

# Proposed Rules

Federal Register

Vol. 78, No. 217

Friday, November 8, 2013

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## MERIT SYSTEMS PROTECTION BOARD

### 5 CFR Part 1201

#### Practices and Procedures

**AGENCY:** Merit Systems Protection Board.

**ACTION:** Solicitation of Public Comments.

**SUMMARY:** The Merit Systems Protection Board (MSPB or the Board) invites public input concerning options the MSPB is considering to revise its regulations governing how jurisdiction is established over Board appeals.

**DATES:** Written comments are invited on or before December 9, 2013.

**ADDRESSES:** Submit your comments concerning this document by one of the following methods and in accordance with the relevant instructions:

*Email:* [mspb@mspb.gov](mailto:mspb@mspb.gov). Comments submitted by email can be contained in the body of the email or as an attachment in any common electronic format, including word processing applications, HTML and PDF. If possible, commenters are asked to use a text format and not an image format for attachments. An email should contain a subject line indicating that the submission contains comments to the MSPB's **Federal Register** Notice regarding jurisdiction. The MSPB asks that parties use email to submit comments if possible. Submission of comments by email will assist MSPB to process comments and speed future actions, including publication of a proposed rule.

*Fax:* (202) 653-7130. Faxes should be addressed to William D. Spencer and contain a subject line indicating that the submission contains comments concerning the MSPB's **Federal Register** Notice regarding jurisdiction.

*Mail or other commercial delivery:* William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419.

*Hand delivery or courier:* Comments should be addressed to William D.

Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419, and delivered to the 5th floor reception window at this street address. Such deliveries are only accepted Monday through Friday, 9 a.m. to 4:30 p.m., excluding Federal holidays.

*Instructions:* As noted above, MSPB requests that commenters use email to submit comments, if possible. All comments received will be made available online at the Board's Web site, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information or other information whose disclosure is restricted by law. Those desiring to submit anonymous comments must submit comments in a manner that does not reveal the commenter's identity, include a statement that the comment is being submitted anonymously, and include no personally-identifiable information. The email address of a commenter who chooses to submit comments using email will not be disclosed unless it appears in comments attached to an email or in the body of a comment.

**FOR FURTHER INFORMATION CONTACT:** William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419; phone: (202) 653-7200; fax: (202) 653-7130; or email: [mspb@mspb.gov](mailto:mspb@mspb.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

On June 7, 2012, the Board published a proposed rule that included a proposed amendment to 5 CFR 1201.56. 77 FR 33663. Now, as then, 5 CFR 1201.56 provides without qualification that the Board's jurisdiction must be proved by preponderant evidence. In the proposed rule, the Board noted that 5 CFR 1201.56 is in conflict with a significant body of Board case law holding that certain jurisdictional elements may be established by making non-frivolous allegations. The Board therefore proposed to amend this regulation to allow the use of non-frivolous allegations to establish certain jurisdictional elements.

The MSPB received numerous thoughtful comments concerning the proposed amendments to this regulation and, because many of the comments addressed matters that went well

beyond the scope of the original proposed rule, the Board decided to withdraw the proposed rule and reconsider the existing regulation in light of the comments and internal discussions spurred by the comments.

#### Ongoing Review

Shortly after the withdrawal of the proposed amendments to 5 CFR 1201.56, the Board directed an internal MSPB working group (regulations working group) to thoroughly review 5 CFR 1201.56 and any related issues concerning the MSPB's jurisdiction. The regulations working group developed several options for the Board to consider, and the Board has determined that it would be appropriate to seek public comment on the various options prior to taking action.

#### Options Developed by the MSPB Regulations Working Group

The exact text, summaries, and analyses of the options developed by the MSPB regulations working group are available for review at the MSPB's Web site ([www.mspb.gov/regulatoryreview/index.htm](http://www.mspb.gov/regulatoryreview/index.htm)). Included below is a short summary of each of the 4 options developed by the working group. In general, Options A and B are intended to make MSPB regulations consistent with existing Board and Federal Circuit case law. Options C and D would in some instances conflict with and supersede Board and Federal Circuit case law.

##### Option A

This option would amend section 1201.56(b) to state that: (1) The appellant bears the burden of proof, generally by a preponderance of the evidence, on issues of jurisdiction, and (2) an administrative judge will inform the parties of the proof required in each case. This option would also amend section 1201.56(b) to state that an appellant generally bears the burden of proof by a preponderance of the evidence on issues of jurisdiction, timeliness, and all affirmative defenses, and make clear that the administrative judge will inform the parties of the proof required as to each defense. Finally, this option would amend 5 CFR 1201.4 by transferring definitions of "substantial evidence," "preponderance of the evidence," and "harmful error" from 1201.56 and adding a definition of "non-frivolous allegation."

*Option B*

This option amends section 1201.56 to address the burdens and degrees of proof applicable in cases other than: (1) An individual right of action (IRA) appeal under the Whistleblower Protection Act, (2) an appeal under the Veterans Employment Opportunities Act (VEOA), and (3) an appeal under the Uniformed Services Employment and Reemployment Rights Act (USERRA), in which the appellant alleges discrimination or retaliation in violation of 38 U.S.C. § 4311. This option would also add a new regulation, 1201.57, that would address how an appellant can establish jurisdiction in the three types of appeals not covered by revised section 1201.56. Finally, this option would amend 5 CFR 1201.4 by transferring definitions of “substantial evidence,” “preponderance of the evidence,” and “harmful error” from 1201.56 and adding a definition for “non-frivolous allegation.”

*Option C*

This option attempts to clarify how jurisdiction should be established in Board proceedings by amending the Board’s regulations to state that all Board appeals include “who” and “what” jurisdictional elements that must be established by preponderant evidence, and identify the 8 appeal types that require allegations as to specific merits issues in order to establish jurisdiction. This option would also include regulatory language stating that the MSPB is not required to hold an evidentiary hearing on matters on which the appellant bears the burden of proof when there is no genuine issue of material fact to be resolved.

*Option D*

This option is the same as Option C, except that it does not include the proposed regulatory language authorizing an appeal to be decided without an evidentiary hearing when there is no genuine issue of material fact to be resolved. Option D would continue the Board’s current practice of affording appellants the opportunity for a hearing, if requested, in all cases within its jurisdiction.

**Comments Requested**

The Board seeks public input before taking action to amend 5 CFR 1201.56 or otherwise alter its regulations governing how a party can establish jurisdiction over an appeal. Comments are invited concerning the 4 options developed by the regulations working group and/or any alternative approaches to improving the MSPB’s regulations

governing the establishment of MSPB jurisdiction over an appeal.

The Board intends to consider all public comments prior to taking further action. However, the Board does not plan to respond to the comments it receives, either directly or in a subsequent **Federal Register** notice.

**William D. Spencer,**

*Clerk of the Board.*

[FR Doc. 2013–26783 Filed 11–7–13; 8:45 am]

**BILLING CODE 7401–01–P**

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****14 CFR Part 25**

[Docket No. FAA–2013–0903; Notice No. 25–13–26–SC]

**Special Conditions: Airbus, Model A350–900 Series Airplane; Side Stick Controllers**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of proposed special conditions.

**SUMMARY:** This action proposes special conditions for the Airbus Model A350–900 series airplanes. These airplanes will have a novel or unusual design feature(s) associated with side stick controllers for pitch and roll control instead of conventional wheels and columns. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

**DATES:** Send your comments on or before December 23, 2013.

**ADDRESSES:** Send comments identified by docket number FAA–2013–0903 using any of the following methods:

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

- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9

a.m. and 5 p.m., Monday through Friday, except federal holidays.

- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to <http://www.regulations.gov/>, including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT’s complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at <http://DocketsInfo.dot.gov/>.

Docket: Background documents or comments received may be read at <http://www.regulations.gov/> at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

**FOR FURTHER INFORMATION CONTACT:**

Loran Haworth, FAA, Airplane and Flight Interface Branch, ANM–111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1133; facsimile (425) 227–1320.

**SUPPLEMENTARY INFORMATION:****Comments Invited**

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive on or before the closing date for comments. We may change these proposed special conditions based on the comments we receive.

**Background**

On August 25, 2008, Airbus applied for a type certificate for their new Model A350–900 series airplane. Later, Airbus requested and the FAA approved an extension to the application for FAA type certification to June 28, 2009. The Model A350–900 series has a conventional layout with twin wing-mounted Rolls-Royce Trent XWB engines. It features a twin aisle 9-abreast economy class layout, and