



DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 209

[Docket No. FRA-2025-0077]

RIN 2130-AD11

Prosecutorial Discretion of Enforcement Attorneys

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This proposed rule would clarify that FRA's Office of the Chief Counsel has discretion to decline or dismiss a violation, such as a technical violation where challenged conduct does not raise a practical safety issue.

DATES: Comments on the proposed rule must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. FRA may consider comments received after that date, but only to the extent practicable.

ADDRESSES: *Comments:* Comments related to Docket No. FRA-2025-0077 may be submitted by going to <https://www.regulations.gov> and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name, docket number (FRA-2025-0077), and Regulatory Identification Number (RIN) for this rulemaking (2130-AD11). All comments received will be posted without change to <https://www.regulations.gov>; this includes any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> and follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Amanda Maizel, Attorney Adviser, FRA, telephone: (202) 308-3753, email: Amanda.Maizel@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Consistent with the deregulatory agenda of President Donald J. Trump and Secretary of Transportation Sean P. Duffy, which seeks to unleash America's economic prosperity without compromising transportation safety, FRA is reviewing its regulatory requirements in parts 200 through 299 of title 49, Code of Federal Regulations (CFR). As part of this effort, on Apr. 3, 2025, DOT issued a request for information in which it asked the public to assist in identifying existing regulations, guidance, paperwork requirements, and other regulatory obligations that can be modified or repealed, consistent with law, to ensure that DOT administrative actions do not undermine the national interest and that DOT achieves meaningful burden reduction while continuing to meet statutory obligations and ensure the safety of the U.S. transportation system.¹ DOT received 955 comments, including some that were rail-related and specifically a comment from the Association of American Railroads (AAR). In addition to other proposals, AAR requested that FRA clarify in 49 CFR part 209 that FRA's Office of the Chief Counsel has discretion to dismiss a technical violation where the challenged conduct does not raise a practical safety issue.

FRA intends to adopt this request and to clarify that attorneys in the Office of the Chief Counsel have enforcement discretion in all phases of a potential enforcement action. FRA has broad discretion to enforce the Federal railroad safety laws and

¹ 90 FR 14593 (Apr. 3, 2025).

regulations, including determining the appropriate method of addressing any violation it finds.² Accordingly, similar to the discretion that FRA has in determining whether to transmit or decline an enforcement action, FRA also has discretion to dismiss a violation, such as a technical violation where the challenged conduct does not raise a practical safety issue. Even where FRA has transmitted a violation and decides not to dismiss it, FRA continues to have the discretion to reduce the civil penalty, but not below the respective statutory minimum amount, adjusted annually for inflation.³ This clarification would streamline the enforcement process, relieve enforcement burdens on regulated entities, and promote due process and fairness. In addition, this proposal is consistent with the Mar. 11, 2025, DOT Memorandum, *Procedural Requirements for Enforcement Actions*.⁴

II. Section-by-Section Analysis

Appendix A to Part 209 - Statement of Agency Policy Concerning Enforcement of Federal Railroad Safety Laws

As discussed above, FRA proposes to clarify that the Office of the Chief Counsel has discretion to decline to enforce a violation, such as a technical violation where the challenged conduct does not raise a practical safety issue. FRA proposes to add this statement to the discussion of FRA's Civil Penalty Process in appendix A to part 209.

III. Regulatory Impact and Notices

² *Railway Labor Executives Ass'n v. Dole*, 760 F.2d 1021, 1025 (9th Cir. 1985) (finding “nothing in the railroad safety legislation to indicate Congress intended to make prosecutorial discretion subject to judicial review,” and upholding the dismissal of a challenge to the Secretary of Transportation’s safety plan that stressed cooperation with railroads in finding and remedying safety problems).

³ See Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act), Pub. L. 114-74, 129 Stat. 599, codified at 28 U.S.C. 2461 note.

⁴ See *Procedural Requirements for Enforcement Actions*, Mar. 11, 2025, available at <https://www.transportation.gov/sites/dot.gov/files/2025-03/Procedural%20Requirements%20for%20DOT%20Enforcement%20Actions.Cote%20Memo.Signed.03-11-2025.pdf>.

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

FRA has considered the impact of this NPRM under E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review and DOT Regulatory Policies and Procedures. The Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) determined that this NPRM is not a significant regulatory action under section 3(f) of E.O. 12866.

FRA analyzed the potential costs and benefits of this proposed rule. This proposed rule would clarify that FRA's Office of the Chief Counsel has discretion to decline or dismiss a violation, such as when the challenged conduct does not raise a practical safety issue. By providing this clarification, regulated entities would benefit from a streamlined enforcement process, relief from enforcement burdens, and the promotion of due process and fairness. This clarification would also help to eliminate any confusion on the Office of the Chief Counsel's discretionary authority to decline to enforce or to dismiss a technical violation where the challenged conduct does not raise a practical safety issue. FRA does not anticipate any costs from this proposed rule, but welcomes comments from the public on the impacts of this proposal.

B. E.O. 14192 (Unleashing Prosperity Through Deregulation)

E.O. 14192 (90 FR 9065, Jan. 31, 2025), Unleashing Prosperity Through Deregulation, requires that for "each new [E.O. 14192 regulatory action] issued, at least ten prior regulations be identified for elimination."⁵ Implementation guidance for E.O. 14192 issued by OMB (Memorandum M-25-20, Mar. 26, 2025) defines two different

⁵ Executive Office of the President. *Executive Order 14192 of January 31, 2025. Unleashing Prosperity Through Deregulation*. 90 FR 9065–9067 (Feb. 6, 2025).

types of E.O. 14192 actions: an E.O. 14192 deregulatory action, and an E.O. 14192 regulatory action.⁶

An E.O. 14192 deregulatory action is defined as “an action that has been finalized and has total costs less than zero.” This proposed rulemaking is expected to have total costs less than zero, and therefore it would be considered an E.O. 14192 deregulatory action upon issuance of a final rule. While FRA affirms that each amendment proposed in this NPRM has a cost that is negligible or “less than zero” consistent with E.O. 14192, FRA still requests comment on the extent of the cost savings for the changes proposed in this NPRM.

C. Regulatory Flexibility Act and E.O. 13272

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996,⁷ requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses. The term *small entities* comprises small businesses and not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000 (5 U.S.C. 601(6)).

No regulatory flexibility analysis is required, however, if the head of an Agency or an appropriate designee certifies that the rule will not have a significant economic impact on a substantial number of small entities. This proposed rule would not preclude small entities from continuing practices that comply with part 209; it merely offers clarity

⁶ Executive Office of the President. Office of Management and Budget. Guidance Implementing Section 3 of Executive Order 14192, Titled “Unleashing Prosperity Through Deregulation.” Memorandum M-25-20. Mar. 26, 2025.

⁷ Pub. L. 104–121, 110 Stat. 857 (Mar. 29, 1996).

that could result in some benefits. By extending this regulatory relief, many regulated entities, including small entities, would experience benefits. Consequently, FRA certifies that the proposed action would not have a significant economic impact on a substantial number of small entities.

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), FRA wants to assist small entities in understanding this proposed rule so they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

D. Paperwork Reduction Act

This proposed rule offers regulatory flexibilities, and it contains no new information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

E. Environmental Assessment

FRA has analyzed this rule for the purposes of the National Environmental Policy Act of 1969 (NEPA). In accordance with 42 U.S.C. 4336 and DOT NEPA Order 5610.1C, FRA has determined that this rule is categorically excluded pursuant to 23 CFR 771.118(c)(4), “[p]lanning and administrative activities that do not involve or lead directly to construction, such as: [p]romulgation of rules, regulations, and directives.” This rulemaking is not anticipated to result in any environmental impacts, and there are no unusual or extraordinary circumstances present in connection with this rulemaking.

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 rulemaking does not approve a project resulting in a use of a resource protected by section 4(f).

F. Federalism Implications

This proposed rule 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 proposed rule would not result in the expenditure, in the aggregate, of \$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.”⁸ FRA has evaluated this proposed rule in accordance with E.O. 13211 and determined that this proposed rule is not a “significant energy action” within the meaning of E.O. 13211.

I. E.O. 13175 (Tribal Consultation)

FRA has evaluated this proposed rule in accordance with the principles and criteria contained in E.O. 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. The proposed rule 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

⁸ 66 FR 28355 (May 22, 2001).

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 1979⁹ prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the U.S. 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 rulemaking 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 U.S.

K. Privacy Act Statement

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to <http://www.regulations.gov>, as described in the system of records notice, DOT/ALL-14 FDMS, accessible through www.transportation.gov/privacy. To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

L. Rulemaking Summary

As required by 5 U.S.C. 553(b)(4), a summary of this rule can be found at [regulations.gov](http://www.regulations.gov), Docket No. FRA-2025-0077, in the SUMMARY section of this proposed rule.

List of Subjects in 49 CFR Part 209

⁹ 19 U.S.C. ch. 13.

Administrative practice and procedure, Enforcement, Hazardous materials transportation, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend part 209 of chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 209—RAILROAD SAFETY ENFORCEMENT PROCEDURES

1. The authority citation for part 209 continues to read as follows:

Authority: 49 U.S.C. 5123, 5124, 20103, 20107, 20111, 20112, 20114; 28 U.S.C. 2461 note; and 49 CFR 1.89.

2. Revise appendix A to part 209 in the section under the heading “THE CIVIL PENALTY PROCESS” to read as follows:

Appendix A to Part 209—Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws.

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THE CIVIL PENALTY PROCESS

* * * * *Once penalties have been assessed, the railroad is given a reasonable amount of time to investigate the charges. Larger railroads usually make their case before FRA in an informal conference covering a number of case files that have been issued and investigated since the previous conference. Thus, in terms of the negotiating time of both sides, economies of scale are achieved that would be impossible if each case were negotiated separately. The settlement conferences include technical experts from both FRA and the railroad as well as lawyers for both parties. Similar to the discretion that the Office of the Chief Counsel has in determining whether to transmit an enforcement action or to decline to prosecute a recommended violation, the Office also has discretion to dismiss a violation, such as a technical violation where the challenged conduct does not raise a practical safety issue. Even if FRA determines not to dismiss the

violation, FRA continues to have the discretion to reduce the penalty, but not below the relevant statutory minimum amount. In addition to allowing the two sides to make their cases for the relative merits of the various claims, these conferences also provide a forum for addressing current compliance problems. Smaller railroads usually prefer to handle negotiations through e-mail or over the phone, often on a single case at a time. Once the two sides have agreed to an amount on each case, that agreement is put in writing and a payment is submitted to FRA's accounting division covering the full amount agreed on.

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Issued in Washington, DC.

Kyle D. Fields,
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