ADMINISTRATIVE CONFERENCE OF

March 14, 2019

SUBMITTED VIA REGULATIONS.GOV

Mr. Daniel K. Elwell
Acting Administrator
U.S. Department of Transportation
Federal Aviation Administration
800 Independence Avenue, SW
Washington, DC 20591

Re: Docket No. FAA-2018-1051: Update to Investig
84 Fed. Reg. 3614 (proposed Feb. 12, 2019) (to

Dear Acting Administrator Elwell:

On behalf of the Office of the Chairman of the Admin
States (ACUS), we offer the following comments in response
Administration's (FAA) proposal to revise the procedural rule
enforcement actions.

ACUS is a government agency dedicated to finding w
procedures in the federal government. In 2018, an ACUS Wo
revisions to the *Model Adjudication Rules*, which were first re
Adjudication Rules are designed for use by federal agencies to
rules for all stages of administrative adjudication. Numerous a
Adjudication Rules to develop and improve their adjudication

The 2018 revisions reflect significant changes in adjuc
technologies over the past 25 years. In revising the *Model Adj*
Group relied on ACUS's extensive empirical research of adju
Administrative Adjudication Database; amendments to the Fe
input from agency officials, academics, practitioners, and othe

The Working Group encourages agencies to adopt the
after accounting for agency-specific matters and proceedings
comments as guides when drafting their procedural rules. As i

use the Model Rules and as they consider other agencies' experiences, they improve the uniformity, rationality, and consistency of federal administrative adjudication." In finalizing the proposed procedural rules, we encourage the FAA to consider the revised *Model Adjudication Rules*, which are available online at https://www.acus.gov/model-rules/model-adjudication-rules.

ACUS issues recommendations for increasing the accuracy, fairness, and efficiency of agency adjudications. As discussed below, the FAA may also wish to consider various ACUS recommendations relevant to the proposed procedural rules. All of ACUS's official recommendations can be found at www.acus.gov and in the *Federal Register*.

Technological Advances

In the notice of proposed rulemaking, the FAA proposes to modernize its rules to account for advances in technology, such as the availability of fax and email for the service and filing of documents, where appropriate, and the enabling electronic payment of civil penalties. In considering its use of technology for hearings and appeals, the FAA may also wish to consider:

- providing adjudicators with discretion to use technology in the discovery context;
- taking further advantage of electronic case management; and
- considering the usefulness and appropriateness of video hearings in FAA proceedings.

For purposes of this rulemaking, several provisions of the *Model Adjudication Rules* may be helpful. They include Model Rule 235 (Requests for Production of Records or Things for Inspection or Other Purposes), which addresses production of records stored in an electronic format. For guidance on subpoena and discovery procedures generally, you may find helpful Model Rules 231 through 239. In particular, the FAA may wish to consider Model Rule 239, which provides guidance on sanctions for a party's failure to comply with discovery obligations.

With regard to electronic case management, you may also wish to consider Conference Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,683, 30,686 (June 29, 2018). For video hearings, you may find helpful Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, 79 Fed. Reg. 75,119 (Dec. 17, 2014), and Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,789, 48,795 (Aug. 9, 2011).

Publication of Adjudication Materials

The preamble to the proposed rule states that the Office of Adjudication will proactively publish all applicable forms and standing orders to its official website. As the FAA finalizes its procedural rules, the FAA may wish to consider Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. 2139, 2142 (Feb. 6, 2019). The FAA may also wish to consider Recommendation 2017-1, *Adjudication Materials on Agency Website*, 82 Fed. Reg. 31,039 (July 5, 2017), which offers best practices on providing access to decisions and supporting materials issued and filed in adjudicative proceedings.

Alternative Dispute Resolution and Settlement Procedures

The proposed rules provide for the use of alternative dispute resolution (ADR) and make settlement procedures more flexible for both the agency and opposing parties. In 1991, ACUS encouraged greater use of a dispute resolution techniques in individual cases and recommended that the FAA place greater emphasis on ADR. 56 Fed. Reg. 67,141 (Dec. 30, 1991). The FAA may wish to consider Conference Recommendation 88-5, *Agency Use of Settlement Judges*, 53 Fed. Reg. 26,030 (July 11, 1988), and Model Rule 220 (Prehearing, Settlement, and Other Conferences) and Model Rule 240 (Settlement and Alternative Dispute Resolution).

Due Process

Proposed 14 C.F.R. § 13.205 provides that an administrative law judge may disqualify himself or herself at any time, and that a party may file a motion for disqualification. As the FAA finalizes its procedural rules, it may wish to consider ACUS Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019). As noted there, recusal is an important tool for maintaining the integrity of adjudication. Recusal protects parties and promotes public confidence in agency adjudication without compromising the agency's ability to fulfill its mission effectively and efficiently. Model Rule 112 (Adjudicator Impartiality, Recusal or Disqualification, or Unavailability) may serve as a helpful guide.

Conclusion

Thank you for providing the opportunity for the public to comment on this important rulemaking. For purposes of this and other rulemakings, we hope you will continue to consider ACUS's recommendations and consult the *Model Adjudication Rules*.

Please contact me at jgraboyes@acus.gov or (202) 480-2095 if you have any questions or would like further information.

Respectfully,

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Matthew L. Wiener
Vice Chair/Executive Director

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