

(4) The current ASAP process does not provide for the FAA to take possession of individual ASAP reports.

(a) *Comment.* The current process does not provide for the FAA to take possession of individual ASAP reports, except for those reports that are excluded from the program for criminal activity, substance abuse, controlled substances, alcohol, or intentional falsification. Additionally, the current version of Advisory Circular (AC) 120-66, Aviation Safety Action Program (ASAP) expressly prohibits the FAA from using either the report or the content of the report for enforcement action. The commenter states that, therefore, all references to "ASAP reports that are in the possession of the FAA" should be replaced with "aggregate ASAP trend information in possession of the FAA."

(b) *The FAA Response.* The FAA does not concur. The intent of this order is to protect sensitive information that may be obtained by the FAA from an ASAP, including an ASAP report, from disclosure. This order does not establish any submission requirements for such information or reports. However, if the information or reports specified in paragraph 5b of this order are obtained by the FAA, they will be protected in accordance with part 193 and this order. As was stated in the notice of proposed designation, the FAA does not anticipate receiving ASAP reports for retention in FAA files or in an FAA database. However, if under any circumstances, the FAA finds itself in possession of an ASAP report, it will be protected from disclosure, as specified in part 193 and this order. For example, if in the course of accomplishing the duties and responsibilities of membership in an ASAP ERC, the FAA representative of that committee is temporarily in possession of a de-identified ASAP report, that report will be protected from disclosure in accordance with part 193 and this order. The FAA believes that the goals of the ASAP are best served by extending disclosure protection to both individual ASAP and certain trend information, as specified in paragraph 5b of this order. To better emphasize that it is the FAA's intent to protect ASAP reports from disclosure, the wording of paragraph 5b(1) of this order has been modified to specify that both the "employee's ASAP report and the content of that report" will be protected under part 193 and this order.

(5) There are other possibilities for a national safety information resource besides the FAA.

(a) *Comment.* We do not know what is meant by the last sentence under Proposed Findings (4) in the notice, "it would also permit the FAA to serve as a national safety-information resource for certificate holders." There are already other possibilities for this endeavor, such as the Air Transportation Association's Aviation Safety Exchange System or the NASA ASRS. Most importantly, the FAA, through the ASAP programs in place, currently has access to ASAP reports on a periodic basis during the ERC meetings. During this process, the FAA helps identify safety issues, develops corrective actions, and monitors the success of these corrective actions during subsequent ASAP reports reviews. Therefore, additional

ASAP information submission to the FAA should be in aggregate form in order to support the identification and correction of National Airspace safety issues. Therefore, a statement in the paragraph describing the proposed data-sharing program should describe this concept.

(b) *The FAA Response.* This order does not establish requirements for ASAP information submissions to the FAA. Rather, it establishes part 193 disclosure protection for the ASAP information specified in paragraph 5b of this order. The FAA concurs with the commenter that additional ASAP information submissions to the FAA, beyond the sharing that already occurs in association with FAA membership on an ASAP ERC, should be in aggregate form in order to support the identification and correction of National Airspace safety issues. This order would provide part 193 protection for such aggregate information submitted to the FAA, except as described in paragraph 6e(2). In view of that protection, the FAA concurs with the commenter that the sentence from the notice that reads, "It would also permit the FAA to serve as a national safety information resource for certificate holders," is inappropriate. While such aggregated information could serve as a national resource for the FAA to monitor the identification and correction of safety trends, it would not serve as a national information resource in the same sense as the NASA ASRS or other potential national repositories because the aggregate ASAP information at the FAA would be subject to the disclosure protections of part 193 and this order. The sentence has therefore been deleted from this order. In view of that deletion, a description of the proposed data-sharing national resource program, as requested by the commenter, is not needed.

(6) The FAA's proposal is not properly within the scope of 49 U.S.C., section 40123.

(a) *Comment.* The effect of this order would be the designation of information provided to the agency from an ASAP as protected from public disclosure under 14 CFR part 193 and 49 U.S.C., section 40123. However, the FAA's proposal is not properly within the scope of that section of the U.S.C. In the Notice of Proposed Order, the FAA represents that certificate holders have not permitted ASAP reports and related information to leave the certificate holder's premises due to their concerns over public disclosure. But under ASAP, the voluntary submitter of the information is not the certificate holder. Rather, the employee of the certificate holder is the submitter, and the protections afforded by 49 U.S.C., section 40123 and 14 CFR part 193 run to the employee submitting information under the program, not to the certificate holder. The idea here is to avoid inhibiting the employee that has a desire to report under ASAP, not to protect the certificate holder. It is not the case that this order is needed in order to encourage submission of ASAP reports by employees, since such reports are in fact already being submitted. Although the certificate holders may obstruct the flow of these reports to the FAA, such obstruction is not the same thing as inhibiting the voluntary submission of the reports in the first place.

A certificate holder who is afforded protection for a report submitted by an employee will have received a benefit to which it is not entitled. Such a certificate holder has hijacked the process and is using its physical control over a properly submitted ASAP report to extort compliance from the FAA. Should the FAA submit to the demands of the certificate holders, its action will all but foreclose the flow of this incredibly useful information into the aviation community and endanger the viability of other aviation safety-related resources. The failure of certificate holders to provide the reported information to the FAA is simply wrong, and the acquiescence of the FAA in extending protection to those certificate holders in return for the information shows only complicity.

(b) *The FAA Response.* As is discussed in the preamble to part 193 (**Federal Register**, volume 66, number 122, pages 33792-33805) regarding the FAA's implementation through rulemaking of 49 U.S.C., section 40123, a major goal of the law and part 193 regulation is to address air carrier concerns about voluntarily allowing information to be released from their premises to the FAA that could be subject to disclosure under the Freedom of Information Act or other laws. The rationale for protecting safety-related information voluntarily provided to the FAA, including in particular ASAP information obtained by the certificate holder, is specifically discussed in that preamble. The public law and part 193 are broadly applicable to any voluntarily provided safety- or security-related information, if the Administrator finds that its disclosure would inhibit the voluntary provision of that type of information and its receipt aids in fulfilling the Administrator's safety and security responsibilities. It is clear that the wording of 49 U.S.C., section 40123 is intended to apply to information that is provided to the FAA. The commenter's observation that ASAP reports are already voluntarily provided to the certificate holder is not the issue. In order for the FAA to employ ASAP information for safety improvement, it must receive that information from certificate holders. The FAA has determined that without the disclosure protections provided under part 193 and this order, certificate holders will not voluntarily release ASAP information from their premises to the FAA. Unless the FAA receives that information, it cannot be aggregated from multiple carriers for FAA safety tracking purposes at a national level.

(7) A part 193 designation for ASAP would inhibit future submissions under the NASA ASRS.

(a) *Comment.* Our greatest fear is that, as an adjunct to "protecting" ASAP data, the FAA will stop the flow of ASAP information into the ASRS database. This would be a tragedy. Although employees of certificate holders are free to file under both ASAP and ASRS programs, the likelihood of such dual filings, especially given the certificate holder's distaste for the dissemination of this kind of information, is exceedingly rare. Safety information needs to be shared, and the aviation community needs to be able to have access to useful data.