

- (i) Are publicly available;
- (ii) Have been furnished to the United States without restriction;
- (iii) Have been otherwise made available without restriction; or
- (iv) Are the subject of a fraudulently asserted use or release restriction.

(2) Only the Contracting Officer's final decision resolving a formal challenge by sustaining the validity of a restrictive marking constitutes "validation" as addressed in 10 U.S.C. 3785(c).

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Part 225

[Docket No. FRA-2024-0034]

RIN 2130-AC98

#### Accident/Incident Investigation Policy for Gathering Information and Consulting With Stakeholders

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Final rule; withdrawal.

**SUMMARY:** FRA is withdrawing the direct final rule titled "Federal Railroad Administration Accident/Incident Investigation Policy for Gathering Information and Consulting with Stakeholders," (the Rule) which was published on October 1, 2024.

**DATES:** Effective on January 17, 2025, FRA withdraws the direct final rule published at 89 FR 79767 on October 1, 2024.

**FOR FURTHER INFORMATION CONTACT:** Rick Huggins, Supervisory Railroad Security Specialist, Office of Railroad Safety, FRA, telephone: 202-465-6922 or email: [ricky.huggins@dot.gov](mailto:ricky.huggins@dot.gov); or Senya Waas, Senior Attorney, Office of the Chief Counsel, FRA, telephone: 202-875-4158 or email: [senyaann.waas@dot.gov](mailto:senyaann.waas@dot.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On October 1, 2024, FRA published the Rule in the **Federal Register** amending 49 Code of Federal Regulations (CFR) 225.31 to, in accordance with Section 22417 of the Infrastructure Investment and Jobs Act (IIJA), create a standard process for

investigators to use during accident and incident investigations conducted under that section.<sup>1</sup> This process was to be used to determine when it was appropriate to collect information and the appropriate method for gathering that information about an accident or incident under investigation from railroad carriers, contractors or employees of railroad carriers, or representatives of employees of railroad carriers, and others, as determined relevant by the Secretary. The process was also to be used to determine when it was appropriate to consult with railroad carriers, contractors or employees of railroad carriers, or representatives of employees of railroad carriers, and others, as determined relevant by the Secretary, for technical expertise on the facts of the accident or incident under investigation. *See* Public Law 117-58, Section 22417, Nov. 15, 2021, 135 Stat. 748.

The Rule generated two adverse, substantive comments. Accordingly, as described in more detail below, FRA has decided to withdraw the Rule.

##### II. Reasons for Withdrawal

FRA is withdrawing the Rule, which took effect on November 15, 2024. FRA received two adverse, substantive comments which opposed the Rule. There were no comments submitted in support of the Rule.<sup>2</sup>

Commenters objecting to the Rule stated that the Rule was insufficient as it needed to be expanded to include the outside review of accidents/incidents by professionals, such as physicists or highly-qualified industrial engineers, as independent reviews of findings.

Commenters also alleged that FRA's outreach to the Class I railroads was limited and insufficient, and nonexistent to short line railroads. As such, it was the position of the commenters that FRA did not account for how the Rule would fully affect the railroad industry in the following ways: (1) FRA's "catch-all" provision for determining which accidents trigger the information gathering and stakeholder consultation requirements is vague and fails to properly implement the IIJA mandate; (2) FRA's description of

"stakeholders" fails to properly implement the IIJA mandate; (3) FRA fails to explain substantive regulatory changes in 49 CFR 225.31(a); (4) loopholes allow for information to be shared with third parties during an investigation; (5) it is unclear how FRA's web-based document sharing site will protect against the disclosure of confidential information; (6) there are no protections against post-investigation disclosures of confidential information; (7) the identity of a stakeholder should not be kept confidential from other stakeholders; (8) FRA's investigation policy would create untenable conflicts with NTSB practice in situations where NTSB and FRA conduct overlapping investigations; (9) FRA improperly limits the basis for restricting stakeholder access to an accident site; (10) FRA does not have the authority to grant a stakeholder "virtual" access to railroad property; (11) the investigation policy will result in undue delays in clearing accident sites; (12) FRA adopts an incident command model but fails to provide details on its structure and tasks; and (13) FRA underestimates the cost of compliance of the new regulation.

Given the extent of the commenters' substantive issues with the Rule, FRA is withdrawing the Rule at this time in order to re-assess its components and work further with stakeholders to evaluate potential changes.

##### III. Regulatory Impact and Notices

*A. Executive Order 12866 as Amended by Executive Order 14094 and DOT Regulatory Policies and Procedures*

This withdrawal is a non-significant regulatory action within the meaning of Executive Order (E.O.) 12866, as amended by E.O. 14094, "Modernizing Regulatory Review 3" and DOT's Order, "Rulemaking and Guidance Procedures," DOT 2100.6A (June 7, 2021).<sup>4</sup> FRA made this determination because the economic effects of this regulatory action will not exceed the \$100 million annual threshold as defined by E.O. 12866.

<sup>1</sup> 89 FR 79767. A correction to the Rule was published on October 28, 2024 (89 FR 85450).

<sup>2</sup> As stated in the Rule: "If FRA receives an adverse, substantive comment on any of the provisions, it will publish in the **Federal Register** a timely withdrawal, informing the public that the direct final rule will not take effect." 89 FR 79767 at 79768.

<sup>3</sup> 88 FR 21879 (Apr. 6, 2023) available at <https://www.federalregister.gov/documents/2023/04/11/2023-07760/modernizing-regulatory-review>.

<sup>4</sup> DOT-2100.6A-Rulemaking and Guidance (Jun. 7, 2021) available at <https://www.transportation.gov/sites/dot.gov/files/2021-08/Final-for-OST-C-210407-001-signed.pdf>.

FRA is amending its Accident/ Incident Regulations, covering reporting, classification, and investigations, by withdrawing its regulation (*i.e.*, the Rule) for gathering information from and consulting with stakeholders during an accident/ incident investigation. Through this withdrawal of the Rule, FRA is revising its accident investigation process by removing the changes made by the Rule that established procedures for

stakeholder participation in investigation, including notifying stakeholders of an accident investigation; permitting the assistance of stakeholders in investigations; and allowing stakeholders to submit information to FRA to assist with the investigation.

FRA anticipates the primary benefit of withdrawing the Rule will be the ability to re-assess and ultimately re-issue a

rule addressing Section 22417 of IJA and concerns raised by commenters.

In the Rule, FRA estimated costs of approximately \$1.0 million (Present Value (PV),<sup>5</sup> 2-percent) over the ten-year analysis. By withdrawing the Rule, FRA estimates this will now incur a cost savings. Table 1 displays the cost savings of withdrawing the Rule from the Accident/Incident regulations in 49 CFR part 225.

TABLE 1—TOTAL COST SAVINGS OF THE FINAL RULE  
[2023 Dollars]<sup>6</sup>

Year	Total stakeholder cost savings	Total government cost savings	Total cost savings	PV 7%	PV 3%	PV 2%
1	\$ 97,922	\$ 19,753	\$ 117,675	\$ 117,675	\$ 117,675	\$ 117,675
2	97,922	10,541	108,463	101,367	105,304	106,336
3	97,922	10,541	108,463	94,736	102,237	104,251
4	97,922	10,541	108,463	88,538	99,259	102,207
5	97,922	10,541	108,463	82,746	96,368	100,203
6	97,922	10,541	108,463	77,333	93,561	98,238
7	97,922	10,541	108,463	72,273	90,836	96,312
8	97,922	10,541	108,463	67,545	88,190	94,424
9	97,922	10,541	108,463	63,126	85,622	92,572
10	97,922	10,541	108,463	58,997	83,128	90,757
Total	979,220	114,622	1,093,842	824,336	962,180	1,002,975

Note: Table may not sum due to rounding.

**B. Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 ((RFA), 5 U.S.C. 601 *et seq.*) and E.O. 13272 (67 FR 53461, Aug. 16, 2002) require an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). A regulatory flexibility analysis is not required when a rule is exempt from notice-and-comment rulemaking.

**C. Paperwork Reduction Act**

There are no new or additional information collection requirements associated with this withdrawal. Therefore, FRA is not required to provide an estimate of a public reporting burden in this document.

**D. Environmental Assessment**

FRA has evaluated this withdrawal in accordance with the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*), the Council of Environmental Quality’s NEPA implementing regulations (40 CFR parts 1500 through 1508), FRA’s regulations implementing NEPA (23 CFR part 771), and other environmental statutes,

executive orders, and related regulatory requirements. FRA has determined that this withdrawal is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) 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 EA or EIS. Specifically, FRA has determined that this withdrawal is categorically excluded from detailed environmental review.

This withdrawal would not directly or indirectly impact any environmental resources and would not result in significantly increased emissions of air or water pollutants or noise. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review. FRA has concluded that no such unusual circumstances exist with respect to this withdrawal and it meets the requirements for categorical exclusion.

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties. FRA has also determined that this withdrawal does not approve a project resulting in a use of a resource protected by Section 4(f). Further, FRA reviewed this withdrawal and found it consistent with E.O. 14008, “Tackling the Climate Crisis at Home and Abroad.”

**E. Environmental Justice**

Executive Order 14096, “Revitalizing Our Nation’s Commitment to Environmental Justice for All,” which expands on E.O. 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” requires DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. DOT Order 5610.2C (“U.S. Department of

<sup>5</sup> The present value of costs are calculated in this analysis. Present value provides a way of converting future costs into equivalent DOT-2100.6A-Rulemaking and Guidance (Jun. 7, 2021) available

at <https://www.transportation.gov/sites/dot.gov/files/2021-08/Final-for-OST-C-210407-001-signed.pdf>.

<sup>6</sup> All figures are presented in a 2023 base year unless otherwise noted.

Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”) instructs DOT agencies to address compliance with E.O. 12898 and requirements within the DOT Order 5610.2C in rulemaking activities, as appropriate, and also requires consideration of the benefits of transportation programs, policies, and other activities where minority populations and low-income populations benefit, at a minimum, to the same level as the general population as a whole when determining impacts on minority and low-income populations.<sup>7</sup> FRA has evaluated this withdrawal under Executive Orders 12898, 14096, and DOT Order 5610.2C, and has determined it will not cause disproportionate and adverse human health and environmental effects on communities with environmental justice concerns.

#### F. Federalism Implications

This withdrawal will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Thus, in accordance with E.O. 13132, “Federalism” (64 FR 43255, Aug. 10, 1999), preparation of a Federalism Assessment is not warranted.

#### G. Unfunded Mandates Reform Act of 1995

This withdrawal will not result in the expenditure, in the aggregate, of

<sup>7</sup> E.O. 14096 “Revitalizing Our Nation’s Commitment to Environmental Justice,” issued on April 26, 2023, supplements E.O. 12898, but is not currently referenced in DOT Order 5610.2C.

\$100,000,000 or more, adjusted for inflation, in any one year by State, local, or Indian Tribal governments, or the private sector. Thus, consistent with section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1532), FRA is not required to prepare a written statement detailing the effect of such an expenditure.

#### H. Energy Impact

E.O. 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355 (May 22, 2001). FRA has evaluated this withdrawal in accordance with E.O. 13211 and determined that this withdrawal is not a “significant energy action” within the meaning of E.O. 13211.

#### I. Executive Order 13175 (Tribal Consultation)

FRA has evaluated this withdrawal in accordance with the principles and criteria contained in E.O. 13175, “Consultation and Coordination with Indian Tribal Governments,” dated November 6, 2000. The withdrawal would not have a substantial direct effect on one or more Indian Tribes, would not impose substantial direct compliance costs on Indian Tribal governments, and would not preempt Tribal laws. Therefore, the funding and consultation requirements of E.O. 13175 do not apply, and a Tribal summary impact statement is not required.

#### J. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the

United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. This withdrawal is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

#### List of Subjects in 49 CFR Part 225

Investigations, Penalties, Railroad safety, Reporting and recordkeeping requirements.

#### The Final Rule

In consideration of the foregoing, FRA amends 49 CFR part 225 as follows:

#### **PART 225—RAILROAD ACCIDENTS/ INCIDENTS: REPORTS CLASSIFICATION, AND INVESTIGATION**

- 1. The authority citation for part 225 continues to read as follows:

**Authority:** 49 U.S.C. 103, 322(a), 20103, 20107, 20901–20902, 21301, 21302, 21311; 28 U.S.C. 2461 note; and 49 CFR 1.89.

#### **§ 225.31 [Amended]**

- 2. Amend § 225.31 by removing the heading for paragraph (a), removing paragraph (b), and redesignating paragraphs (a)(1) through (a)(6) as paragraphs (a) through (f) respectively.

Issued in Washington, DC.

**Allison Ishihara Fultz,**

*Chief Counsel.*

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