



## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Parts 209 and 211

[Emergency Order No. 32, Notice No. 1]

#### Emergency Order Requiring Face Mask Use in Railroad Operations

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**SUMMARY:** To help prevent the spread of coronavirus disease 2019 (COVID-19), the Federal Railroad Administration (FRA) is issuing this emergency order (EO) to require compliance with the mask requirements of the Order of the Centers for Disease Control and Prevention (CDC), *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs*. This EO also implements *Promoting COVID-19 Safety in Domestic and International Travel*, issued on January 21, 2021, requiring masks to be worn in or on airports, commercial aircraft, and various modes of surface transportation, including trains. Specifically, this EO addresses requirements for face mask use with respect to all freight rail operations and portions of each passenger rail operation under FRA's safety jurisdiction.

**DATES:** This emergency order is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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**SUPPLEMENTARY INFORMATION:**

## Introduction

FRA is issuing this EO to implement Executive Order 13998,<sup>1</sup> which directs the Secretary of Transportation to take action to require masks to be worn in compliance with CDC guidelines in or on trains.<sup>2</sup>

On January 31, 2021, the Transportation Security Administration (TSA) issued Security Directive (SD) 1582/84-21-01, *Security Measures – Face Mask Requirements* (TSA SD), to implement Executive Order 13998 and to enforce the CDC Order with respect to conveyances and transportation facilities used in various modes of surface transportation, including passenger rail.

On February 12, 2021, the Secretary of Transportation issued an Action Memorandum to further USDOT's efforts to implement the President's Executive Order 13998. Finding that COVID-19 and its variants continue to present unprecedented challenges to the health of the traveling public in all modes of transportation, and that the wearing of masks on all modes of transportation can mitigate the risk of travelers spreading COVID-19 and can instill safety and confidence in transportation systems, the Secretary directed FRA to take action to support and carry out enforcement of the CDC Order with respect to transportation entities subject to its jurisdiction.

In issuing this EO, FRA is exercising its emergency railroad safety authority to the extent necessary to require mask wearing in accordance with the CDC Order and implement Executive Order 13998 with respect to freight rail operations and those portions of passenger rail operations<sup>3</sup> not already covered by the TSA SD. FRA is not exercising its authority over any

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<sup>1</sup> 86 FR 7205 (Jan. 26, 2021).

<sup>2</sup> For example, this EO applies to all persons in or on a freight train, locomotive, high-rail vehicle, crew transportation vehicle, or in a railroad transportation facility, terminal, yard, storage facility, yard office, crew room, maintenance shop, and other areas regularly occupied by personnel engaged in railroad operations.

<sup>3</sup> For an explanation of how FRA exercises its safety jurisdiction over passenger rail operations, see "FRA's Policy on Jurisdiction Over Passenger Operations" in 49 CFR part 209, appendix A—Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws.

other aspect of the COVID-19 pandemic and does not otherwise intend by this EO to affect working conditions for employees and contractors engaged in railroad operations.<sup>4</sup>

### **Authority**

Authority to enforce Federal railroad safety laws has been delegated by the U.S. Secretary of Transportation to the Administrator of FRA. 49 U.S.C. 103; 49 CFR 1.89(e) and internal delegations. Railroads are subject to FRA’s safety jurisdiction under the Federal railroad safety laws. 49 U.S.C. 20101, 20103. FRA is authorized to issue emergency orders where an unsafe condition or practice “causes an emergency situation involving a hazard of death, personal injury, or significant harm to the environment.” 49 U.S.C. 20104. Emergency orders may immediately impose “restrictions and prohibitions ... that may be necessary to abate the situation.” *Id.*

### **COVID-19 Pandemic**

Due to the ongoing COVID-19 pandemic, and to reduce the spread of COVID-19, President Biden issued Executive Order 13998, *Promoting COVID-19 Safety in Domestic and International Travel*, on January 21, 2021, requiring masks to be worn in airports, on commercial aircraft, and in various modes of surface transportation, including rail. To implement Executive Order 13998, to require compliance with the public health standards set forth in the CDC Order,<sup>5</sup> and due to the immediate need to ensure masks are worn appropriately in the railroad industry to prevent the spread of COVID-19, FRA has determined that an emergency situation involving a hazard of death and personal injury exists, and is issuing this EO pursuant to the authority of 49 U.S.C. 20101, 20104. FRA is authorized to promote safety in every area of railroad operations.

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<sup>4</sup> Nothing in this EO is intended to interfere with any applicable jurisdiction over COVID-19 issues in the workplace by the Occupational Safety and Health Administration. Additionally, FRA is not exercising its railroad safety authority over any COVID-19 issue other than requiring compliance with mask mandates in accordance with the CDC Order, nor is it exercising its jurisdiction over how a railroad decides to comply with the CDC Order and this EO. For example, a railroad may not include any type of COVID-19 risk-based hazard analysis as part of its railroad system safety program under either 49 CFR part 270 (System Safety Program) or part 271 (Risk Reduction Program) in order to protect that analysis from discovery or use in litigation under either 49 CFR 270.105 or 49 CFR 271.11.

<sup>5</sup> See order under section 361 of the Public Health Service Act (42 U.S.C. 264) and 42 CFR 70.2, 71.31(b), 71.32(b); *Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs* (January 29, 2021). 86 FR 8025 (Feb. 3, 2021).

49 U.S.C. 20101, 20103.<sup>6</sup> The failure to wear masks as required by the CDC Order during railroad operations could impact railroad employees' safety with respect to the risks of COVID-19. Consistent with these mandates and FRA's authority, and after consultation with CDC and TSA, FRA is issuing this EO to require freight and passenger railroad carriers to comply with the mask<sup>7</sup> requirements of the CDC Order<sup>8</sup> during railroad operations subject to FRA's railroad safety jurisdiction, except to the extent portions of the passenger railroad carrier's operations are already covered by the TSA SD. For example, this EO applies to all persons in or on a freight train, locomotive, high-rail vehicle, crew transportation vehicle, or in a railroad transportation facility, terminal, yard, storage facility, yard office, crew room, maintenance shop, and other areas regularly occupied by railroad personnel. While the CDC Order applies to all persons awaiting, boarding, or alighting a conveyance and while in a transportation hub,<sup>9</sup> this EO does not apply to passengers or persons (including railroad carrier personnel) in or on a passenger train or in public areas of passenger railroad transportation hubs or facilities. The mask

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<sup>6</sup> FRA's exercise of its authority is consistent with prior, targeted regulatory action taken under 49 U.S.C. ch. 201 to protect employee exposure to health risks in the workplace. *See, e.g.*, rules on occupational noise exposure (49 CFR part 227), camp cars as sleeping quarters (49 CFR part 228), locomotive cab sanitation and cab temperature (e.g., 49 CFR part 229).

<sup>7</sup> *Mask* means a material covering the nose and mouth of the wearer, excluding face shields. The CDC has stated that a properly worn mask completely covers the nose and mouth of the wearer. A mask should be secured to the head, including with ties or ear loops. A mask should fit snugly but comfortably against the side of the face. Masks do not include face shields. Masks can be either manufactured or homemade and should be a solid piece of material without slits, exhalation valves, or punctures. Medical masks and N-95 respirators fulfill the requirements of this EO. CDC guidance for attributes of acceptable masks in the context of this EO is available at <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>.

<sup>8</sup> The CDC Order states, "While this [CDC] Order may be enforced and CDC reserves the right to enforce through criminal penalties, CDC does not intend to rely primarily on these criminal penalties but instead strongly encourages and anticipates widespread voluntary compliance as well as support from other federal agencies in implementing additional civil measures enforcing the provisions of this Order, to the extent permitted by law and consistent with President Biden's Executive Order of January 21, 2021 (Promoting COVID-19 Safety in Domestic and International Travel)." 86 FR 8030.

<sup>9</sup> 86 FR 8025 (Feb. 3, 2021) (requiring face masks to be worn by all travelers while on public transportation). *Your Guide to Masks*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html> ("CDC recommends that people wear masks in public settings, at events and gatherings, and anywhere they will be around other people. Effective February 2, 2021, **masks are required** on planes, buses, trains, and other forms of public transportation traveling into, within, or out of the United States and in U.S. transportation hubs such as airports and stations."); *Requirement for Face Masks on Public Transportation Conveyances and at Transportation Hubs*, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/face-masks-public-transportation.html> ("CDC has issued an **order** that requires face masks to be worn by all travelers while on public transportation (which includes all passengers and all personnel operating conveyances). People must wear masks that completely cover both the mouth and nose while awaiting, boarding, disembarking, or traveling on airplanes, ships, ferries, trains, subways, buses, taxis, and ride-shares as they are traveling into, within, or out of the United States and U.S. territories. People must also wear masks while at transportation hubs (e.g., airports, bus or ferry terminals, train and subway stations, seaports) and other locations where people board public transportation in the United States and U.S. territories.").

requirements in TSA SD 1582/84-21-01, *Security Measures – Face Mask Requirements*, apply to passengers and such persons.

There is currently a pandemic of respiratory disease, COVID-19, caused by a novel coronavirus (SARS-CoV-2). As of February 16, 2021, there have been over 108,000,000 confirmed cases of COVID-19 globally, resulting in nearly 2,400,000 deaths.<sup>10</sup> As of February 14, 2021, there have been over 27,000,000 cases identified in the United States, and over 482,000 deaths due to the disease.<sup>11</sup>

According to the CDC, multiple new SARS-CoV-2 variants have emerged in recent weeks, including at least one with evidence of increased transmissibility.<sup>12</sup> These variants seem to spread more easily and quickly than other variants, which may lead to more cases of COVID-19.<sup>13</sup> An increase in the number of cases will put more strain on health care resources, lead to more hospitalizations, and potentially lead to more deaths.<sup>14</sup> While the CDC is closely monitoring these new variants to learn more about them, rigorous and increased compliance with public health mitigation strategies, such as the use of masks, is essential to limit the spread of the virus including any new variants.<sup>15</sup> Additionally, controlling the spread of the virus by implementing public health measures such as mask wearing will help prevent new mutations, as viruses will not mutate well if they do not have the opportunity to replicate freely.<sup>16</sup> In short, given these developments, it is more critical than ever that persons wear masks whenever possible to help prevent the spread of the virus that causes COVID-19 and the further emergence of new variants. The CDC has also recently published research documenting a decline in

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<sup>10</sup> See <https://covid19.who.int>.

<sup>11</sup> See <https://covid.cdc.gov/covid-data-tracker/#datatracker-home>.

<sup>12</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/scientific-brief-emerging-variants.html>; <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html>.

<sup>16</sup> <https://www.whitehouse.gov/briefing-room/press-briefings/2021/02/03/press-briefing-white-house-covid-19-response-team-and-public-health-officials/>.

COVID-19 hospitalization growth rates associated with statewide mask mandates.<sup>17</sup> For a detailed discussion on how appropriate mask wearing helps reduce COVID-19 transmission, FRA refers readers to the CDC Order.<sup>18</sup>

### **Lack of Uniformity in Mask Wearing in Railroad Operations**

As of February 1, 2021, field observations<sup>19</sup> from FRA’s railroad safety inspectors regarding mask use on railroad property indicate that the critical practice of wearing a face mask is not consistent or uniform among railroad personnel. While some railroad carriers require their personnel to wear masks when working in an occupied locomotive cab and in rail facilities and shops, FRA has found this is not a universal requirement. FRA has observed railroad personnel often not wearing a face mask on railroad property, both in situations where social distancing is possible, and situations involving close proximity to others. FRA inspectors have also observed railroad personnel who did not put on a face mask when approached by the inspectors to discuss matters of railroad safety.

### **Necessity of Issuing this EO**

Taking into consideration the unique and exigent circumstances presented by the COVID-19 pandemic (particularly the recent emergence of variants with increased transmissibility), as well as the inconsistent use of masks observed by FRA inspectors through FRA inspection and investigation during railroad operations, FRA has determined that the COVID-19 pandemic has created an unsafe condition or practice involving a hazard of death or personal injury—not only to railroad personnel, but also to FRA and participating State<sup>20</sup> rail safety inspectors who interact with railroad personnel during the performance of their essential railroad safety duties. This EO is necessary to abate this emergency situation, by FRA requiring face mask use in accordance with the CDC Order, to ensure a minimum level of nationwide

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<sup>17</sup> Joo H, Miller GF, Sunshine G, et al. *Decline in COVID-19 Hospitalization Growth Rates Associated with Statewide Mask Mandates—10 States, March-October 2020*, MMWR Morb Mortal Wkly Rep. ePub: 5 Feb. 2021. DOI: <https://www.cdc.gov/mmwr/volumes/70/wr/mm7006e2.htm>.

<sup>18</sup> 86 FR 8025-8030.

<sup>19</sup> These FRA field observations constitute “inspection” and “investigation” under 49 U.S.C. 20104(a)(1).

<sup>20</sup> 49 U.S.C. 20105.

compliance,<sup>21</sup> together with the TSA SD. Railroad carriers<sup>22</sup> and their personnel must comply with the mask-wearing requirements set forth in the CDC Order while engaged in railroad operations,<sup>23</sup> including whenever they are in a transportation hub/facility<sup>24</sup> under the railroad carrier's control (regardless of duty status).

America's railroad transportation system is essential—not only for public health, but also for America's economy and other bedrocks of American life. Railroads carry life-saving medical supplies and medical providers into and across the nation to our hospitals, nursing homes, and physicians' offices. Trains bring food and other essentials to our communities and bring America's workforce to their jobs. Requiring mask use on our railroads will protect railroad employees and contractors, as well as FRA and participating State rail safety inspectors who enforce Federal railroad safety laws. Requiring mask use will also help control the spread of the virus causing the COVID-19 pandemic, slow the rate of international spread from trains moving across U.S. borders, prevent the emergence of new variants, and more quickly re-open America's economy.

For reasons described in the CDC Order, this EO applies to railroad personnel who have received a COVID-19 vaccine and/or who have recovered from COVID-19.<sup>25</sup>

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<sup>21</sup> 49 U.S.C. 20106(a)(1).

<sup>22</sup> *Railroad* means any form of nonhighway ground transportation that runs on rails or electro-magnetic guideways, including (i) commuter or other short-haul passenger service in a metropolitan or suburban area and commuter service that was operated by the Consolidated Rail Corporation on January 1, 1979; and (ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation. *Railroad carrier* means a person providing railroad transportation. *General railroad system of transportation* has the same meaning as under 49 CFR part 209, appendix A—Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws.

<sup>23</sup> *Railroad operation* means any activity which affects the movement of a train, locomotive, or other on-track equipment, singly or in combination with other equipment, on the track of a railroad.

<sup>24</sup> *Transportation hub/facility* means any airport, bus terminal, marina, seaport or other port, subway stations, terminal (including any fixed facility at which passengers are picked-up or discharged), train station, U.S. point of entry, or any other location that provides transportation subject to the jurisdiction of the United States. The meaning of the term “transportation hub,” as applied to railroad facilities, includes railroad terminals, yards, storage facilities, yard offices, crew rooms, maintenance shops, and other areas regularly occupied by railroad personnel. The CDC Order broadly requires persons to wear masks in such settings and applies in both passenger and freight rail facilities. See CDC FAQs explaining that employees at transportation hubs must wear a mask while on the premises of a transportation hub unless they are the only person in the work area, such as in private offices, private hangars at airports, or in railroad yards (available at: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/face-masks-public-transportation.html>).

<sup>25</sup> 86 FR 8029.

## **Finding and Order**

Based on the foregoing, FRA has determined that the spread of the virus that causes COVID-19 creates an emergency situation involving a hazard of death or personal injury. Accordingly, under the authority of 49 U.S.C. 20104, delegated to the Administrator of FRA by the Secretary of Transportation, 49 CFR 1.89, it is hereby ordered that freight railroads, passenger railroads, and any other person whose actions are necessary to effectuate the directives in this EO, take the following actions, as required:

I. *Railroad carriers.* (A) Railroad carriers must require their personnel to wear a mask in compliance with the CDC Order while engaged in railroad operations, including whenever in a transportation hub/facility under the railroad carrier's control (regardless of duty status), except as described in Section III (Exceptions and exemptions), below. For the purpose of this EO, the term "personnel" includes employees, contractors, probationary employees, and volunteers. Railroad carriers must provide their personnel with prominent and adequate notice of the mask requirements to facilitate awareness and compliance.<sup>26</sup> At a minimum, this notice must inform railroad carrier personnel of the following:

1. Federal law requires every individual to wear a mask while engaged in railroad operations unless otherwise exempted and failure to comply may result in removal from service.

2. Refusing to wear a mask is a violation of Federal law and railroad carrier personnel may be subject to FRA enforcement action against them individually.

(B) Railroad carriers must establish written procedures to manage situations with their personnel who refuse to comply with the requirement to wear a mask. At a minimum, for any person who is not exempted from the requirement to wear a mask and who refuses to comply with an instruction given by the railroad carrier with respect to wearing a mask, the railroad carrier must:

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<sup>26</sup> Notice may include, if feasible, notifications on digital platforms, such as on apps, websites, or email; posted signage with illustrations; or other methods as appropriate.



1. Remove the person from performing duties in support of railroad operations; and
2. Make best efforts to remove the person from the railroad transportation hub/facility as soon as practicable.

II. *Railroad carrier personnel*. Railroad carrier personnel must comply with the mask wearing requirements of the CDC Order while engaged in railroad operations, including whenever in a transportation hub/facility under the railroad carrier's control (regardless of duty status), except as described in Section III.D., below. For the purpose of this EO, the term "personnel" includes employees, contractors, probationary employees, and volunteers.

III. *Exceptions and exemptions*. (A) While the CDC Order applies to all persons awaiting, boarding, or alighting a conveyance and while in a transportation hub, this EO does not apply to passengers or persons (including railroad carrier personnel) in or on a passenger train or in public areas of passenger railroad transportation hubs or facilities. Note: The mask requirements in TSA SD 1582/84-21-01, *Security Measures – Face Mask Requirements*, apply to passengers and such persons.

(B) The requirement to wear a mask does not apply under the following circumstances:

1. When necessary to temporarily remove the mask for identity verification purposes.
2. For brief periods, while eating, drinking, or taking oral medications.<sup>27</sup> Note: Prolonged periods of mask removal are not permitted for eating or drinking; the mask must be worn between bites and sips.
3. While communicating with a person who is deaf or hard of hearing, when the ability to see the mouth is essential for communication.
4. If unconscious (for reasons other than sleeping), incapacitated, unable to be awakened, or otherwise unable to remove the mask without assistance.<sup>28</sup>

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<sup>27</sup> The CDC has stated that brief periods of close contact without a mask should not exceed 15 minutes. <https://www.cdc.gov/coronavirus/2019-ncov/php/public-health-recommendations.html>.

<sup>28</sup> Persons who are experiencing difficulty breathing or shortness of breath or are feeling winded may remove the mask temporarily until able to resume normal breathing with the mask. Persons who are vomiting should remove the mask until vomiting ceases. Persons with acute illness may remove the mask if it interferes with necessary medical care such as supplemental oxygen administered via an oxygen mask. 86 FR 8027, FN 7.

5. When necessary to temporarily remove the mask to provide a breath or saliva specimen for required alcohol testing under U.S. Department of Transportation drug and alcohol testing regulations or an employer-mandated substance abuse testing program.

(C) The following persons are exempted from wearing masks:

1. Persons in private conveyances operated solely for personal, non-commercial use.
2. A driver, when operating a commercial motor vehicle, such as a crew transportation van, limo, or taxi, as this term is defined in 49 CFR 390.5, if the driver is the sole occupant of the vehicle.
3. A person who is the sole occupant of an enclosed cab of a locomotive, hi-rail vehicle, roadway maintenance machine, or any other on-track equipment that has an enclosed cab.

(D) This EO exempts the following categories of persons from wearing masks:<sup>29</sup>

1. People with disabilities who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*).<sup>30</sup>
2. People for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or Federal regulations.<sup>31</sup>

## **Preemption**

The requirements in this EO do not preempt any State, local, Tribal, or territorial rule, regulation, order, or standard necessary to eliminate or reduce a local safety hazard, which

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<sup>29</sup> Railroad carriers may impose requirements on employees requesting an exemption from the requirement to wear a mask, including medical consultation by a third party, medical documentation by a licensed medical provider, and/or other information as determined by the railroad carrier, as well as require evidence that the person does not have COVID-19, such as a negative result from a SARS-CoV-2 viral test or documentation of recovery from COVID-19. CDC definitions for SARS-CoV-2 viral test and documentation of recovery are available in Frequently Asked Questions at: <https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html>.

Railroad carriers may also impose additional protective measures that improve the ability of an employee eligible for exemption to maintain social distance (separation from others by 6 feet). Railroad carriers may further require that employees seeking exemption from the requirement to wear a mask request an exemption in advance.

<sup>30</sup> This is a narrow exception that includes a person with a disability who cannot wear a mask for reasons related to the disability. CDC states it will issue additional guidance regarding persons who cannot wear a mask under this exemption. <https://www.cdc.gov/quarantine/masks/mask-travel-guidance.html>. 86 FR at 8027-28.

<sup>31</sup> For example, a maintenance shop employee performing welding operations may be exempt from this EO, due to potential mask flammability concerns.

includes public health measures that are the same or more protective of public health than those required in this EO, if that provision is not incompatible with this EO.

### **Relief**

Any railroad carrier affected by this EO may petition for special approval to take actions not in accordance with this EO. Petitions must be submitted to the Associate Administrator for Railroad Safety, who is authorized to act on those requests without amending this EO. In reviewing any petition for special approval, the Associate Administrator will grant petitions only if the petitioner has clearly articulated an alternative action that will provide, in the Associate Administrator's judgment, at least a level of safety equivalent to that provided by compliance with this EO.

### **Civil Penalties**

Any violation of this EO may subject the person (a railroad carrier) committing the violation to a civil penalty of up to \$118,826 for each day the violation continues. 49 U.S.C. 21301 and 86 FR 1751 (Jan. 11, 2021). Any individual (railroad personnel) who willfully violates a provision stated in this order is subject to civil penalties under 49 U.S.C. 21301. In addition, any individual (railroad personnel) whose violation of this order demonstrates the individual's unfitness for safety-sensitive service may be removed from safety-sensitive service on the railroad under 49 U.S.C. 20111. FRA may, through the Attorney General, also seek injunctive relief to enforce this Order. 49 U.S.C. 20112.

### **Effective Date and Notice to Affected Persons**

This EO is effective upon issuance and railroad carriers subject to this EO must immediately initiate steps to implement this EO. This EO remains in effect until the CDC Order is modified or rescinded based on specific public health or other considerations, until the U.S. Secretary of Health and Human Services rescinds the determination under section 319 of the Public Health Service Act (42 U.S.C. 247d) that a public health emergency exists, or until

rescinded by FRA, unless FRA extends its terms by subsequent notice published in the *Federal Register*.

**Review**

Opportunity for formal review of this EO will be provided under 49 U.S.C. 20104(b) and 5 U.S.C. 554. Administrative procedures governing such review are at 49 CFR part 211.

Issued in Washington, DC on February 24, 2021.

Amitabha Bose,  
Acting Administrator,  
Federal Railroad Administration.

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