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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

#### 49 CFR Part 10

[Docket No. OST-2016-0028]

RIN 2105-AE46

#### Maintenance of and Access to Records Pertaining to Individuals

**AGENCY:** Office of the Secretary (OST), U.S. Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** On October 4, 2018, the Department of Transportation issued a notice of proposed rulemaking requesting comment on proposed exemptions from certain requirements of the Privacy Act for the Department's insider threat program system of records. The exemptions are necessary to protect properly classified information from disclosure, preserve the integrity of insider threat inquiries, and protect the identities of sources in such inquiries and any related investigations. The Department received no comments on this proposed rule. As a result, this final rule will finalize the proposed rule without change.

**DATES:** This final rule is effective May 23, 2019.

**ADDRESSES:** You may access docket number DOT-OST-2016-0028 by any of the following methods:

- *Federal Rulemaking Portal:* Go to <http://www.regulations.gov>.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE, between 9:00 a.m. and 5:00 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202-493-2251.

**FOR FURTHER INFORMATION CONTACT:** Claire Barrett, Departmental Chief Privacy Officer, Office of the Chief Information Officer, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590 or [privacy@dot.gov](mailto:privacy@dot.gov) or (202) 366-8135.

**SUPPLEMENTARY INFORMATION:** DOT identifies a system of records that is exempt from one or more provisions of the Privacy Act (pursuant to 5 U.S.C. 552a(j) or (k)) both in the system of records notice published in the **Federal Register** for public comment and in an appendix to DOT's regulations implementing the Privacy Act (49 CFR part 10, appendix). This rule exempts records in the Insider Threat Program system of records from subsections (c)(3) (Accounting of Disclosures), (d) (Access to Records), (e)(1) and (e)(4)(G) through (I) (Agency Requirements) and (f) (Agency Rules) of the Privacy Act to the extent that records are properly classified, in accordance with 5 U.S.C. 552a(k)(1), or consist of investigatory material compiled for law enforcement purposes in accordance with 5 U.S.C. 552a(k)(2).

As DOT received no comments on the notice of proposed rulemaking published on October 4, 2018 (83 FR 50053), we are finalizing the proposed rule without change.

#### Regulatory Analysis and Notices

##### A. Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

DOT considered the impact of this rulemaking action under Executive Orders 12866 and 13563 (January 18, 2011, "Improving Regulation and Regulatory Review"), and DOT Order 2100.6, "Policies and Procedures for Rulemakings." DOT has determined that this action will not constitute a significant regulatory action within the meaning of Executive Order 12866 and within the meaning of DOT regulatory policies and procedures. This rulemaking has not been reviewed by the Office of Management and Budget. This rulemaking will not result in any costs. Since these records would be exempt from certain provisions of the Privacy Act, DOT would not have to expend any funds in order to administer those aspects of the Act.

##### B. Regulatory Flexibility Act

DOT has evaluated the effect these changes will have on small entities and does not believe that this rulemaking will impose any costs on small entities because the reporting requirements themselves are not changed and because the rule applies only to information on individuals that is maintained by the Federal Government or that is already publicly available. Therefore, I hereby certify that this rule will not have a significant economic impact on a substantial number of small entities.

##### C. National Environmental Policy Act

DOT has analyzed the environmental impacts of this final action pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 3.c.5 of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Highway Administration's implementing procedures, "[p]romulgation of rules, regulations, and directives." 23 CFR 771.117(c)(20). The purpose of this rulemaking is to amend the Appendix to DOT's Privacy Act regulations. The Department does not anticipate any environmental impacts and there are no extraordinary circumstances present in connection with this rulemaking.

##### E. Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, Federalism, dated August 4, 1999, and it has been determined that it will not have a substantial direct effect on, or sufficient Federalism implications for, the States, nor would it limit the policymaking discretion of the States. Therefore, the preparation of a Federalism Assessment is not necessary.

##### F. Executive Order 13084 (Consultation and Coordination With Indian Tribal Governments)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 ("Consultation and Coordination with Indian Tribal Governments"). Because it would not effect on Indian Tribal Governments, the funding and consultation requirements of Executive Order 13084 do not apply.

##### G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*),

Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The DOT has determined that this action does not contain a collection of information requirement for the purposes of the PRA.

#### H. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4, 109 Stat. 48, March 22, 1995) requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments; and the private sector. The UMRA requires a written statement of economic and regulatory alternatives for proposed and final rules that contain Federal mandates. A “Federal mandate” is a new or additional enforceable duty, imposed on any State, local, or tribal Government; or the private sector. If any Federal mandate causes those entities to spend, in aggregate, \$143.1 million or more in any one year (adjusted for inflation), an UMRA analysis is required. This final rule does not impose Federal mandates on any State, local, or tribal governments; or the private sector.

#### List of Subjects in 49 CFR Part 10

Penalties, Privacy.

In consideration of the foregoing, DOT amends part 10 of title 49, Code of Federal Regulations, as follows:

#### PART 10—MAINTENANCE OF AND ACCESS TO RECORDS PERTAINING TO INDIVIDUALS

■ 1. The authority citation for part 10 continues to read as follows:

**Authority:** 5 U.S.C. 552a; 49 U.S.C. 322.

#### Appendix to Part 10 [Designated as Appendix A to Part 10 and Amended]

■ 2. Designate the appendix to part 10 as appendix A to part 10 and amend newly designated appendix A, in Part II, by revising sections A., B., F., and G. to read as follows:

#### Appendix A to Part 10—Exemptions

\* \* \* \* \*

##### Part II. Specific Exemptions

A. The following systems of records are exempt from subsection (c)(3) (Accounting of Certain Disclosures), (d) (Access to Records), (e)(4)(G), (H), and (I) (Agency Requirements), and (f) (Agency Rules) of 5 U.S.C. 552a, to the extent that they contain investigatory material compiled for law enforcement purposes, in accordance 5 U.S.C. 552a(k)(2):

1. Investigative Record System (DOT/FAA 815) maintained by the Federal Aviation

Administration at the Office of Civil Aviation Security in Washington, DC; the FAA regional Civil Aviation Security Divisions; the Civil Aviation Security Division at the Mike Monroney Aeronautical Center in Oklahoma City, Oklahoma; the FAA Civil Aviation Security Staff at the FAA Technical Center in Atlantic City, New Jersey; and the various Federal Records Centers located throughout the country.

2. FHWA Investigations Case File System, maintained by the Office of Program Review and Investigations, Federal Highway Administration (DOT/FHWA 214).

3. Federal Motor Carrier Safety Administration (FMCSA) Enforcement Management Information System, maintained by the Chief Counsel, FMCSA (DOT/FMCSA 002).

4. DOT/NHTSA Investigations of Alleged Misconduct or Conflict of Interest, maintained by the Associate Administrator for Administration, National Highway Traffic Safety Administration (DOT/NHTSA 458).

5. Civil Aviation Security System (DOT/FAA 813), maintained by the Office of Civil Aviation Security Policy and Planning, Federal Aviation Administration.

6. Suspected Unapproved Parts (SUP) Program, maintained by the Federal Aviation Administration (DOT/FAA 852).

7. Motor Carrier Management Information System (MCMIS), maintained by the Federal Motor Carrier Safety Administration (DOT/FMCSA 001).

8. Suspicious Activity Reporting (SAR) database, maintained by the Office of Intelligence, Security, and Emergency Response, Office of the Secretary.

9. Departmental Office of Civil Rights System (DOCRS).

10. Insider Threat Program (DOT/ALL 26). These exemptions are justified for the following reasons:

1. From subsection (c)(3), because making available to a record subject the accounting of disclosures from records concerning him/her would reveal investigative interest by not only DOT but also the recipient agency, thereby permitting the record subject to take appropriate measures to impede the investigation, as by destroying evidence, intimidating potential witnesses, fleeing the area to avoid the thrust of the investigation, etc.

2. From subsections (d), (e)(4)(G), (H), and (I), and (f), because granting an individual access to investigative records, and granting him/her access to investigative records with that information, could interfere with the overall law enforcement process by revealing a pending sensitive investigation, possibly identify a confidential source, disclose information that would constitute an unwarranted invasion of another individual's personal privacy, reveal a sensitive investigative technique, or constitute a potential danger to the health or safety of law enforcement personnel.

B. The following systems of records are exempt from subsections (c)(3) (Accounting of Certain Disclosures) and (d) (Access to Records) of 5 U.S.C. 552a, in accordance with 5 U.S.C. 552a(k)(2):

1. General Air Transportation Records on Individuals, maintained by various offices in

the Federal Aviation Administration (DOT/FAA 847).

2. Investigative Records System, maintained by the Assistant Inspector General for Investigations in the Office of the Inspector General (DOT/OST 100).

3. General Investigations Record System, maintained by the Office of Investigations and Security, Office of the Secretary (DOT/OST 016).

4. Insider Threat Program (DOT/ALL 26).

These exemptions are justified for the following reasons:

1. From subsection (c)(3), because making available to a record subject the accounting of disclosures from records concerning him/her would reveal investigative interest by not only DOT but also the recipient agency, thereby permitting the record subject to take appropriate measures to impede the investigation, as by destroying evidence, intimidating potential witnesses, fleeing the area to avoid the thrust of the investigation, etc.

2. From subsection (d), because granting an individual access to investigative records could interfere with the overall law enforcement process by revealing a pending sensitive investigation, possibly identify a confidential source, disclose information that would constitute an unwarranted invasion of another individual's personal privacy, reveal a sensitive investigative technique, or constitute a potential danger to the health or safety of law enforcement personnel.

\* \* \* \* \*

F. Those portions of the following systems of records which consist of information properly classified in the interest of national defense or foreign policy in accordance with 5 U.S.C. 552(b)(1) are exempt from sections (c)(3) (Accounting of Certain Disclosures), (d) (Access to Records), (e)(4) (G), (H) and (I) (Agency Requirements), and (f) (Agency Rules) of 5 U.S.C. 552a:

1. Investigative Record System maintained by the Assistant Inspector General for Investigations in the Office of the Inspector General (DOT/OST 100).

2. Personnel Security Records System, maintained by the Office of Investigations and Security, Office of the Secretary (DOT/OST 035).

3. Civil Aviation Security System (DOT/FAA 813), maintained by the Office of Civil Aviation Security, Federal Aviation Administration.

4. General Investigations Record System, maintained by the Office of Investigations and Security, Office of the Secretary (DOT/OST 016).

5. Insider Threat Program (DOT/ALL 26).

The purpose of these exemptions is to prevent the disclosure of material authorized to be kept secret in the interest of national defense or foreign policy, in accordance with 5 U.S.C. 552(b)(1) and 552a(k)(1).

G. Those portions of the following systems of records which consist of information properly classified in the interest of national defense or foreign policy in accordance with 5 U.S.C. 552a(b)(1) are exempt from subsections (c)(3) (Accounting of Certain Disclosures) and (d) (Access to Records) of 5 U.S.C. 552a:

1. Investigative Record System (DOT/FAA 815) maintained by the Federal Aviation

Administration at the Office of Civil Aviation Security in Washington, DC; the FAA regional Civil Aviation Security Divisions; the Civil Aviation Security Division at the Mike Monroney Aeronautical Center in Oklahoma City, Oklahoma; the FAA Civil Aviation Security Staff at the FAA Technical Center in Atlantic City, New Jersey; and the various Federal Records Centers located throughout the country.

2. Insider Threat Program (DOT/ALL 26).

The purpose of these exemptions is to prevent the disclosure of material authorized to be kept secret in the interest of national defense or foreign policy, in accordance with 5 U.S.C. 552(b)(1) and 552a(k)(1).

Issued in Washington, DC, on May 8, 2019.

**Elaine L. Chao,**

*Secretary.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

**49 CFR Parts 209, 213, 214, 215, 217, 218, 219, 220, 221, 222, 223, 224, 225, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 270, and 272**

[Docket No. FRA-2016-0090; Notice No. 1]

RIN 2130-AC63

#### Moving the Federal Railroad Administration (FRA) Civil Penalties Schedules and Guidelines From the Code of Federal Regulations (CFR) to the FRA Website

**AGENCY:** FRA, U.S. Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** To eliminate unnecessary costs and improve public access, FRA is removing its civil penalties schedules and guidelines from the CFR and publishing them on the FRA website.

**DATES:** This final rule is effective May 23, 2019.

**FOR FURTHER INFORMATION CONTACT:** Veronica Chittim, Attorney, Safety Law Division, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE, Washington, DC 20590 (telephone 202-493-0273), [veronica.chittim@dot.gov](mailto:veronica.chittim@dot.gov).

**SUPPLEMENTARY INFORMATION:** FRA is authorized as the delegate of the Secretary of Transportation (Secretary) to enforce the Federal railroad safety statutes, regulations, and orders, including the civil penalty provisions codified primarily at 49 U.S.C. ch. 213. See 49 U.S.C. 103 and 49 CFR 1.89; 49 U.S.C. chs. 201-213. The Secretary also authorized FRA to enforce certain hazardous materials transportation

statutes, regulations, and orders, including the civil penalty provisions, relating to railroad transportation. See 49 CFR 1.89; 49 U.S.C. ch. 51.<sup>1</sup> FRA currently has safety regulations in 34 parts of the CFR that contain provisions establishing the agency's authority to impose civil penalties if a person violates any requirement in the pertinent portion of a statute or the CFR, and 32 CFR parts containing FRA regulations include an appendix with a civil penalty schedule or guidelines.

Since 1988, FRA has included the civil penalties schedules or guidelines as an appendix in the corresponding CFR part. Civil penalties schedules and guidelines are not regulations nor are they subject to notice-and-comment requirements. They are merely policy statements that do not bind FRA.

Instead, FRA retains full discretion to assess civil penalties for violations that are between the minimum and maximum amounts authorized by statute and adjusted for inflation.<sup>2</sup> Yet, their place in the CFR has necessitated that any changes to them, including adjustments for inflation required by federal law, be published in the **Federal Register**.

Like other federal agencies, FRA is charged by the page for each page in its segment of the CFR, namely title 49, parts 200-299. Currently, the annual rate is \$85 per page.<sup>3</sup> FRA, like other agencies, is also charged for each column it prints in the **Federal Register**, currently at a rate of \$151 per column.<sup>4</sup>

In this final rule, FRA is removing the civil penalties schedules and guidelines from 49 CFR parts 200-299 and updating references to the schedules and guidelines to reflect their new location on the FRA website, without substantive change.<sup>5</sup> This move will end

<sup>1</sup> Civil penalties related to hazardous materials transportation statutes, regulations, or orders administered by other agencies, such as the Pipeline and Hazardous Materials Safety Administration, are not affected by this rule.

<sup>2</sup> For railroad safety violations, the current statutory minimum civil penalty is \$870, the ordinary maximum civil penalty is \$28,474, and the aggravated maximum civil penalty is \$113,894. See 83 FR 60732 (Nov. 27, 2018). For hazardous materials violations, the current statutory minimum civil penalty (for violations relating to training) is \$481, the ordinary maximum civil penalty is \$79,976, and the aggravated maximum civil penalty is \$186,610. *Id.*

<sup>3</sup> See GPO Circular Letter No. 1007 (June 4, 2018), available at <https://www.gpo.gov/how-to-work-with-us/agency/circular-letters/open-requisitions-sf1-for-federal-register-and-code-of-federal-regulations>.

<sup>4</sup> *Id.*

<sup>5</sup> This final rule redirects any references to an appendix in the CFR that formerly contained civil penalties schedules and guidelines to FRA's website at [www.fra.dot.gov](http://www.fra.dot.gov). FRA's main website ([www.fra.dot.gov](http://www.fra.dot.gov)) will contain a link to FRA's civil penalties guidance website ([www.fra.dot.gov/Page/](http://www.fra.dot.gov/Page/)

the unnecessary costs of amending the schedules and guidelines through the **Federal Register** and printing them in the CFR. At the same time, locating the schedules and guidelines on the FRA website will improve public access to those statements of agency policy and simplify enforcement by grouping all schedules and guidelines into one location. Changes for inflation to the minimum, maximum, and aggravated maximum penalty amounts will still be published in the **Federal Register**, as required by federal law.

#### Public Participation

FRA is proceeding to a final rule without a notice of proposed rulemaking or an opportunity for public comment. The civil penalties schedules and guidelines, and therefore this rule to move those schedules and guidelines to FRA's website without substantive change, are general statements of policy. As such, the notice and comment procedures under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(3)(A), do not apply.

#### Regulatory Impact

*A. Executive Orders 12866, 13771, and DOT Regulatory Policies and Procedures*

FRA evaluated this final rule consistent with Executive Order 12866 (Regulatory Planning and Review), Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs), and DOT policies and procedures. See 44 FR 11034, Feb. 26, 1979; 76 FR 3821, Jan. 21, 2011; and 82 FR 9339, Jan. 30, 2017. In this final rule, FRA solely replaces statements of agency policy with references to the statements' new location on the FRA website, and is not a significant regulatory action under section 3(f) of Executive Order 12866.

FRA will realize cost savings from not printing the civil penalties schedules and guidelines in the yearly CFR revision, and therefore this rulemaking is a deregulatory action under Executive Order 13771. Counting the number of pages in the current CFR (as revised Oct. 1, 2018) used by the civil penalties schedules and guidelines, FRA estimates 80.5 fewer pages would be printed in each CFR revision. The migration of the civil penalties schedules and guidelines is a one-time occurrence; however, the cost savings accrue annually, and therefore FRA

(P1155) linking to a tabbed workbook containing each respective CFR part's civil penalties table. Language referring to either a "statement of agency civil penalty policy" or "schedule of civil penalty amounts" is maintained from the existing CFR. See, e.g., 49 CFR 214.5; 49 CFR 222.11.