 U.S.C. § 553 (1994).

arbitrary or capricious) and procedurally fair (developed within the agency as delegated by the Administrator and made widely available to the public) should bind the NTSB.

Part I of this Comment gives an overview of the roles the NTSB and FAA play in aviation safety administration. Part II explores general deference principles and examines how the Civil Penalty Act affects the deference the NTSB gives FAA interpretations in FAA certificate actions. Part III defines the range of interpretations that could be considered "validly adopted." Part IV proposes that, to be binding, interpretations must be substantively and procedurally fair, meeting specific uniformity[10] and notice requirements. This Comment concludes that the NTSB should defer to FAA interpretations that meet public notice requirements, are developed pursuant to authority delegated by the Administrator, and are not arbitrary or capricious.

I. OVERVIEW OF THE RELATIONSHIP BETWEEN THE FAA AND THE NTSB

The split-enforcement administrative structure is used by only a minority of administrative agency organizations. Administrative agencies typically engage in rulemaking, enforcement, and adjudication functions when carrying out their policy formation and administration duties.[11] In most enforcement agencies, the same agency performs these three functions, subject to internal "separation of functions" requirements.[12] In specific situations, Congress has carried the separation of functions one step further by structuring agencies according to a "split-enforcement" or "split-function" model.[13] Under this model, one agency performs the rulemaking and enforcement functions, while an independent agency performs the adjudication function.[14] In the split-enforcement model used

10. No guarantee exists that each FAA field office will interpret a specific Federal Aviation Regulation the same way. Imposing uniformity by ensuring that regulations are interpreted in only one way will ensure reliability and fairness.

11. *See ACUS Recommendation 86-4*, *supra* note 5, at 18.

12. 5 U.S.C. § 554(d) (1994); *see, e.g.*, 15 U.S.C. §§ 41–58 (1994) (Federal Trade Commission); 47 U.S.C. §§ 151–159 (1994 & Supp. I 1995) (Federal Communications Commission).

13. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1990). *See generally* George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 Admin. L. Rev. 315 (1987).

14. Examples of areas administered according to the split-enforcement model include occupational safety and health (with the Occupational Safety and Health Administration assigned the rulemaking and enforcement functions and the Occupational Safety and Health Review Commission

to administer aviation safety,[15] the FAA performs the rulemaking and enforcement functions in aviation safety certificate actions,[16] while the NTSB carries out the appellate adjudication function.[17]

A. The Federal Aviation Administration: Rulemaking and Enforcement

A component of the Department of Transportation, the FAA is the primary agency that regulates the aviation industry.[18] Most importantly, the FAA regulates aviation safety,[19] which has been highly regulated since 1926.[20] The FAA's responsibilities involve developing and implementing aviation safety policy through two of its functions, rulemaking and enforcement.[21]

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assigned the adjudication function) and mine safety and health (with the Mine Safety and Health Administration assigned rulemaking and enforcement functions and the Federal Mine Safety and Health Review Commission assigned the adjudicatory function). *See ACUS Recommendation 86-4*, *supra* note 5, at 18–19. In 1986, the Administrative Conference of the United States (ACUS) "was unable to conclude [that the split-enforcement] model achieves greater fairness in adjudication" than the traditional model. *Id.* at 19.

15. This Comment focuses on the FAA-NTSB relationship as it applies to airmen, and more specifically, FAA certificate actions against airmen. For example, certified pilots and mechanics are airmen. In addition to actions against airmen, the FAA imposes civil penalties against non-airmen, including uncertificated individuals and non-natural persons such as corporations and partnerships. A civil penalty imposed against an airline passenger who smokes in an aircraft lavatory is an example of a non-airmen civil penalty. *See, e.g.*, Daniel S. Pippin, 1998 FAA LEXIS 312, Mar. 23, 1998. Unlike airmen cases, in non-airmen cases in which the civil penalty is equal to or less than $50,000, the FAA carries out the rulemaking, enforcement, and adjudication functions. 14 C.F.R. § 13.16 (1998). Federal district courts adjudicate airmen and non-airmen cases involving civil penalties over $50,000. 14 C.F.R. § 13.15(c)(5) (1998). For a discussion on certificate actions and civil penalties, see *infra* notes 34–43 and accompanying text. "Airman" and "airmen" are terms used by the FAA that include both men and women.

16. This relationship is also true for civil penalties imposed on airmen. For a definition and discussion of certificate actions, see *infra* notes 34–43 and accompanying text.

17. The adjudicatory powers exercised during certificate actions do not lie only with the NTSB. The FAA also exercises adjudicatory authority when it issues an order, such as an Order of Revocation. In this Comment, "adjudicatory function" and "adjudication" refer to the appellate adjudicatory authority the NTSB exercises in certificate actions.

18. Office of the Federal Register & National Archives and Records Administration, *The United States Government Manual 1997/98* 418 (1997).

19. 49 U.S.C. § 40101(d) (1994) (giving FAA authority to regulate aviation safety); *United States Government Manual*, *supra* note 18, at 418–19.

20. For history of aviation safety regulation, see generally Robert Burkhardt, *The Federal Aviation Administration* (1967); Harry P. Wolfe & David A. NewMyer, *Aviation Industry Regulation* (1985); and Paul Stephen Dempsey, *The State of the Airline, Airport & Aviation Industries*, 21 Transp. L.J. 129, 130–53 (1992).

21. *See* 49 U.S.C. §§ 106, 40101(d), 44709–44723 (1994) (granting FAA statutory authority in area of aviation safety).

The FAA establishes and implements aviation safety policy primarily through two interrelated rulemaking processes. First, the agency is authorized by Congress to promulgate legislative rules, the Federal Aviation Regulations (FARs).[22] The agency promulgates legislative rules under the Administrative Procedure Act (APA).[23] Legislative rules "carry the force of law" and bind the public and the agency.[24] Because much regulatory language tends to be vague, the FAA must both promulgate and interpret the FARs.

Developing interpretations, which clarify and explain existing regulations, is the FAA's second rulemaking role in aviation safety. Because aviation safety depends on voluntary compliance with the regulations,[25] the FAA achieves compliance primarily by ensuring that a "clear awareness and understanding" of the regulations exists within the aviation industry.[26] It issues interpretations to clarify the meaning of the FARs. The FAA develops and issues interpretations in a variety of forms, including interpretive rules,[27] Advisory Circulars,[28] letters in

22. 49 U.S.C.S. § 106(f)(3)(A) (1997) (granting FAA rulemaking authority). For a discussion on rulemaking, see generally Administrative Conference of the United States, *A Guide to Federal Agency Rulemaking* (2d ed. 1991) [hereinafter *ACUS Guide*], and 1 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* chs. 6–7 (3d ed. 1994).

23. The FAA promulgates informal rules under the APA. *See* 5 U.S.C. § 553 (1994) (outlining the informal rulemaking process). The major requirement of informal rulemaking, also called "notice and comment" rulemaking, is publication of the proposed rule in the Federal Register, which allows for public notice with the opportunity to comment. 5 U.S.C. § 553(b). As long as informal interpretations only interpret existing rules or regulations without adding substantive content, these interpretations are designated as "interpretive rules" according to the APA, and are exempt from the requirements of § 553 rulemaking. 5 U.S.C. § 553(b)(3)(A). Other informal interpretations may not fit neatly within the definition of interpretive rules if they are more like policy statements that do not interpret, but only state policy. *See ACUS Guide*, *supra* note 22, at 47–69.

24. Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977) (stating that legislative rules have full force of law and bind court subject to arbitrary, capricious standard but interpretive rules do not); *see also* Davis & Pierce, *supra* note 22, § 6.3, at 233, § 6.5, at 250.

25. Compliance and Enforcement Program, F.A.A. Order No. 2150.3A, at 12 [hereinafter *Enforcement Handbook*]; *see also Federal Aviation Administration's Civil Penalties Program: Hearing on H.R. 5481 Before the Subcomm. on Aviation of the House Comm. on Pub. Works and Transp.*, 102d Cong. 85 (1992) (statement of Pete West, President, Government Affairs, National Business Aircraft Association) ("[A]s everyone here today knows, voluntary compliance is critical to aviation safety.").

26. *Enforcement Handbook*, *supra* note 25, at 12.

27. Interpretive rules are interpretations of regulations that are not subject to the notice and comment provisions of the APA, but must be published in the Federal Register. 5 U.S.C. §§ 552(a)(1)(D), 553(b)(3)(A) (1994). Interpretations that are not legislative rules, interpretive rules,

response to interpretation inquiries (which could be generated from a field office, a regional office, or the FAA Headquarters in Washington D.C.), phone conversations, internal memoranda, and positions developed in the course of litigation. The FAA issues a large number of these interpretations in its effort to develop, implement, and explain policy objectives.[29] Some of these interpretations qualify as interpretive rules[30] and statements of policy[31] that, under the APA, are exempt from the notice and comment provisions.[32] The APA prohibits interpretive rules and policy statements from adversely affecting persons having no actual notice of them unless they are published in the Federal Register.[33]

In addition to promulgating and interpreting regulations, the FAA enforces the FARs. In the area of aviation safety, the FAA may pursue two primary types of enforcement actions: certificate actions and civil penalty actions.[34] Certificate actions affect individuals and entities possessing FAA certificates, which grant the holders certain privileges. FAA certificates include airmen certificates (such as pilot and aircraft mechanic certificates),[35] air agency certificates (including repair stations, flight schools, and aircraft maintenance schools),[36] and air carrier certificates (airlines and aircraft charter companies).[37] These certificated individuals[38] are subject either to certificate actions, in which the FAA suspends or revokes privileges conferred by the certificate, or civil

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or policy statements fall outside the APA, but this Comment includes them within the broad term "interpretations."

28. *See, e.g.*, Temporary Flight Restrictions (TFRs), AC No. 91-63B (Feb. 28, 1997).

29. FAA regulations occupy four inches of library shelf space, "but the corresponding technical guidance materials [occupy] well in excess of forty feet." Peter L. Strauss, Comment, *The Rulemaking Continuum*, 41 Duke L.J. 1463, 1469 (1992) (referring to facsimile from Neil Eisner, Office of the General Counsel, U.S. Dep't of Transp. (Mar. 4, 1992)). Also, the FAA "generates approximately 215 feet of domestic and international notices yearly." *Id.* at 1469 n.20.

30. *See supra* note 27.

31. Policy statements do not interpret, but advise the public as to how the agency intends to exercise its discretionary power. *ACUS Guide*, *supra* note 22, at 58.

32. 5 U.S.C. § 553(b)(3)(A) (1994).

33. 5 U.S.C. § 552(a)(1)(D) (1994).

34. *See* 14 C.F.R. pt. 13 (1998).

35. *See* 14 C.F.R. pts. 61, 63 (1998).

36. *See* 14 C.F.R. pts. 141–43, 145, 147 (1998).

37. *See* 14 C.F.R. pts. 119, 125 (1998). The FAA also issues certificates that do not grant the holder privileges, such as airworthiness certificates issued to aircraft. *See* 14 C.F.R. pt. 21 (1998).

38. Although enforcement actions may be brought against air agencies and air carriers, this Comment focuses on certificate actions against airmen.

penalty actions.[39] When an airman violates an FAR, the FAA prefers to take certificate action against the airman.[40] For example, FAA actions involving pilots could result in a suspension or revocation[41] of the individual's pilot certificate for up to one year.[42] During the period of suspension or revocation, the pilot may not exercise her flight privileges.[43]

Alternatively, the FAA may enforce the FARs by imposing civil penalties.[44] When a certificate action will put the certificate holder out of business, the FAA prefers to impose a civil penalty. For example, in the case of air carriers, the FAA will take civil penalty action if a "substantial adverse impact on the public interest from disrupted service" would occur as a result of certificate action as long as "this impact is not outweighed by safety considerations."[45] In addition, violators who do not possess an FAA certificate will be subject to civil penalties. For example, the FAA may impose a civil penalty upon a person who shipped hazardous materials by air and did not label the packaging in compliance with the Department of Transportation hazardous materials regulations.[46]

To culminate its enforcement function, the FAA issues orders.[47] In a certificate action, the FAA issues a Notice of Proposed Certificate Action.[48] At this point the airman may either surrender her certificate,[49]

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39. *Enforcement Handbook*, *supra* note 25, at 24.

40. *Id.*

41. 49 U.S.C. § 44709(b) (1994) (authorizing Administrator's suspension and revocation power). A suspension takes away the airman's certificate privileges for a specified period of time, such as 30 days. At the end of the suspension period, the pilot is free to exercise his certificate privileges. "Suspension action is appropriate where there is a need temporarily to suspend the privileges of the certificate pending demonstration of qualification." *Enforcement Handbook*, *supra* note 25, at 25. Revocation is the more serious action. "Revocation of a certificate is used . . . when the certificate holder lacks the necessary qualifications to hold the certificate. The continued exercise of the privileges of the certificate in such circumstances would be contrary to safety in air commerce or air transportation." *Id.* If a certificate is revoked, after one year the pilot must retake and pass the appropriate oral and practical tests to have her certificate reissued. *See* 14 C.F.R. § 61.13(g) (1998).

42. *See* 14 C.F.R. § 61.13(g).

43. 14 C.F.R. § 61.13 (1998).

44. *See* 49 U.S.C. § 46301 (1994).

45. *Enforcement Handbook*, *supra* note 25, at 24.

46. 49 C.F.R. pts. 171–172 (1997).

47. This is an example of the FAA exercising its adjudicatory power. *See supra* note 17.

48. 14 C.F.R. § 13.19(b) (1998); *Enforcement Handbook*, *supra* note 25, at 139–40.

49. 14 C.F.R. § 13.19(c)(1) (1998).

answer the charges in writing,[50] or request an informal conference.[51] If the issue is not settled, the FAA will issue an Order of Suspension or Order of Revocation, as appropriate.[52] The Order constitutes final FAA action, and may be appealed to the NTSB.[53]

B. The National Transportation Safety Board: Adjudication

As the adjudicating body for FAA certificate action appeals, the NTSB's position is similar to that of a reviewing court with the power of de novo review.[54] When an FAA Order is appealed, an NTSB Administrative Law Judge (ALJ) hears the matter and then issues an Initial Decision and Order affirming, amending, modifying, or reversing the FAA Order.[55] If either party is dissatisfied with the ALJ's Decision and Order, that party may appeal to the full Board.[56] After reviewing the record, the Board issues an Opinion and Order.[57] Finally, if either side remains dissatisfied, that party may appeal to a federal court of appeals.[58]

Some NTSB adjudications of certificate action and civil penalty appeals[59] pose questions of FAR interpretation. As the adjudicating body, the Board must determine if the FAA's interpretation should stand.

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50. 14 C.F.R. § 13.19(c)(2) (1998).

51. 14 C.F.R. § 13.19(c)(4) (1998). Airmen civil penalty actions follow a similar process. The FAA issues a Notice of Proposed Civil Penalty and the violator may either pay or challenge the penalty. 14 C.F.R. § 13.16(d) (1998).

52. 14 C.F.R. § 13.19(c) (1998). In civil penalty cases, the FAA issues a Final Notice of Civil Penalty. 14 C.F.R. § 13.16(e) (1998).

53. 49 U.S.C. § 44709(d)(1) (1994); 14 C.F.R. § 13.19(d) (1998). Airmen civil penalties may also be appealed to the NTSB. 49 U.S.C. § 46301(d)(5)(B) (1994).

54. Hinson v. NTSB, 57 F.3d 1144, 1147 n.1 (D.C. Cir. 1995). The NTSB's position is the same for airmen civil penalty appeals. *See supra* notes 15–16.

55. 49 U.S.C. § 44709(d)(1); *Enforcement Handbook*, *supra* note 25, at 142–43. The ALJ's decision is "not . . . precedent binding on the Board." 49 C.F.R. § 821.43 (1997).

56. 49 U.S.C. § 1133 (1994); *Enforcement Handbook*, *supra* note 25, at 143.

57. 49 C.F.R. § 821.49(b) (1997).

58. 49 U.S.C. § 44709(f) (1994).

59. Certificate action and civil penalty appeals by airmen follow the same adjudicatory process. *See* 49 U.S.C. §§ 44709, 46301 (1994).

II. NTSB DEFERENCE TO FAA INTERPRETATIONS

A. The Judicial Standard of Deference to Informal Interpretations

The degree of judicial deference owed to agency interpretations differs depending on whether the agency is interpreting a statute or its own regulation. An agency regulation promulgated under specific statutory grants of rulemaking authority is called a "legislative rule."[60] Regulations issued by the agency that interpret specific statutory provisions are one type of legislative rule. For example, Congress authorizes the FAA to regulate air traffic operations in navigable airspace.[61] In interpreting this statutory provision, the FAA promulgated a regulation that requires pilots to obtain permission from the appropriate air traffic control center before entering designated Class B airspace,[62] which tends to have a high volume of air traffic. These legislative rules (or regulations) carry the force of law, whereas agencies' interpretations of their own regulations do not.[63]

Courts give legislative rules great deference.[64] In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the U.S. Supreme Court articulated a two-step process to be used in determining whether a court should defer to a legislative rule.[65] First, courts must determine whether the statute exhibits clear Congressional intent.[66] If Congress has spoken with clear intent, the agency must give effect to that intent and any contradictory agency interpretation must fail.[67] Second, if Congress has

60. Davis & Pierce, *supra* note 22, § 6.3, at 234.

61. 49 U.S.C. § 40103(b)(2) (1994).

62. 14 C.F.R. § 91.131 (1998).

63. Commissioner v. Schleier, 515 U.S. 323, 336 n.8 (1995) ("[I]nterpretive rulings do not have the force and effect of regulations...."); Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977) (stating that legislative rules have full force of law and bind court subject to arbitrary, capricious standard but interpretive rules do not); Davis & Pierce, *supra* note 22, § 6.3, at 233–34, 236.

64. Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996) (emphasizing that Court defers to reasonable judgments of agencies' interpretations of ambiguous terms in statutes they administer); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (declaring that Supreme Court has traditionally given considerable weight to agency interpretations of statute that agency is entrusted to administer).

65. 467 U.S. at 842–43.

66. *Id.*

67. *Id.* at 843 n.9. Some commentators have suggested that Congress is almost never "clear," and therefore the *Chevron* doctrine in effect accords administrative interpretations a default stance,

not spoken, the question becomes whether the agency construction of the statute is a reasonable or "permissible" construction.[68] The courts should not determine whether the agency interpretation is the only or best interpretation, but whether it is a reasonable interpretation.[69] According to *Chevron*, if the interpretation is reasonable, and not arbitrary or capricious, it should be upheld.[70]

Courts have traditionally allotted agency interpretations of legislative rules less deference than legislative rules themselves.[71] Whether this is true today is less certain. Originally, in the 1944 landmark case *Skidmore v. Swift*, the U.S. Supreme Court stated that an agency's interpretation of its own regulation has persuasive, not controlling authority, and its persuasive weight depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[72] Determining the level of persuasiveness given an interpretive rule entailed weighing these factors.

Since the *Chevron* decision, however, the U.S. Supreme Court has given *Chevron*-type deference to interpretations that were not legislative rules.[73] In *Thomas Jefferson University Hospital v. Shalala*, the Court held that it must give "substantial deference to an agency's interpretation of its own regulations," and its interpretation is controlling unless it is unreasonable.[74] The Court then reviewed the interpretation by the "arbitrary, capricious" standard as outlined in the APA.[75] This analysis

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where courts defer to agency interpretations unless Congress has been clear. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 990 (1992).

68. *Chevron*, 467 U.S. at 843.

69. *Id.* at 843 n.11.

70. *Id.* at 844.

71. Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 157 (1990) ("Although not entitled to the same deference as norms that derive from the exercise of... delegated lawmaking powers, these informal interpretations are still entitled to some weight on judicial review.").

72. 323 U.S. 134, 140 (1944).

73. *See, e.g.*, *Martin*, 499 U.S. at 150 (noting it is well established that agency's construction of its own regulations is entitled to substantial deference) (citing Lyng v. Payne, 476 U.S. 926, 939 (1986)); Prater v. United States Parole Comm'n, 802 F.2d 948 (7th Cir. 1986); Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 55–63 (1990).

74. 512 U.S. 504, 512 (1994).

75. *Id.* at 512–14; *see* 5 U.S.C. § 706(2)(A) (1994).

appears to follow the reasonableness and non-arbitrariness standards outlined in *Chevron* rather than the factorial analysis of *Skidmore*.

Thomas Jefferson represents a departure from *Skidmore*, which did not grant such interpretations controlling weight, but only persuasive weight that fell on a sliding scale. Although later in *Thomas Jefferson* the Court stated that an interpretation should be given less weight if it is inconsistent with prior interpretations[76]—hinting at *Skidmore* treatment—the Court emphasized that the agency has the prerogative of changing an interpretation and "where an agency's interpretation of [its regulation] is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction."[77] This again indicates that courts should confer *Chevron* treatment to interpretations that are not legislative rules. Therefore, the degree of judicial deference accorded to interpretations of regulations appears to be moving up from *Skidmore* levels toward *Chevron* levels.

B. The Administrative Standard Within the Split-Enforcement Model

In 1991, the U.S. Supreme Court addressed the issue of regulatory interpretation in a split-enforcement model. In *Martin v. Occupational Safety and Health Review Commission*, the Court specifically considered to which agency's interpretation an adjudicating court should defer.[78] The *Martin* Court confronted two conflicting interpretations of a regulation promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970:[79] one by the Secretary of Labor and the other by the Occupational Safety and Health Review Commission (OSHRC). The Court held that reviewing courts should defer to the interpretation articulated by the Secretary of Labor, the rulemaking agency, and not the OSHRC, the reviewing agency.[80] The Court reasoned that because Congress did not place lawmaking and policymaking power with the OSHRC, it would not allow the OSHRC to use its adjudicatory

76. *Thomas Jefferson*, 512 U.S. at 515.

77. *Id.* at 517 (citing Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993)).

78. 499 U.S. 144. *Martin* involved the Secretary of Labor and the OSHRC. The Court expressly limited its decision to that particular relationship under the Occupational Safety and Health Act of 1970. *Id.* at 157.

79. Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651–678 (1994)).

80. *Martin*, 499 U.S. at 152–53.

powers to make policy.[81] The Court went on to state that the OSHRC's adjudicatory role was akin to that of a court, and it could only review the Secretary's interpretations of the Secretary's own regulations for "consistency with the regulatory language and for reasonableness."[82] This indicated *Chevron*-level deference. Thus, according to *Martin*, the adjudicating agency should accord rulemaking agency interpretations the deference a court would accord interpretations under *Chevron*.

C. *Evolution of FAA-NTSB Deferential Standards*

For two reasons, aviation safety currently employs a deference standard unique even among agencies structured according to the split-enforcement model. First, the Civil Penalty Act[83] statutorily mandates that the NTSB defer to FAA interpretations.[84] This is unique because other agencies do not have a statutory deference directive. Second, the statute adopts a novel standard. The NTSB is bound only by "validly adopted" interpretations that are not arbitrary, capricious, or contrary to law.[85] Although it attempted to clarify which agency held interpretive power, Congress only clouded the issue by using the words "validly adopted." Congress did not define "validly adopted" and no other agency uses this deference standard.

1. *Pre-Statutory Deference*

Prior to the 1992 enactment of the Civil Penalty Act, the NTSB sometimes deferred to, but never considered itself bound by, FAA interpretations.[86] In order to identify the standard of deference, it is necessary to consider cases where the NTSB failed to defer. In some cases, the Board did not defer to the interpretation advanced by the FAA and articulated various reasons for its decision.

In *Administrator v. Thomas*, a dispute arose over the interpretation of "weather conditions" in the context of takeoff visibility under Instrument

81. *Id.* at 154.

82. *Id.* at 154–55.

83. Pub. L. No. 102-345, 106 Stat. 923 (1992) (codified as amended at 49 U.S.C. §§ 44703, 44709, 46301(d) (1994)).

84. 49 U.S.C. §§ 44703(c)(2), 44709(d)(3), 46301(d)(5)(C) (1994).

85. 49 U.S.C. § 44709(d)(3).

86. Richard H. Fallon, Jr., *Enforcing Aviation Safety Regulations: The Case For a Split-Enforcement Model of Agency Adjudication*, 4 Admin. L.J. 389, 424 n.182 (1991).

Flight Rules.[87] The FAA interpreted "weather conditions" to mean officially *reported* weather conditions.[88] The NTSB disagreed and decided that "weather conditions" should not be limited to reported weather conditions, but should include the pilot's own observation of the prevailing visibility.[89] The NTSB did not find the FAA's interpretation unreasonable; it only indicated that the FAA interpretation was unsupported by weather references in other sections of the FARs.[90]

In *Administrator v. Bowen*, the Board refused to defer to the FAA interpretation advanced at trial because it conflicted with the interpretation developed during "genesis" of the rule.[91] In *Bowen*, the FAA claimed that Dominion Bizjets, Inc. was conducting passenger-carrying flights for compensation or hire without a required part 135 air carrier operating certificate because Dominion was charging "customers" for the salaries of the flight crews.[92] Generally, in this situation a pilot may not carry passengers for compensation or hire unless the operation is conducted in accordance with FAR Part 135.[93] In specific circumstances, however, a company may operate an aircraft carrying passengers and charge them with specific costs, including fuel, oil, and landing fees.[94] "Flight crew salaries" was not an approved cost specifically listed in the FARs.[95] Therefore, the FAA advocated that these flights were subject to part 135 regulation.[96] Because Dominion did not hold a part 135 operating certificate, the FAA claimed the flights were illegal.[97] The Board disagreed, finding instead that in its final rulemaking notice, the FAA had indicated crew salaries would be allowed to be recovered.[98] Nowhere did the Board state that the FAA's litigation interpretation was implausible or unreasonable. Instead, it found that neither the pilot nor

87. 3 N.T.S.B. 3203, 3202–04 (1981).

88. *Id.* at 3204. The decision does not indicate that the FAA position was anything but a litigation position.

89. *Id.*

90. *Id.*

91. 7 N.T.S.B. 1052, 1057 (1991); *see also* Davey, 3 N.T.S.B. 3164, 3165 (1980) (rejecting FAA interpretation that varied from interpretation set forth by FAA in rulemaking proceeding).

92. *Bowen*, 7 N.T.S.B. at 1052, 1057.

93. 14 C.F.R. pt. 119 (1998).

94. *Bowen*, 7 N.T.S.B. at 1056–57.

95. *Id.*

96. *Id.* at 1054.

97. *Id.* at 1052–54.

98. *Id.* at 1057–58.

the aviation community had been given notice of the interpretation advanced at trial,[99] and it deferred to the "more authoritative rulemaking interpretation" encompassed within the regulatory history.[100]

In *Administrator v. Conley*, the NTSB did not defer to the FAA interpretation, but instead relied on Board precedent that showed a preference for the Board's interpretation over the FAA's.[101] The FAA had suspended Conley's commercial pilot certificate after he operated a helicopter that, according to the FAA, had not met the requirements for an annual maintenance inspection.[102] The ALJ reversed the Administrator's suspension and the FAA appealed.[103] The Board affirmed the ALJ's decision.[104]

Conley involved two FARs. The first mandated that an aircraft cannot be operated unless it has had an annual inspection, which involves a completed inspection and approval for return to service by an authorized inspector (AI),[105] within the preceding twelve calendar months.[106] The second required that an aircraft that has been altered or repaired[107] cannot be used to carry passengers unless it has been approved for return to service and checked in flight by a pilot.[108] In *Conley*, the helicopter had been rebuilt prior to the annual inspection.[109] At the time of the incident that led to this case, the inspection had been completed, but the AI wanted Conley to perform a flight check before he signed the aircraft

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99. The Board did not make this clear in its decision, although it hinted at it in a footnote. *Id.* at 1057 n.11 (rejecting interpretation in favor of one provided during promulgation of rule). In a later case, the Board explained that notice was the reason behind the decision in *Bowen*. *See* Administrator v. Kraley, N.T.S.B. Order No. EA-4581, 4 (Aug. 18, 1997).

100. *Bowen*, 7 N.T.S.B. at 1057.

101. 3 N.T.S.B. 2236, 2237–38 (1980) (relying on Hawkins, 3 N.T.S.B. 1653 (1979), which held that aircraft may be flown prior to completion of annual inspection).

102. *Id.* at 2236–37.

103. *Id.* at 2236.

104. *Id.* at 2237.

105. An aircraft is approved for return to service when an AI—an advanced type of aircraft mechanic—certifies such and signs the aircraft logbooks with his name and certificate number.

106. *Conley*, 3 N.T.S.B. at 2236 n.2.

107. The applicable FAR, 14 C.F.R. § 91.167(a) (recodified at 14 C.F.R. § 91.407(b) (1998)), addresses "an aircraft that has been repaired or altered in a manner that may have appreciably changed its flight characteristics, or substantially affected its operation in flight." *Conley*, 3 N.T.S.B. at 2238 n.11.

108. *Id.* at 2238.

109. *Id.* at 2237 n.6. The aircraft was thus subject to the requirements of 14 C.F.R. § 91.167(a) (recodified at 14 C.F.R. § 91.407(b) (1998)). *See supra* note 107.

logbooks approving the helicopter for return to service.[110] During the flight check, the helicopter crashed.[111]

The FAA focused on the FAR that addressed annual inspections, interpreting it to mean that an annual inspection is not complete until the logbooks are signed.[112] Therefore, an aircraft could not be flown prior to the signing of the logbooks.[113] Because the logbooks had not been signed, the FAA claimed that the aircraft had not completed an annual inspection in accordance with the FARs and therefore could not be operated without a special flight permit.[114] The Board disagreed. Designating the "sign off" a formality, it decided the annual inspection had been completed even though the AI had not signed off the annual inspection.[115] Furthermore, the Board concluded that the flight was proper even though the annual inspection was incomplete[116] because the two required conditions after alteration—returning the aircraft to service and flight-checking the aircraft—could be met concurrently because they were listed in the conjunctive.[117] These cases, in which the Board viewed the FAA interpretations as merely persuasive, illustrate the use of a *Skidmore* standard.[118]

2. *Section 44709(d)(3) of the Civil Penalty Administrative Assessment Act of 1992*

In 1992, the Civil Penalty Act codified the deferential relationship between the NTSB and the FAA in aviation safety enforcement appeals adjudicated by the NTSB.[119] The Act declared the Board bound by all

110. *Bowen*, 7 N.T.S.B. at 2237.

111. *Id.*

112. *Id.* at 2236.

113. *Id.*

114. *Id.* at 2238.

115. *Id.* at 2237.

116. *Id.* at 2238.

117. *Id.* at 2237.

118. *See supra* notes 71–72 and accompanying text.

119. Pub. L. No. 102-345, 106 Stat. 923 (1992) (codified as amended at 49 U.S.C. §§ 44703(c)(2), 44709(d)(3), 46301(d)(5)(C) (1994)). Although it codified the deference standard, the Civil Penalty Act's primary objective was to transfer appellate adjudicatory authority from the FAA to the NTSB in FAA civil penalty actions against pilots, flight engineers, mechanics, and repairmen. Full discussion of this Act is beyond the scope of this Comment. For a record of the final House Aviation Subcommittee hearing at which the FAA, NTSB, and several interested organizations testified, see generally *Hearing*, *supra* note 25.

"validly adopted"[120] FAA interpretations that are not arbitrary, capricious, or inconsistent with the law.[121] The "validly adopted" terminology originated in Recommendation 91-8, which was issued by the Administrative Conference of the United States (ACUS).[122] Recommendation 91-8 evolved from a congressionally-ordered ACUS study and evaluation of the NTSB-FAA procedures concerning the adjudication of civil penalty actions.[123] Therein, the ACUS recommended that the NTSB should be bound by all "validly adopted" FAA interpretations that are not arbitrary, capricious, or contrary to law.[124] Recommendation 91-8 did not define "validly adopted," but only stated that validly adopted interpretations should not include litigation positions,[125] which are interpretations advanced for the first time by the FAA in an NTSB hearing.

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120. With an arguably ambiguous term such as "validly adopted," the proper forum to conduct the interpretation depends upon the legislative intent behind the statute. *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–43 (1984). If this is determined to be a pure statutory interpretation question, it is a matter for the court to determine "what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987) (holding that pure questions of statutory construction are decisions for court). However, if the court finds that the legislature intended to delegate the interpretation to the agency, then it is for the agency to determine the meaning of the statute and for the court to determine the reasonableness of the interpretation. *Chevron*, 467 U.S. at 843. The proper forum inquiry is outside the scope of this Comment.

If "validly adopted" is left to agency interpretation, the next inquiry becomes which agency is the correct interpreter, the FAA or NTSB. This Comment argues that in this case, "valid adoption" is a standard like "arbitrary, capricious," and therefore the NTSB will be the agency to determine whether the FAA interpretation meets that standard. As the adjudicator, the NTSB is in a position akin to a reviewing court, and therefore, it is the NTSB's responsibility to analyze the interpretation against the applicable standard.

121. Although titled "Civil Penalty Administration Assessment Act," the Act's scope regarding deference was not limited to civil penalty appeals. The NTSB is currently bound by "validly adopted" interpretations in certificate action appeals, civil penalty appeals, and denial of certificate application and renewal appeals. *See* 49 U.S.C. §§ 44703(c)(1) (certificate issuance or renewal appeals), 44709(d)(3) (certificate action appeals), 46301(d)(5)(C) (civil penalty appeals) (1994).

122. 56 Fed. Reg. 67,139, 67,142–43 (1991); Administrative Conference of the United States, *Recommendations and Reports 1991, Recommendation 91-8: Adjudication of Civil Penalties Under the Federal Aviation Act* 44, [hereinafter *ACUS Recommendation 91-8*]. The ACUS was an independent agency created to investigate and issue recommendations to improve federal agency procedures. The ACUS was abolished Feb. 1, 1996 by the Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, tit. IV, 109 Stat. 480, tit. IV (1995).

123. *See* Pub. L. No. 101-370 § 3(a), 104 Stat. 451, 452 (1990) (repealed by FAA Civil Penalty Administrative Assessment Act of 1992, Pub. L. No. 102-345, § 3, 106 Stat. 923, 925–26).

124. 56 Fed. Reg. at 67,143; *ACUS Recommendation 91-8*, *supra* note 122, at 49.

125. "The [ACUS] recommends that validly adopted FAA interpretations of FAA regulations be deferred to, unless such interpretations are arbitrary, capricious or not in accordance with

Addressing the Civil Penalty Act appeal provisions, the NTSB suggested that it did not believe the Act significantly changed the standard of deference it already afforded FAA interpretations.[126] In response to concerns regarding the new deference standard, the Board declined to limit "validly adopted" interpretations to those subject to notice and comment rulemaking,[127] reasoning that agencies are and should be permitted to develop policy through means short of "formal rulemaking."[128] In addition, the Board declined to require that interpretations commanding deference be developed only at the "highest levels within the FAA."[129] Rejecting such bright line rules, the Board identified "the quality of the process through which an interpretation is reached and the manner of its announcement" as key considerations affecting "both the public interest and aviation safety dimensions" of its review.[130] The Board cautioned that the domain of "validly adopted" interpretations should be limited in at least one way: "hastily" and "thinly" developed litigation positions should not bind the Board.[131] The

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law.... This does not, however, mean that [the] NTSB should simply defer to litigation positions of the FAA prosecutor." 56 Fed. Reg. at 67,142; *ACUS Recommendation 91-8*, *supra* note 122, at 47. Litigation positions are generally not afforded deference because they could be *post hoc* rationalizations of agency actions developed for the first time by agency counsel before the reviewing appellate body. *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 156 (1990); *see also* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988).

126. *See* Final Rules - NTSB Rules of Practice in Civil Penalty Proceedings, 59 Fed. Reg. 59,050, 59,053 (1994) ("As we noted to Congress during the considerations of these amendments, we do not believe the amended language brings about any significant change in the relationship between FAA and NTSB or to the kind and quality of deference to the Administrator's interpretations that has been traditionally accorded."). However, the pre-statutory cases in which the NTSB did not defer do not indicate that the NTSB felt "bound" by any FAA interpretations. *See supra* Part II.C.

127. *See supra* notes 22–24 and accompanying text.

128. Such a view [requiring notice and comment] requires the belief that Congress intended a dramatic change in the administrative process as normally understood, and we decline to infer any such intention without the support of clear evidence. Traditional administrative practice has permitted the development of agency policy through a range of devices that fall short of formal rulemaking, and the Board is given no specific authority to limit the Administrator's discretion in this regard.

59 Fed. Reg. at 59,052–53. Notice and comment rulemaking is informal rulemaking, not formal rulemaking. For discussion on the differences between formal and informal rulemaking, see *ACUS Guide*, *supra* note 22, at 37–48.

129. 59 Fed. Reg. at 59,053. This suggestion was made by Aircraft Owners and Pilots Association, with which the Board did not agree. *Id.* The Board's position suggests that it would agree to be bound by interpretations developed by lower-level agency employees.

130. *Id.*

Board's response, then, focused on the procedure used to develop interpretations rather than on what level in the hierarchy the interpretation is developed.

3. *Post-Statutory Deference*

NTSB adjudicatory decisions made after the Civil Penalty Act was enacted indicate a more organized deference inquiry. While post-Act Board decisions shed some light on what it considers to be "validly adopted" documents, no clear definition of the term "validly adopted" has emerged.

One area in which the deference question has been somewhat settled is sanction disputes. In *Administrator v. Reina*,[132] the FAA had issued an order suspending a pilot certificate for 120 days. At the initial NTSB hearing, the ALJ reduced the sanction to a thirty-day suspension coupled with a $500 civil penalty.[133] The FAA appealed to the full Board, which then reinstated the 120-day suspension order.[134] The Board stated that although it had authority to modify sanctions, its discretion was not limitless.[135] The Board observed that, according to section 44709(d)(3),[136] it was bound by all validly adopted interpretations including the FAA's Enforcement Sanction Guidance Table[137] (Sanction Table).[138] The FAA's

131. *Id.* The Board also emphasized that Congress did not intend the deference standard to extend to litigation positions, but there is no support for that claim in the authority cited by the NTSB. *Id.* (citing H.R. Rep. No. 102-671, at 10 (1992)).

132. N.T.S.B. Order No. EA-4508 (Dec. 6, 1996) *modification and clarification denied*, N.T.S.B. Order No. EA-4552 (May 23, 1997) *amended by* N.T.S.B. Order No. EA-4568 (July 11, 1997). For other sanction disputes, see Administrator v. Kimsey, N.T.S.B. Order No. EA-4537 (Mar. 25, 1997), and Administrator v. Oliver, N.T.S.B. Order No. EA-4505 (Dec. 4, 1996).

133. *Reina*, N.T.S.B. Order No. EA-4508, at 2.

134. *Id.*

135. *Id.* at 3.

136. Actually, the Board cited 49 U.S.C. § 44703, but later clarified that it was referring to 49 U.S.C. § 44709. *See Reina*, N.T.S.B. Order No. EA-4568 (July 11, 1997) (amending N.T.S.B. Order No. EA-4508 (Dec. 6, 1996) and N.T.S.B. Order No. EA-4552 (May 23, 1997)).

137. *Enforcement Handbook*, *supra* note 25, at app. 4.

138. *Reina*, N.T.S.B. Order No. EA-4508, at 3. Although the NTSB has repeatedly stated that the Sanction Table is validly adopted, it has failed to articulate its reasoning behind that finding. *See, e.g.*, Administrator v. Oliver, N.T.S.B. Order No. EA-4505, 2 (Dec. 4, 1996) (stating Board is generally bound by validly adopted interpretations of laws and regulations, which include Administrator's sanction guidance table); Administrator v. Finnell, N.T.S.B. Order No. EA-4427 (Feb. 20, 1996) (holding, pursuant to § 44709(d)(3), Board bound by Administrator's written sanction policy guidance as well as all validly adopted interpretations).

120-day suspension order was consistent with the Sanction Table as well as Board precedent;[139] therefore, the NTSB was bound to defer.[140] Nonetheless, the NTSB has held that the FAA must offer the Sanction Table into the hearing record for it to be binding. For example, in cases in which the issue on appeal was sanction modification, and the FAA failed to offer the Sanction Table into the hearing record, the NTSB accorded it no deference.[141]

The NTSB has also affirmed its previously stated position that litigation positions should not be binding.[142] In *Administrator v. Smith & Wright*, the Board determined that the finding of a violation could not stand because the FAA's interpretation of an aircraft clearance regulation was a litigation position that was not binding or entitled to deference.[143] The Board found that the regulatory language did not support the FAA's interpretation, and noted that the FAA had offered no other supporting documentary evidence.[144] In addition, the Board decided that the FAA interpretation was unclear.[145] Finally, the Board found that the FAA had taken an initial position that could not be reconciled with its current litigation position.[146] The combination of these factors convinced the Board that it was not bound by the FAA's interpretation. The Board, however, did not elucidate upon which part of section 44709(d)(3) its decision was founded: the interpretation's lack of validity in adoption or the arbitrariness of the rule.

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139. *Reina*, N.T.S.B. Order No. EA-4508, at 5.

140. *See id.*; *see also Oliver*, N.T.S.B. Order No. EA-4505.

141. *See, e.g.*, Administrator v. Gartner, N.T.S.B. Order No. EA-4623 (Feb. 11, 1998); Administrator v. Kimsey, N.T.S.B. Order No. EA-4537 (Mar. 25, 1997); Administrator v. Sanders, N.T.S.B. Order No. EA-4470 (July 17, 1996); Administrator v. Stange, N.T.S.B. Order No. EA-4375 (June 29, 1995).

142. *See* Administrator v. Merrell, N.T.S.B. Order No. EA-4670, 3 (June 3, 1998); *Gartner*, N.T.S.B. Order No. EA-4623, at 3; Administrator v. Krachun, N.T.S.B. Order No. EA-4002, 5 (Oct. 21, 1993). This does not imply that the NTSB will never defer to FAA interpretations advanced through litigation; it only means that litigation positions should persuade, not bind. If the NTSB agrees with the FAA litigation position, it should defer to it but not consider itself bound by it.

143. N.T.S.B. Order No. EA-4169, 2, 6–10 (May 13, 1994).

144. *Id.* at 8–10. In *Krachun*, the Board held that "deference cannot be readily accorded in the context of a hastily-developed record that is sustained solely by argument of counsel." N.T.S.B. Order No. EA-4002, at 5. The Board emphasized that this was particularly so when the argument was not supported by "practice, precedent, or explicit documentation, and where it entails consequences not only for respondent, but for the aviation community generally." *Id.* at 5–6. This statement hints at a notice requirement.

145. *Smith & Wright*, N.T.S.B. Order No. EA-4169, at 7.

146. *Id.* at 8.

In a later case, *Administrator v. Foss*, the Board deferred to an apparent litigation position of the FAA. *Foss* involved the decisional responsibilities of a pilot carrying parachutists.[147] The parachutists had descended through clouds while conducting their jumps, an act forbidden by the FARs.[148] Foss, the pilot, had deferred to the parachutists onboard in determining whether the jump should continue, and had not "actively participate[d] in the decision-making" himself.[149] The FAA interpreted the FARs to impose a "dual responsibility for the pilot and the parachutists to ascertain that the parachutists can adhere to cloud clearance requirements."[150] The Board deferred to the FAA's interpretation, but reasoned that Foss had not advocated a "compelling reason" for the Board to reject the FAA's interpretation.[151] The Board stated that the FAA's interpretation was not arbitrary or capricious.[152] The Board acknowledged that it was bound by validly adopted FAA interpretations; however, the Board used language in its opinion indicating that although it agreed with the FAA's interpretation, it did not consider itself bound. Furthermore, the Board did not discuss whether the FAA's interpretation was validly adopted—it merely stated that it was obviously correct.[153] Thus, although the Board deferred to what was apparently an interpretation developed in anticipation of litigation, *Foss* does not appear to alter the Board's position that it is not bound by such interpretations.[154]

Recently, the NTSB indicated that it would recognize as validly adopted only written FAA policy that gives notice to airmen. *Administrator v. Merrell* involved a Northwest Airlines pilot, Merrell, who acknowledged an air traffic control (ATC) clearance intended for an American Airlines flight.[155] Merrell mistakenly believed that the ATC

147. N.T.S.B. Order No. EA-4631, 3 (Feb. 5, 1998).

148. *Id.* at 2. The applicable FAR, 14 C.F.R. § 105.29, stated that "[n]o person may make a parachute jump, and no pilot in command of an aircraft may allow a parachute jump to be made from that aircraft . . . [i]nto or through a cloud." *Id.* at 2 n.2.

149. *Id.* at 5.

150. *Id.* at 4.

151. *Id.*

152. *Id.*

153. *Id.* at 5.

154. A later case emphasizes that "litigating positions are not necessarily 'validly adopted interpretations . . . of written agency policy guidance available to the public.'" Administrator v. Gartner, N.T.S.B. Order No. EA-4623, 3 (Feb. 11, 1988).

155. N.T.S.B. Order No. EA-4670, 2 (June 3, 1998).

call was intended for his flight, and answered ATC at the same time the appropriate American flight responded.[156] At the initial hearing, neither party disputed that the transmission was squelched and the ATC tape indicated that two aircraft responded to the ATC instruction at the same time.[157] The ALJ dismissed the case based on NTSB precedent that, assuming the mistake was not caused by carelessness, excuses a pilot who mishears an ATC clearance, follows the correct procedure by reading back the clearance, and acts upon the mistaken clearance if no ATC correction is received.[158] The FAA appealed, claiming that a violation of regulations prohibiting careless operations and operations counter to ATC instructions had occurred and that the NTSB was bound to defer to the FAA's interpretation under section 44709.[159] The Board disagreed, determining the FAA's interpretation was merely a litigation position that did not demand deference.[160] The Board stated that it was not required to defer because the FAA's position was not encompassed within any adopted rule or "written discussion, adopted as FAA policy, with notice to airmen."[161] Thus, *Merrell* indicates that the NTSB may require a validly adopted FAA interpretation to be written FAA policy that gives notice to airmen. This is the Board's most explicit statement to date concerning its position on the meaning of "validly adopted."

In the only post-statutory deference case that has been decided by a court on appeal, *Hinson v. NTSB*, the Court of Appeals for the D.C. Circuit admonished the NTSB for not directly addressing the question of deference.[162] The FAA petitioned the court to review the NTSB's reversal of a ninety-day pilot certificate suspension. The court denied the FAA's petition because the FAA, by neglecting to articulate its interpretations in the proceedings below, failed to preserve its statutory deference objection for appeal.[163] The court stated, however, that Congress had clearly and unambiguously directed the NTSB to defer to

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1 & n.1, 2. In *Merrell*, the regulations at issue were 14 C.F.R. § 91.123(b), (e) (1998), and § 91.13(a) (1998).

160. *Id.* at 3.

161. *Id.*

162. 57 F.3d 1144, 1148 (D.C. Cir. 1995). The NTSB Order was *Administrator v. Rolund*, N.T.S.B. Order No. EA-4123 (Mar. 17, 1994).

163. *Hinson*, 57 F.3d at 1151.

FAA interpretations of the FARs.[164] The court emphasized that the Board had specifically found that the FAA interpretation was not arbitrary, capricious, or contrary to law, and therefore the Board should have been bound by that interpretation, provided it was "validly adopted."[165] The court did not answer the question of whether the interpretation was "validly adopted" because the FAA had failed to preserve that argument for appeal.[166] Although it chastised the FAA for not raising this argument, the court found:

> [It is] both puzzling and disturbing that in a case where important air traffic safety issues are implicated, the Board apparently did not even inquire into, much less consider itself bound by, the FAA's interpretation of the applicable regulations, in the face of a clear statutory directive to defer to reasonable, validly adopted FAA interpretations.[167]

In sum, the deferential relationship between the FAA and NTSB is governed by the Civil Penalty Act, and is not subject to common law doctrine.[168] The *Chevron* and *Skidmore* decisions, however, are relevant as background for interpreting the statute. According to these cases, while interpretations advanced through legislative rules are binding,[169] under *Skidmore*, less formal interpretations are generally given only persuasive weight by courts of law.[170]

The Civil Penalty Act determines the degree of deference required by the NTSB in FAA certificate actions. This Act indicates a level of deference above that articulated in *Skidmore*. According to the NTSB cases decided after the Act, the Board will defer to some FAA interpretations such as the Sanction Guidance Table. The NTSB also reiterated that it will not be bound by stances taken during litigation. Unfortunately, these two positions provide little guidance in ascertaining

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164. *Id.*

165. *Id.* at 1147–48.

166. *Id.* at 1148.

167. *Id.*

168. In *Hinson*, the court of appeals explicitly stated that the statutory language, not common law doctrine, determines the NTSB-FAA deference issue. *Id.* at n.2.

169. *See* Beazer East, Inc. v. EPA, 963 F.2d 603, 606 (3d Cir. 1992) ("[Regulations] have the force and effect of law and must be promulgated in accordance with the proper procedures under the APA.").

170. *See supra* notes 71–77 and accompanying text.

to which interpretations the Board must defer. This determination turns on the definition of "validly adopted" as used in the Civil Penalty Act.

III. DETERMINING WHICH FAA INTERPRETATIONS ARE "VALIDLY ADOPTED"

The Civil Penalty Act states that FAA interpretations must satisfy a two-part test to bind the NTSB. First, interpretations must be validly adopted.[171] Second, validly adopted interpretations must not be arbitrary, capricious, or otherwise not according to the law.[172] If an interpretation fails to satisfy either of these requirements, it does not bind the NTSB.[173]

Arguably, one could read the statute as a one part test: "validly adopted" means "not arbitrary or capricious." But were one to do this, the words "validly adopted" would be unnecessarily included.[174] It would have sufficed to bind the NTSB to "all FAA interpretations not arbitrary, capricious, or not according to the law." The fact that Congress qualified "interpretations" with "validly adopted" must mean that the test has two parts, with "validly adopted" referring to the interpretation development process, and "not arbitrary, capricious" referring to the substance of the interpretation.

The real question, of course, is not when the NTSB will be bound, but when the public will be bound by FAA interpretations. Because validly adopted FAA interpretations bind the NTSB, these interpretations in turn bind the aviation community. Thus, the question of which interpretations are "validly adopted" must be considered from the standpoint of pilots, aircraft mechanics, and all others involved in aviation.

"Validly adopted" can be defined in various ways. "Validly adopted" interpretations could be limited to include only legislative rules. Alternatively, "validly adopted" could be read broadly to include all reasonable FAA interpretations originating in any FAA office. Finally,

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171. 49 U.S.C. § 44709(d)(3) (1994).

172. 49 U.S.C. § 44709(d)(3).

173. It is important to distinguish between situations where the NTSB defers to an interpretation and situations where it is bound by an interpretation. Just because an interpretation is not binding does not mean the Board cannot defer to it or otherwise agree with it. The Board is free to defer to all FAA interpretations that are not arbitrary or capricious, if it so chooses. Only validly adopted interpretations actually bind the NTSB, leaving it with no deferential discretion.

174. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." 2A Norman J. Singer, *Statutes and Statutory Construction* 119 (5th ed. 1992).

"validly adopted" interpretations could encompass any combination of interpretations that lies between these two extremes.

A. The Narrow Alternative: Only Legislative Rules Bind the NTSB

Only legislative rules can bind the public.[175] One approach, following this logic, would be to consider legislative rules, the FARs, "validly adopted," and find any interpretation less formal than a legislative rule not "validly adopted."[176]

In enacting the Civil Penalty Act, however, Congress specifically bound the NTSB to interpretations that are "validly adopted"—not "validly adopted legislative rules" or "interpretations subject to notice and comment under the APA." This less restrictive terminology suggests that the meaning of "validly adopted" is not limited to interpretations contained in the FAA's legislative rules.

The FAA is the aviation safety policymaking agency, and non-legislative rules[177] are an important vehicle the FAA uses to develop policy.[178] The aviation industry requests daily interpretive guidance in order to ascertain whether its operations are conducted properly.[179] In response to this, the FAA issues numerous less formal interpretations every year upon which the aviation industry relies.[180]

If one defines "validly adopted interpretations" as interpretations that are binding under the APA, the NTSB might not uphold existing interpretive guidance short of legislative rules. As a result, the aviation community might have less confidence in FAA guidance on the meaning of the FARs, leaving pilots, mechanics, and others without dependable direction on how to perform their duties. Consequently, conflicting practices could result and aviation safety could be compromised.

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175. *See* Pacific Gas & Elec. Co. v. Federal Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (holding only legislative rules establish binding norms); *see also* Davis & Pierce, *supra* note 22, § 6.3, at 233–34, § 6.5, at 250.

176. According to the NTSB, certain commentators have supported this view. 59 Fed. Reg. 59,050, 59,052 (1994). Although the FAA does not promulgate formal rules in accordance with 5 U.S.C. §§ 556–557, formal rules promulgated under these sections would be binding and therefore validly adopted.

177. *See supra* notes 27–33 and accompanying text.

178. *See supra* note 29 and accompanying text.

179. Interview with Karl Lewis, Supervising Attorney, FAA, in Renton, Wash. (Feb. 20, 1998).

180. *See supra* note 29–32 and accompanying text.

Taken to the extreme, the NTSB would become a co-policymaking agency because it would be implementing aviation safety policy when interpreting the FARs through adjudication. Although policy may be implemented through adjudication,[181] in this case it would be effectuated by an agency that is not authorized to develop that policy. In *Martin v. Occupational Safety and Health Review Commission*, the U.S. Supreme Court held that because Congress had not delegated policymaking authority to the adjudicating agency, Congress could not have "expected [that agency] to use its adjudicatory power to play a policymaking role."[182] Congress has not delegated aviation safety policymaking authority to the NTSB, so the NTSB should be bound by the full range of FAA policymaking authority. Interpretations subject to notice and comment rulemaking should not be considered the sole body of validly adopted interpretations.

B. The Broad Alternative: Presumptive Validity of All Interpretations

Arguably, section 44709(d)(3) could be read broadly to state that validly adopted interpretations are all those not arbitrary, capricious, or contrary to law—in other words, all reasonable interpretations.[183] Under such a broad reading, any FAA interpretation consistent with the regulation and therefore reasonable, or not clearly erroneous, would bind the NTSB. This definition would include any interpretation the agency issues, regardless of its form or origin, as long as it was not arbitrary or capricious. Although straightforward, such a broad approach has significant shortcomings.

First, this approach would generate, and even sanction, inconsistency. For example, one regional FAA office could issue an interpretation of a

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181. *See* Union Flights, Inc. v. FAA, 957 F.2d 685, 688 (9th Cir. 1992) (citing NLRB v. Bell Aerospace Co., 416 U.S. 267, 290–95 (1974)) ("Administrative agencies are generally free to announce new principles during adjudication."); Administrator v. Miller, N.T.S.B. Order No. EA-3581, 4 (Apr. 28, 1992) ("While the evolutionary interpretation of rules is thought to be better accomplished through the rulemaking process itself, there is little question that the adjudicatory process may also be used to develop and define the meaning of existing regulations.").

182. 499 U.S. 144, 154 (1990).

183. In fact, when addressing the House of Representatives on the day the House passed the Civil Penalty Act, Representative Hammerschmidt only mentioned the arbitrary, capricious standard, with no reference to any type of further adoption process: "I would like to make clear . . . that if the Board finds that [the] FAA is interpreting its laws and regulations . . . in an arbitrary or capricious manner, then the Board is not obliged to follow the FAA's approach." 138 Cong. Rec. H7238 (daily ed. Aug. 3, 1992) (statement of Rep. Hammerschmidt).

particular FAR that is inconsistent with another regional office's interpretation of the same FAR. If the first region's interpretation had bound the NTSB in a past appellate adjudication, there would be no assurance that the Board would defer to the second region's conflicting interpretation of the same regulation in a separate proceeding. This would lead to an inconsistent application of the regulations. Aviation is an inherently national and international activity; thus, aviation safety is not solely a local concern. Interpretations that do not follow a standard process will add more confusion to that already generated by vague regulations. This is an undesirable result when important air safety issues are involved.

Second, this approach is procedurally unfair. Under such a reading, even hastily developed litigation positions not found to be arbitrary or capricious would be considered "validly adopted."[184] Courts do not ordinarily accord deference to litigation positions classified as post-hoc rationalizations.[185] Likewise, the NTSB does not defer to litigation positions because they provide the aviation community with no notice.[186] Therefore, such a broad reading is not acceptable.

IV. PROPOSED STANDARDS FOR VALID ADOPTION

Interpretations should be given deference if they are substantively and procedurally fair. The statutory language neatly sets out the criteria for achieving such fairness.

Substantive fairness will result through application of the second half of the criterion established by Congress: not arbitrary, capricious, or contrary to law.[187] It is well established that agency interpretations must

184. *But see Martin*, 499 U.S. at 157 (stating that Secretary of Labor's interpretation of its regulation "embodied in a citation" is "agency action, not a *post hoc* rationalization of it" and under these circumstances litigation positions are as much exercises of delegated lawmaking powers as promulgation of regulations).

185. *See id.* at 156 (finding litigation positions not entitled to deference when they are merely counsel's post hoc rationalizations for agency action); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988) (holding deference is not given to wholly unsupported agency litigation positions).

186. *See, e.g.*, Administrator v. Kraley, N.T.S.B. Order No. EA-4581, 4 (Aug. 18, 1997) (citing Bowen, 7 N.T.S.B. 1052 (1991)) (declining to enforce FAA interpretation against pilot because "no notice [had been given] to him or the aviation community").

187. *See* 49 U.S.C. § 44709(d)(3) (1994).

be reasonable, not arbitrary or capricious.[188] Arbitrary, capricious interpretations should not be given NTSB deference, as directed by the Civil Penalty Act.

Procedural fairness will be achieved through the adoption process itself, which should satisfy two requirements: uniformity and notice. Without uniform interpretations, certain affected individuals will be operating under conflicting presumptions regarding the meaning of the FARs. In addition, affected individuals should have notice of the interpretations that bind them. Thus, the FAA may issue validly adopted interpretations if they are developed pursuant to an established procedure that incorporates these elements.

1. Uniformity: Delegated Development

Aviation safety requires uniformity of interpretation, which is the very purpose of section 44709(d)(3). Without uniform rules and interpretations thereof, conflicting practices in aviation may have dangerous consequences. The number of informal interpretations issued by the FAA evinces the existing uncertainty in the meaning of the FARs.[189] Many times, vague FARs need further clarification. Without such clarification, airmen could interpret FARs in different ways, leading to uncertainty and contradicting practices that could inhibit aviation safety. For example, conflicting interpretations between FAA field offices could cause a Seattle-based pilot to understand a particular FAR to mean something different than would a Chicago-based pilot. In extreme cases, accidents could occur before conflicts were resolved.

Further interpretation conflicts also arise between the FAA and the NTSB, as the statute at issue suggests.[190] This uncertainty would be minimized by requiring one set of standard, uniform interpretations upon which all parties could rely.[191]

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188. *See, e.g.*, Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 739 (1996); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981).

189. *See supra* note 29.

190. *See, e.g.*, Hinson v. NTSB, 57 F.3d 1144 (D.C. Cir. 1995); Administrator v. Merrell, N.T.S.B. Order No. EA-4670 (June 3, 1998); Bowen, 7 N.T.S.B. 1052 (1991).

191. This is not to imply that the interpretations will be rigid and unchanging. An agency's interpretation may, and at times should, change over time to meet the present needs of the public. *See* Thomas Jefferson Univ. Hosp. v. Shalala, 512 U.S. 504, 517 (1994) (holding Secretary is not estopped from changing interpretation if Secretary believes change is necessary).

To achieve uniformity, all "validly adopted" interpretations should be issued pursuant to authority delegated by the Administrator. The Administrator may delegate the interpretive responsibility to the agency subdivision that possesses rulemaking responsibility for the specified area of regulation.[192] More than one organization responsible for rulemaking may exist, but only one subdivision should have that authority for each "set" of regulations. For example, all interpretations of regulations within part 67 of the FARs (medical standards) should be issued by the Federal Air Surgeon within the FAA.

Assigning interpretive authority to the organization that develops the regulations is logical and practical. The designated organizations are most familiar with the intended meaning of the regulations, and should therefore be able to develop corresponding interpretations in the most cost-effective and efficient way. This procedure will also ensure that only one interpretation of a regulation will be issued officially and bind the NTSB.[193] Requiring uniformity satisfies the first factor the NTSB stated it would consider: the quality of the process through which an interpretation is reached.[194]

2. *Notice: Publication and Dissemination to the Public*

When an agency intends to bind the public, it must provide notice of that which will bind.[195] Because "validly adopted" FAA interpretations will bind the NTSB, they will bind the public as well. The public must therefore have notice of such interpretations, especially because the public will not be given an opportunity to comment, as it is given when

192. The Administrator has the power to "delegate, and authorize successive redelegations of, to an officer or employee of the Administration any function, power, or duty conferred upon the Administrator, unless such delegation is prohibited by law." 49 U.S.C.S. § 106(f)(2)(C) (1997). Within the agency are various organizations, or subdivisions, such as Flight Standards Service, Aircraft Certification Service, and the Office of Aviation Medicine.

193. Additionally, field offices must be made aware that although they may advise the public of an interpretation, to be considered binding it must pass through the subdivision possessing authority delegated by the Administrator.

194. 59 Fed. Reg. 59,050, 59,053 (1994).

195. *See* Administrator v. Merrell, N.T.S.B. Order No. EA-4670, 3 (June 3, 1998) ("[T]he FAA has here offered us no evidence of any policy guidance written by the FAA, validly adopted or otherwise, for the proposition it argues here.... [I]t offers no written discussion, adopted as FAA policy, with *notice to airmen*, that discusses the circumstances [under which a violation here would not be found].") (emphasis added).

FARs are promulgated.[196] The notice provided must be both available and understandable. Requiring notice satisfies the second factor the NTSB stated it would consider: the manner in which an interpretation is developed.[197]

The public should be given notice beyond that provided by the Freedom of Information Act (FOIA)[198] and the Federal Register. While the constructive notice these sources provide may suffice for other purposes, in a scheme where the public is to be bound by agency interpretations without being given the opportunity to comment, constructive notice is not enough. There is no guarantee that a majority of individuals subject to the FARs are even aware of the FOIA, or that agency documents may be obtained pursuant to it.[199] In addition, although publication of interpretive rules in the Federal Register satisfies legal notice requirements, from a practical standpoint this is inadequate for the aviation community. Generally, even if they are aware of its existence, pilots and mechanics do not read the Federal Register. Notice must be provided through a commonly known, easily accessible source.

The NTSB has emphasized the importance of notice in several ways. The Board considers the manner in which interpretations are announced when determining if an interpretation is "validly adopted."[200] The Board has held that regulations must be specific enough to notify individuals that if the regulations are violated, the individual will suffer punitive FAA action.[201] To extend this NTSB position in a practical way, individuals must be able to understand the meaning of the regulations if they are to be bound by them. The FAA may need to interpret vague regulations in order to impart the specificity demanded by the NTSB.

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196. Because the FARs are informal rules, they are subject to the notice and comment provisions of 5 U.S.C. § 553(c) (1994).

197. *See* 59 Fed. Reg. 59,050, 59,053 (1994).

198. All agency adopted interpretations not published in the Federal Register are required to be "available for public inspection and copying." 5 U.S.C. § 552(a)(2) (Supp. II 1996). Additionally, interpretations developed after 1996 are required to be available to the public through "computer telecommunications or . . . other electronic means." 5 U.S.C. § 552(a)(2).

199. Arguably, interpretations are available to the public through non-governmental publications. *See, e.g.*, Joseph D. Kuchta, *Federal Aviation Decisions, Compilation of Civil Penalty and Chief Counsel Interpretations* (1993). However, the responsibility of notice provision should rest squarely on the FAA and not be left to outside sources. *See supra* note 195.

200. *See* 59 Fed. Reg. at 59053.

201. *See* Conley, 3 N.T.S.B. 2236, 2258 n.12 (1980) (citing Babbitt, 1 N.T.S.B. 1305, 1307 (1971)).

Any adoption process short of requiring notice of understandable interpretations would violate principles of procedural fairness.

The FAA should publish[202] all "validly adopted" interpretations in both an official publication and on the FAA's Internet Web site[203] in order to provide the most people with actual notice and access. While publication in the Federal Register need not be required, publication in a designated official source should be required. This source should be widely publicized among and available to the aviation community. One possibility would be to publish a quarterly "Interpretation Bulletin" listing validly adopted interpretations developed during that quarter. Posting the interpretations on the FAA's Internet Web site would provide an efficient, far-reaching distribution process that can be accessed easily at little cost to the public. Using the Internet would demand minimal agency time and expense. The 1996 amendment to the FOIA, which requires publication of agency interpretations issued after November 1, 1996 "by computer telecommunications or . . . other electronic means," strongly supports Internet utilization.[204]

To provide adequate notice, the interpretation distribution process must be well known in the aviation community, and interpretations must be widely available. Certificated individuals should be notified first by mail that validly adopted FAA interpretations of the FARs will be available to them via the Internet and Interpretation Bulletin. Thereafter, an individual should be given the opportunity to receive the Interpretation Bulletin quarterly by mail if she chooses. This practical process ensures that more affected members of the public will receive notice of binding FAA interpretations than would be accomplished through the traditional legal methods.[205] Increasing the number of individuals who receive notice will ensure greater understanding of and uniformity in application of the FARs, ultimately leading to safer skies.

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202. This is not the first time that there has been a call for publication of interpretations. The Aircraft Owners and Pilots Association submitted a written statement to the House of Representatives aviation subcommittee suggesting this very idea to prevent overreaching by the FAA. *Hearing*, *supra* note 25, at 487–88 (written statement of John Yodice, General Counsel, Aircraft Owners and Pilots Association).

203. *Federal Aviation Administration* (visited Aug. 5, 1998) <http://www.faa.gov>.

204. 5 U.S.C. § 552(a)(2) (1994 & Supp. II 1996) (mandating that agency cannot rely on, use, or cite as precedent interpretations created on or after Nov. 1, 1996, unless agency publishes and offers it for sale or makes it available via "computer telecommunications" by Nov. 1, 1997). To date the FAA has not posted its interpretations on its Web site.

205. The traditional legal methods include the Federal Register and FOIA. *See supra* note 198 and accompanying text.

V. CONCLUSION

In certificate actions, the FAA Civil Penalty Administrative Assessment Act of 1992 directs the NTSB to defer to all "validly adopted" FAA interpretations that are not arbitrary, capricious, or contrary to the law.[206] The phrase "validly adopted" remains undefined by Congress, the courts, and the administrative agencies. By including this phrase in the Civil Penalty Act, Congress must have intended validly adopted interpretations to include more than those interpretations promulgated as informal rules under the APA, but less than every interpretation put forth by the FAA.

Validly adopted interpretations should be both substantively and procedurally fair. On its face, the statute provides for both fairness aspects in the form of a two-part analysis. First, it requires that interpretations must not be arbitrary or capricious, ensuring substantive fairness. Second, a valid adoption process ensures procedural fairness. The adoption process should establish a uniform body of FAA interpretations, adequate notice of which must be given to affected individuals. Any process that falls short of this standard will jeopardize, rather than enhance, aviation safety.

206. 49 U.S.C. § 44709(d)(3) (1994).