AIR TRANSPORT ASSOCIATION

October 7, 2002

Docket Management System
U.S. Department of Transportation
400 Seventh St., SW
Room Plaza 401
Washington, D.C. 20590-0001

Re: **Flight Operational Quality Assurance Program/14 CFR Part 193**
67 Fed. Reg. 56770 (September 5, 2002)
Docket No. FAA-2002-13237

Aviation Safety Action Program
67 Fed. Reg. 56774 (September 5, 2002)
Docket No. FAA-2002-13236

Dear Sir or Madam:

The Air Transport Association of America, Inc. ("ATA"), on behalf of its member airlines,[1] submits the following comments on two Notices of Proposed Orders Designating Information as Protected from Disclosure under 14 CFR Part 193 issued on September 5, 2002: **Flight Operational Quality Assurance Program** ("FOQA"), Docket No. FAA-2002-13237 (67 Fed. Reg. 56770) and **Aviation Safety Action Program** ("ASAP"), Docket No. FAA-2002-13236 (67 Fed. Reg.13236). In reliance on 14 CFR Part 193, the Proposed Orders are designed to protect certain carrier operational data and related analyses and reports from public disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, and other laws.

Our members fully support regulatory efforts such as this to facilitate the voluntary sharing of sensitive safety data with the FAA and appreciate, in particular, the FAA's

[1] Members are: Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International Airlines, Federal Express, Hawaiian Airlines, JetBlue Airways, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Southwest Airlines, United Airlines, United Parcel Service, and US Airways. Associate members are: Aerovias de Mexico, Air Canada, Air Jamaica, KLM-Royal Dutch Airlines, and Mexicana de Aviacion.

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partnership with the industry in the development and refinement of the FOQA and ASAP programs. Because these programs have proven to be valuable safety tools, ATA member airlines continue to participate in FOQA and ASAP despite continuing and still unresolved concerns about the potential for public disclosure or use (by FAA) of confidential information made available to the FAA under these programs. Our concerns, expressed in part in industry comments filed in September 1999 in response to the Notice of Proposed Rulemaking for Protection of Voluntarily Submitted Information ("NPRM"), 14 CFR Part 193, Docket No. FAA-1999-6001 (64 Fed. Reg. 40472), are only partially addressed in the pending Notices of Proposed Orders. Then, as now, we believe that the full potential of FOQA and ASAP will be realized only when the disincentives to the sharing of sensitive operational data are removed.

The Proposed Orders offer protection from public disclosure of certain categories of operational data voluntarily provided by participating airlines to the FAA. While this protection will facilitate airline participation in these programs and is a reasonable solution to one of the concerns outlined in industry comments to the earlier NPRM,[2] the Proposed Orders do raise some concerns that are discussed below. We urge the FAA to revise the final form of the FOQA and ASAP orders accordingly.

The FOQA Notice

1. Disclosure to Support Rulemaking/Regulatory Action Should be Limited. ATA continues to believe that FAA should not "disclose de-identified (no operator or pilot identity), summarized information that has been derived from FOQA aggregate data or extracted from the protected information."[3] As noted in our comments on the Part 193 proposed rule, release of this information, once designated as protected from disclosure, is not authorized by 49 USC § 40123. Instead, to support regulatory or policy changes, FAA should disclose only its generalized findings and conclusions derived from its review of protected data and related information.[4]

2. Protected Data Should be More Broadly Defined in the FOQA Order.

A. Paragraph B.1 defines FOQA data as any digital flight data collected pursuant to an FAA approved FOQA program. Paragraphs B.3&6 cover aggregate FOQA data and the results of any FAA analysis of FOQA aggregate data, but limit the protection to

[2] ATA commends the FAA for dropping the proposed notice and comment process for identifying protected data, which was not required or authorized by Congress.

[3] FOQA Notice, 67 Fed. Reg. at 56773 (2nd column).

[4] Although the preamble to the Part 193 Final Rule states FAA does not intend to release underlying data, instead relying on statistical or more general summaries of operator or aggregated data (see 66 Fed. Reg. 33795, June 25, 2001), we continue to believe that only generalized findings and conclusions – not summaries of protected information – should be made public.

"when such data is obtained pursuant to an FAA approved FOQA program." ATA's concern is that in the course of aggregating, reviewing or analyzing FOQA data, other data may be inadvertently (or purposefully) included, in order to make the information more robust or complete. In such instances, the fact that the data was not obtained or collected "pursuant to an FAA approved FOQA program" should not prevent the data or aggregated data or analysis from being protected from disclosure. We believe it is consistent with the statute and Congressional intent to protect such data. Therefore, we urge FAA to revise the Final Order to protect all data shared with the FAA pursuant to an approved FOQA program, even if such data does not fall within the precise definition of FOQA data under B.1.

B. Paragraphs B.4&5 also are unduly restrictive. These provisions protect reports prepared by an operator or FAA, and the identity of an operator associated with FOQA data or reports, but only if such reports or information are prepared "pursuant to an FAA approved FOQA program." In both paragraphs, this limiting language is not necessary and could lead to unwanted disclosures. In the case of B.4, if a report is based on FOQA data or an analysis of FOQA data, then the report should be protected; it need not necessarily have been prepared pursuant to an approved FOQA program. In the case of B.5, the identify of an operator associated with FOQA data or a report based on FOQA data should always be protected. Again, the analysis need not have been developed pursuant to an approved FOQA program. For these reasons, ATA urges FAA to delete this clause from these paragraphs.

C. Paragraph B.7 protects corrective actions, but only if based on an analysis of that operator's FOQA data. Here, any corrective action based on any FOQA data, including reports, analyses or recommendations from the FAA based on another operator's FOQA data, should be protected from disclosure. The FAA contemplates that it will notify operators of systemic problems it uncovers. Thus, corrective actions taken by an operator may not, in fact, be based on its own FOQA data. ATA urges the FAA to revise this paragraph accordingly.

3. Paragraph C is Confusing. Paragraph C, "How persons would participate," requires operators to voluntarily share FOQA data and information with the FAA in order to participate. This statement contradicts paragraph B.1, which states that operators are "not expected or required" to provide FOQA data as a condition of approval of their FOQA implementation and operations plans. ATA recommends deleting paragraph C as unnecessary and confusing.

4. Finding 6 – Electronic Exchange of Information. In Finding 6, the FAA states that it hopes to establish in the future an internet-based method for receiving aggregate

FOQA data.[5] While our members generally support efforts to move from paper to electronic environments, we are concerned in this particular instance about assuming that an internet-based system will be the best system. Given the sensitive nature of FOQA (and ASAP) data, it may be the case that a different method of delivering this data in electronic format to the FAA will be preferred. We urge the FAA to move cautiously and to engage in early consultations with industry on this issue. The discussion of this Finding in the final order should be revised accordingly.

Likewise, it may not be the case that initial submissions under Part 193 will be in the form of paper reports, as this Finding contemplates. FAA should work with industry to allow flexibility in the manner in which initial reports are submitted.

The ASAP Notice

1. The content of ASAP Memorandums of Understanding (MOUs) and signatories to those MOUs should not be disclosed. While acknowledging the existence of an ASAP MOU is not problematic, ASAP programs are highly confidential and at times have been the subject of discovery disputes in civil litigation. Furthermore, it is very likely that MOUs will contain information about ASAP programs that operators would keep confidential under normal circumstances. For these reasons, we urge FAA to determine that it will not release or disclose the content of MOUs, including the identification of the signatories. The public does not have a need to know exactly who signs an MOU on behalf of an operator, and identification of that person could lead to unwanted public inquiries.

2. Use of the Term "Information Sharing Program" is not accurate. The ASAP notice characterizes ASAP programs as "information sharing programs" ("Summary of the ASAP Voluntary Information Sharing Program;" "Duration of this information sharing program," both at p. 56775). These characterizations are not quite accurate and suggest that a formal ASAP information sharing program exists. That is not the case. The process by which the industry will share ASAP information with the FAA is evolving through the efforts of the ASAP Aviation Rulemaking Committee (ARC) and the combined ASAP/FOQA Information Sharing Sub-Committee. For this reason, ATA recommends that FAA delete this phrase from the final order. It is not necessary to characterize the ASAP program at all. The goal of ASAP is to prevent accidents; the means by which certificate holders share information is ancillary to the corrective and preventative action process.

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[5] This statement also suggests FAA intends to be a repository of FOQA data, an issue which is outside the scope of Part 193. Furthermore, appropriate consideration has not been given to how FOQA data might be aggregated, analyzed and used. FAA should work with industry to address issues associated with the maintenance and disposition of FOQA data.

ATA and its member carriers look forward to continuing to work with the FAA, in the FOQA and ASAP Aviation Rulemaking Committees and other fora, to enhance voluntary safety information sharing programs. Subject to our specific comments above, ATA's members agree with the types of information FAA has proposed to be designated as protected from disclosure under Part 193. Please contact me if you have any questions concerning these comments or need additional information.

Sincerely,

Malcolm B. Armstrong

Malcolm B. Armstrong
Senior Vice President – Operations & Safety