IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

POLYWEAVE PACKAGING, INC.,
a Delaware corporation,

Plaintiff,

v.

PETER PAUL MONTGOMERY BUTTIGIEG,
Secretary, United States Department of Transportation, in his official capacity,

Defendant.
_____/

CASE NO. 4:21-CV-00054

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Polyweave Packaging, Inc. hereby moves the Court pursuant to Rule 65 of the Federal Rules of Civil Procedure for a preliminary injunction enjoining Defendant Peter Paul Montgomery Buttigieg, in his official capacity as Secretary of Transportation, from rescinding the U.S. Department of Transportation's regulations at 49 CFR Part 5 Subpart D - Enforcement Procedures, 49 CFR § 5.53 et seq., and denying plaintiff the protections thereunder. *See* Dep't of Transp., *Administrative Rulemaking, Guidance, and Enforcement Procedures*, 86 Fed. Reg. 17292 (Apr. 2, 2021). A memorandum of law supporting this motion is attached.

Plaintiff respectfully requests an expedited briefing schedule on this motion to permit this Court to resolve this motion as quickly as possible and restore its rights.

Respectfully,

/s/Christopher Wiest
Christopher Wiest (KY Bar No. 90725)
CHRIS WIEST, ATTORNEY AT LAW, PLLC
25 Town Center Blvd, Ste 104
Crestview Hills, KY 41017
(513) 257-1895

Reed Rubenstein
Sheng Li (*pro hac vice pending*)
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing upon the Defendant by: (i) arranging service of same to be served with the Complaint and Summons in this matter, this 19 day of May, 2021; and (ii) by filing a copy of same with this Court via the Court's CM/ECF system, which will provide notice to all parties of record, also this 19 day of May, 2021.

/s/Christopher Wiest

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Plaintiff,

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PETER PAUL MONTGOMERY BUTTIGIEG, Secretary, United States Department of Transportation, in his official capacity,

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MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION

Preliminary Statement

Plaintiff Polyweave Packaging, Inc. ("Polyweave") is a small business that manufactures and certifies hazardous materials packaging. It employs seven workers with a payroll of approximately $300,000 per year at its plant in Madisonville, Ky. Polyweave is regulated by the U.S. Department of Transportation ("DOT" or the "Department"). *See* Cmpl. ¶¶ 1, 23, 45–61. The Department, employing more than fifty-five thousand administrators and bureaucrats, regulates automobiles, boats, highways, airlines, pipelines, mass transit, railroads, trucks, shipping materials, and the Saint Lawrence Seaway, among other things.[1] It uses almost five hundred lawyers and thousands of contractors to support its work.[2] The Department's FY2021 budget was over $ 89,000,000,000.00.[3]

[1] Dep't of Transp., "Who We Are," https://www.transportation.gov/administrations
[2] *See* Dep't of Transp., "Office of the General Counsel," https://www.transportation.gov/administrations/office-general-counsel.
[3] *See* Dep't of Transp., "FY 2021 Budget Highlights," https://www.transportation.gov/sites/dot.gov/files/2020-02/BudgetHightlightFeb2021.pdf.

Polyweave has sued Defendant Peter Paul Montgomery Buttigieg in his official capacity as Secretary of Transportation for unlawfully rescinding 49 CFR Part 5 Subpart D – Enforcement Procedures. In 2019, the Department's Office of the Secretary promulgated binding rules providing regulated persons "appropriate due process in all enforcement actions." Dep't of Transp., *Administrative Rulemaking, Guidance, and Enforcement Procedures,* 84 Fed. Reg. 71714 (Dec. 27, 2019) ("Subpart D") (Exhibit 1). The Department's cited authority for this action was 49 U.S.C. § 322(a). *Id.*

Among other things, Subpart D compelled the Department to disclose exculpatory evidence in compliance with the principle of *Brady v. Maryland*, 373 U.S. 83 (1963); prohibited DOT "fishing expeditions" to find potential violations of law absent sufficient evidence in hand to support the assertion of a violation; mandated the prompt adjudication of enforcement matters; required DOT to inform targets of investigations when such investigations have concluded; and commanded civil penalties should be imposed only when and as supported by clear statutory authority and sufficient findings of fact, reflect due regard for fairness, the scale of the violation, the violator's knowledge and intent, and any mitigating factors (such as whether the violator is a small business), and, when imposed, fully transparent in their calculation. *See, e.g.,* 49 CFR §§ 5.65, 5.83, 5.89, 5.97. Thus, Subpart D fundamentally reordered the Department's relationship with Polyweave in critical and substantive ways and Polyweave had a reasonable reliance interest in the due-process rights and procedural protections acknowledged, created, expanded, and/or protected thereunder. Cmpl. ¶¶ 29, 33, 57–61.

On March 8, 2021, pursuant to 49 CFR § 107.317(d), the Department's Pipeline and Hazardous Material Safety Administration's (PHMSA) Chief Counsel served an Order on Polyweave to pay a substantial fine for regulatory violations that allegedly occurred in 2015. Cmpl. ¶¶ 50–56. This was an "enforcement action" subject to Subpart D. 49 CFR § 5.57.

On April 2, 2021, Defendant Peter Paul Montgomery Buttigieg rescinded Subpart D without public comment, without a reasoned explanation for rescission, and without considering Polyweave's reliance interests. *See* Dep't of Transportation, *Administrative Rulemaking, Guidance, and Enforcement Procedures*, 86 Fed. Reg. 17292, 17293 (Apr. 2, 2021) (Exhibit 2). He therefore violated the Administrative Procedure Act. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020); *United States v. Utesch*, 596 F.3d 302, 309–310 (6th Cir. 2010); *Dismas Charities, Inc. v. United States DOJ*, 401 F.3d 666, 677–678 (6th Cir. 2004).

As demonstrated below, Polyweave has a strong likelihood of success on the merits, will suffer irreparable injury without an injunction, and an injunction is in the public interest.

Facts

On February 15, 2019, DOT issued a memorandum expanding the due-process rights and procedural protections it recognized and afforded for regulated persons, including Polyweave, facing enforcement action. Among other things, Department personnel were directed to follow *Brady v. Maryland,* 373 U.S. 83 (1963), and disclose "as a matter of course" exculpatory evidence; to stop using "its enforcement authority effectively to convert agency guidance documents into binding rules;" to stop allowing cases to "to linger unduly;" and to stop imposing penalties that do not "reflect due regard for fairness, the scale of the violation [and] the violator's knowledge and intent." Dep't of Transp., *"Procedural Requirements for DOT Enforcement Actions"* at 1, 9–11 (Feb. 15, 2019) https://www.transportation.gov/sites/dot.gov/files/docs/mission/administrations/office-general-counsel/331596/c1-mem-enforcement-actions-signed21519.pdf. (Feb. 15, 2019) (the "Bradbury Memo") (Exhibit 3).

On October 9, 2019, President Trump issued Executive Order 13892, *Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication*, 84 Fed. Reg. 55239 (Oct. 9, 2019) (Exhibit 4). In relevant part, Executive Order 13892 directed the Department to "act

transparently and fairly with respect to all affected parties, as outlined in this order, when engaged in civil administrative enforcement or adjudication" and to "afford regulated parties the safeguards described in this order, above and beyond those that the courts have interpreted the Due Process Clause of the Fifth Amendment to the Constitution to impose." 84 Fed. Reg. at 55239. Executive Order 13892 also prescribed standards for the Department's notice, guidance document, inspection, and information collection practices. *Id.* at 55239, 55240–41.

On December 27, 2019, the Department promulgated 49 CFR Part 5 Subpart D. It promised:

> This final rule ensures that DOT provides affected parties appropriate due process in all enforcement actions, that the Department's conduct is fair and free of bias and concludes with a well-documented decision as to violations alleged and any violations found to have been committed, that the penalties or corrective actions imposed for such violations are reasonable, and that proper steps needed to ensure future compliance were undertaken by the regulated party.

84 Fed. Reg. at 71716. To make good on this promise, Subpart D contained substantive rules affecting and expanding Polyweave's important due-process rights and protections, while imposing new and binding obligations on the Department's employees.[4] Specifically:

- For the first time, the Department in 49 CFR § 5.83 specifically acknowledged, affirmed, and codified that Polyweave and others similarly situated have an entitlement and lawful right to disclosure of exculpatory evidence under the principle of *Brady v. Maryland,* 373 U.S. 83 (1963), and then required Department personnel to comply accordingly.

- For the first time, the Department in 49 CFR § 5.59 specifically acknowledged, affirmed, and codified that Polyweave and others similarly situated shall not "be subject to an administrative enforcement action or adjudication absent prior public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct."

[4] Subpart D also contained procedural rules of agency organization, procedure, or practice. These include 49 CFR §§ 5.55 ("Enforcement attorney responsibilities"); 5.79 ("The hearing record"); 5.87 ("Alternative Dispute Resolution (ADR)"); 5.99 ("Publication of decisions"); 5.101 ("Coordination with the Office of Inspector General on criminal matters"); 5.93 ("Settlements"); 5.95 ("OGC approval required for certain settlement terms"); 5.103 ("Standard operating procedures"); 5.105 ("Cooperative Information Sharing").

- For the first time, the Department in 49 CFR § 5.61 specifically acknowledged, affirmed, and codified requiring its employees, to the maximum extent consistent with protecting the integrity of the investigation, "to promptly disclose to the affected parties the reasons for the investigative review and any compliance issues identified or findings made in the course of the review."

- For the first time, the Department in 49 CFR § 5.65 specifically acknowledged, affirmed, and codified the rule its employees "*must not adopt or rely* upon overly broad or unduly expansive interpretations of the governing statutes or regulations" in exercising their discretion to initiate and pursue enforcement action and promised the Department "*will not rely* on judge-made rules of judicial discretion, such as the *Chevron* doctrine, as a device or excuse for straining the limits of a statutory grant of enforcement authority."(Emphasis added).

- For the first time, the Department in 49 CFR § 5.67 affirmed, acknowledged, and codified that Polyweave and others similarly situated have the right to be free from Department "enforcement actions," defined as "an action taken by the Department upon its own initiative or at the request of an affected party in furtherance of its statutory authority and responsibility to execute and ensure compliance with applicable laws", without the Department having at least some prior evidence (i.e., "probable cause") to support assertion of a violation. Specifically, "The Department *will not* initiate enforcement actions as a 'fishing expedition' to find potential violations of law *in the absence of sufficient evidence in hand to support the assertion of a violation*." (Emphasis added.) This mandatory and binding section prohibits Department personnel from subjecting regulated persons, including Polyweave, to administrative investigations, inquiries, and subpoenas simply on suspicion that the law is being violated, or even just because it wants assurance that it is not.

- For the first time, the Department in 49 CFR § 5.69 guaranteed and entitled Polyweave and others similarly situated an enforcement action notice containing *all* "legal authorities, statutes or regulations allegedly violated, basic issues, key facts alleged, a clear statement of the grounds for the agency's action, and a reference to or recitation of the procedural rights available to the party to challenge the agency action, including appropriate procedure for seeking administrative and judicial review."

- For the first time, the Department in 49 CFR § 5.85 specifically prohibited Department personnel from using guidance documents to target Polyweave and others similarly situated for enforcement action. "[T]he Department *may not* use its enforcement authority to convert agency guidance documents into binding rules. Likewise, enforcement attorneys *may not* use noncompliance with guidance documents as a basis for proving violations of applicable law." (Emphasis added).

- For the first time, the Department in 49 CFR § 5.97 codified binding limits on its employees' discretion to seek civil penalties from Polyweave and others similarly situated. Specifically: "*No civil penalties will be sought* in any DOT enforcement action except when and as supported by clear statutory authority and sufficient findings of fact." Additionally, the Department affirmed, acknowledged, and codified the rights

of Polyweave and others similarly situated to have robust procedural transparency rights with respect to civil penalty assessments, and prohibited Department employees from "hiding the ball" on penalty calculations. Specifically: "The assessment of proposed or final penalties in a DOT enforcement action *shall be* communicated in writing to the subject of the action, along with a full explanation of the basis for the calculation of asserted penalties. In addition, the agency *shall voluntarily share* penalty calculation worksheets, manuals, charts, or other appropriate materials that shed light on the way penalties are calculated to ensure fairness in the process and to encourage a negotiated resolution where possible."

- For the first time, the Department in 49 CFR § 5.107 ("Small Business Regulatory Enforcement Fairness Act Compliance") codified its obligation and guarantee to Polyweave and other regulated persons that it would comply with the terms of SBREFA when conducting administrative inspections and adjudications, including section 223 of SBREFA (reduction or waivers of civil penalties, where appropriate). It further prescriptively affirmed the Department "*will also cooperate with the Small Business Administration (SBA) when a small business files a comment or complaint related to DOT's inspection authority* and when requested to answer SBREFA compliance requests." (Emphasis added).

Subpart D applied to "*all* enforcement actions taken by *each* Department operating administration and *each* component of the Office of the Secretary of Transportation with enforcement authority," including Administrative Law Judges. 49 CFR § 5.53; 84 Fed. Reg. at 71729.

Polyweave is regulated by PHMSA. Cmpl. ¶ 45. PHSMA waited until March 2021 before properly serving Polyweave with an order to pay a civil penalty for a 2015 citation.[5] Cmpl. ¶¶ 53–55. On March 25, 2021, pursuant to 49 CFR § 107.325(b), Polyweave appealed this order to the PHMSA Administrator. Cmpl ¶ 56. This appeal is an "informal enforcement adjudication" under 49 CFR § 5.57 and subject to Subpart D. At all times relevant, Polyweave relied on Subpart D as a source of rights and protections in DOT enforcement proceedings, fully expecting it would be entitled to all due-process rights and procedural protections provided thereunder, including the right to *Brady* disclosures under 49 CFR § 5.83. Cmpl. at ¶ 60.

[5] The Department may not commence any action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture after five years from the date when the claim first accrued. 28 U.S.C. § 2462.

On April 2, 2021, Defendant rescinded Subpart D in its entirety, and with it the binding due-process rights and procedural protection provided thereunder. Rescission occurred without notice and comment, without a reasoned explanation, and without any consideration of the legitimate reliance interests Polyweave and other regulated persons might have. 86 Fed. Reg. at 17292, 17293. It is noteworthy that rescission occurred within weeks of the March 2021 civil-penalty order served on Polyweave. Defendant surely knew or expected that Subpart D's rights and protection would be stripped away when he decided to serve that order.

Defendant's justification appears to have been that "many" (*not* "all") of Subpart D's rights are merely "derived from the Administrative Procedure Act (APA) and significant judicial decisions and thus need not be adopted by regulation in order to be effective." *Id.* Thus, he says Subpart D is unnecessary because application "of the APA and these decisions to enforcement matters can be accomplished by internal directives as the Department deems necessary and appropriate." *Id.*

Secretary Buttigieg apparently also relied on the Biden Administration's Executive Order 13992, directing rescission of rescind rules or regulations implementing Executive Order 13892 that might "threaten to frustrate the Federal Government's ability to confront urgent challenges facing the Nation, including the coronavirus disease 2019 pandemic, economic recovery, racial justice, and climate change" as justification for his action with respect to Subpart D. *Id.* (*citing* Executive Order 13992, *"Revocation of Certain Executive Orders Concerning Federal Regulation"* 86 Fed. Reg. 7049 (Jan. 20, 2021) (Exhibit 5)). However, he did not explain how or why Subpart D might "threaten to frustrate" the Department's ability to confront the "coronavirus disease 2019 pandemic," "economic recovery," "racial justice," or "climate change."

Standard of Review

A preliminary injunction is a stopgap measure, generally limited as to time, and intended to maintain a status quo or to preserve the relative positions of the parties until a trial on the merits can

be held. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). The Court "must balance four factors in deciding whether to issue a preliminary injunction: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Wilson v. Gordon*, 822 F.3d 934, 952 (6th Cir. 2016). "The final two factors, harm to others and the public interest, 'merge when the Government is the opposing party.'" *Gun Owners of Am., Inc. v. Garland*, 992 F.3d 446, 453 (6th Cir. 2021) (citation omitted). "Each of these factors should be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction." *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014) (internal quotation marks and alteration omitted). "[I]t is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Northeastern Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591 (6th Cir. 2012).

Section 705 of the APA authorizes "the reviewing court" to stay "the effective date of an agency action" pending judicial review "to prevent irreparable injury." 5 U.S.C. § 705. The factors governing issuance of a preliminary injunction also govern issuance of a stay. *See, e.g., Texas v. EPA*, 829 F.3d 405, 424, 435 (5th Cir. 2016); *Cuomo v. United States Nuclear Regulatory Com.*, 772 F.2d 972, 974 (D.C. Cir. 1985).

As set forth below, Polyweave's likelihood of success on the merits, irreparable harm, and the public interest all strongly favor the issuance of a preliminary injunction.

Argument

I. POLYWEAVE IS LIKELY TO SUCCEED ON THE MERITS

A. Defendant Unlawfully Denied Polyweave an Opportunity to Comment on Subpart D's Rescission.

The central distinction among agency regulations found in the APA is that between "substantive rules," on the one hand, and "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice," on the other. 5 U.S.C. § 553; *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979). Substantive rules may be issued only after the agency publishes a notice of proposed rulemaking and considers public comments on its proposal, while procedural rules are exempt from this notice-and-comment requirement.

"Substantive rules" and "procedural rules" are not defined in the APA. But in *Chrysler Corp.,* and in *Morton* v. *Ruiz*, 415 U.S. 199 (1974), the Supreme Court noted a characteristic inherent in the concept of a "substantive rule." A substantive rule is one "affecting individual rights and obligations." *Chrysler Corp.,* 441 U.S. at 301–302; *Morton,* 415 U.S. at 236. This characteristic is an important touchstone for distinguishing rules that may be "binding" or have the "force of law." *Id.* at 235, 236. Therefore, an agency rule modifying substantive rights and interests can only be nominally procedural, and the APA's notice-and-comment exemption for "rules of agency procedure" does not apply. *Texas*, 809 F.3d at 171, 176 (notice-and-comment exemption is narrowly construed); *Reeder v. FCC*, 865 F.2d 1298, 1305 (D.C. Cir. 1989).[6]

Defendant claims he may rescind Subpart D by fiat because "this is a rule of agency procedure for which notice and comment are not required." 86 Fed. Reg. at 17293. But he may not avoid notice-and-comment by mislabeling. "On the contrary, courts have long looked to the *contents* of the agency's

[6]Accordingly, courts have held rules altering the rights or affecting the interests of regulated parties, encoding "a substantive value judgment," trenching on substantial private rights and interests, or expressing a change in substantive law or policy which the agency intends to make binding or administers with binding effect, are substantive and subject to APA notice-and-comment. *See Texas*, 809 F.3d at 176; *Inova Alexandria Hosp. v. Shalala*, 244 F.3d 342, 349 (4th Cir. 2001); *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 900 F.2d 369, 376 (D.C. Cir.) *vacated as moot per curiam* 933 F.2d 1043 (D.C. Cir. 1991); *United States v. Picciotto*, 875 F.2d 345, 348 (D.C. Cir. 1989); *Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980).

action, not the agency's self-serving *label*, when deciding whether statutory notice-and-comment demands apply." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) (emphases in original). If a rule affects individual rights and agency obligations, then it is substantive and the full panoply of notice-and-comment requirements must be adhered to "scrupulously." *Texas*, 809 F.3d at 171; *see also Chrysler Corp.*, 441 U.S. at 301–302.

Courts have held a rule to be substantive "if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding." *General Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (citation omitted). Subpart D meets both criteria because "from beginning to end … [i]t commands, it requires, it orders, it dictates." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000). For example:

- "The authority to prosecute the asserted violation and the authority to impose monetary penalties, if sought, *must be* clear in the text of the statute." 49 CFR § 5.63 (emphasis added).

- "DOT *will not* rely on judge-made rules of judicial discretion, such as the *Chevron* doctrine, as a device or excuse for straining the limits of a statutory grant of enforcement authority." § 5.65 (emphasis added).

- "The Department *will not* initiate enforcement actions as a 'fishing expedition' to find potential violations of law in the absence of sufficient evidence in hand to support the assertion of a violation." § 5.67 (emphasis added).

- "All documents initiating an enforcement action *shall* ensure notice reasonably calculated to inform the regulated party of the nature and basis for the action being taken to allow an opportunity to challenge the action and to avoid unfair surprise." § 5.69 (emphasis added).

- "[E]ach responsible OA or component of OST *will voluntarily follow* in its civil enforcement actions the principle articulated in *Brady v. Maryland*…." § 5.83 (emphasis added).

- "[T]he Department *may not* use its enforcement authority to convert agency guidance documents into binding rules. Likewise, enforcement attorneys *may not* use noncompliance with guidance documents as a basis for proving violations of applicable law." § 5.85 (emphases added).

Encoding a substantive value judgment favoring due process and transparency and disfavoring uncabined discretion, Subpart D recognized and expanded Polyweave's rights, and through its many and detailed mandates, directives, and commands, imposed new binding obligations on DOT. *See, e.g.,* Compl. ¶¶ 10–13, 29–33; 84 Fed. Reg. at 71715–16; 49 CFR §§ 5.67, 5.83, 5.97. Therefore, Subpart D's rules are not mere "internal processes" exempt from APA notice and comment. *Texas*, 809 F.3d at 176 ("An agency rule that modifies substantive rights and interests can only be nominally procedural, and the exemption for such rules of agency procedure cannot apply.").

Secretary Buttigieg conceded as much. His justification for rescission was:

> [W]ith regard to the regulations on enforcement matters, many of these provisions are derived from the Administrative Procedure Act (APA) and significant judicial decisions and thus need not be adopted by regulation in order to be effective. Application of the APA and these decisions to enforcement matters *can be accomplished by internal directives as the Department deems necessary and appropriate*. Therefore, 49 CFR part 5, subpart D—Enforcement Procedures is rescinded in its entirety.

86 Fed. Reg. at 17293 (emphasis added). In other words, Secretary Buttigieg acknowledged Subpart D affected Polyweave's statutory and due-process rights. But he just decided those rights "need not be adopted by regulation in order to be effective" and protection by "internal directives as the Department deems necessary and appropriate" was quite enough for Polyweave and everyone else. Yet, Buttigieg's rescission of binding prescriptive rules and replacement with a regulatory regime in which Polyweave's rights are determined by unidentified "internal directives" issued at the Department's sufferance, is the paradigmatic sort of policy and legal shift for which notice and comment are required. *See Texas*, 809 F.3d at 176; *Pickus v. U.S. Bd of Parole*, 507 F.2d 1107, 1114 (1974).

A binding rule of substantive law it "will be taken for what it is." *Azar,* 139 S. Ct. at 1812 (citations omitted). Subpart D was such a rule. Accordingly, Secretary Buttigieg's rescission without notice and comment was unlawful.

B. Defendant Unlawfully Failed to Explain or Acknowledge Its Change in Policy.

The APA requires agencies to engage in "reasoned decisionmaking." *Regents*, 140 S. Ct. at 1905; *Michigan* v. *EPA*, 576 U.S. 743, 750 (2015). Agency action must be set aside if, as here, it is arbitrary or capricious. 5 U.S.C. § 706(2)(A).

To lawfully rescind Subpart D, Defendant was obligated to give adequate reasons for its decisions. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). His decision had to be "based on consideration of the relevant factors," and may not have failed "to consider an important aspect of the problem." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983). He was required to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id.* And this requirement was satisfied only if his "path may reasonably be discerned." *Encino*, 136 S. Ct. at 2125 (quoting *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)).

Also, in rescinding Subpart D, Secretary Buttigieg was obligated to "display awareness that [he was] changing position" and "show that there [were] good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U. S. 502, 515 (2009). In addition to explaining the mere fact of a policy change, "a reasoned explanation [was] needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 516; *Regents*, 140 S. Ct. 1891, 1910–1911.

Here, Secretary Buttigieg said "many" (notably not *all*) of rights provided by Subpart D are already provided by the APA and judicial decisions, which the Department may implement through "internal directives" as it "deems necessary and appropriate." 86 Fed. Reg. at 17293. Yet, he did not identify a single APA requirement or judicial decision that would make redundant any given Subpart D rule. Nor did he explain or describe the conditions under which the Department might deem it "necessary and appropriate" to provide Subpart D-type protection. As such, it is impossible to follow, let alone judge, his explanation. This alone renders rescission unlawful. *Encino*, 136 S. Ct. at 2125.

Critically, Secretary Buttigieg failed to acknowledge, let alone explain away, DOT's justification for promulgating Subpart D in the first place. Subpart D was promulgated to address and cure Department employees' systemic violation of due process and procedural rights. 84 Fed. Reg. 71716. Any lawful attempt to rescind Subpart D required a reasoned explanation of why DOT's prior concerns over due process and procedural abuse have now abated or are somehow outweighed by new considerations. *See Fox*, 556 U.S. at 515 ("a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the priory policy"). However, no such reasoned explanation was provided.

It may be Secretary Buttigieg relied on Executive Order 13992's instruction to "rescind any rules or regulations, or portions thereof, implementing revoked" Executive Order 13892. *See* 86 Fed. Reg. at 17293. But most of Subpart D, including its *Brady* disclosure guarantee, codified the Bradbury Memo, not Executive Order 13892. 84 Fed. Reg. at 71716 n.7; *compare, e.g.,* Bradbury Memo ¶¶ 13, 14, 20 with 49 CFR §§ 5.83, 5.85, 5.87. Also, Executive Order 13992 requires consistency "with applicable law, including the Administrative Procedure Act." *See* 86 Fed. Reg. at 7049. It assuredly did not authorize Secretary Buttigieg to evade the APA's reasoned-explanation requirement. Nor could it.

Alternatively, it may be that Secretary Buttigieg invoked Executive Order 13992 because he concluded Subpart D might "threaten to frustrate the Federal Government's ability to confront urgent challenges facing the Nation, including the coronavirus disease 2019 pandemic, economic recovery, racial justice, and climate change." *Id.*; *see also* 86 Fed. Reg. at 17293. However, he never explained how Subpart D might threaten, or is even related to, the Department's ability to address the "2019 pandemic," "economic recovery," "racial justice," or "climate change." His explanation is simply impossible to follow.

In fact, Secretary Buttigieg's explanation is so lacking that it amounts to a failure to "display awareness that [he] *is* changing position." *Fox*, 556 U.S. at 515. To be sure, he acknowledges deleting

regulatory text. But he insists the Department policy has not changed because the text at issue merely provides things "derived from the Administrative Procedure Act (APA) and significant judicial decisions" that "need not be adopted by regulation in order to be effective." 86 Fed. Reg. at 17293.

In other words, Secretary Buttigieg seemed to be saying that post-rescission, Polyweave and other regulated parties will have precisely the same rights and the Department precisely the same obligations as under Subpart D. But this is not true. Subpart D expanded Polyweave's rights and imposed new obligations on DOT. Rescission reduces Polyweave's rights and expands agency discretion and power. Defendant's irrational insistence that rescission changes nothing suggests only a distressing lack of "awareness that [he] is changing position." *Fox*, 556 U.S. at 515.

For example, 49 CFR § 5.83 is the first time the Department has codified and acknowledged a duty to disclose exculpatory evidence in civil-enforcement proceedings under *Brady v. Maryland*, 373 U.S. 83 (1963). While Polyweave and several federal agencies believe *Brady* disclosures are required in civil-enforcement proceedings to ensure basic fairness,[7] DOT never before agreed. Indeed, DOT promulgated 49 CFR § 5.83 requiring *Brady* disclosures precisely because the Department did not previously do so.

As a second example, 49 CFR § 5.65 concerns "[p]roper exercise of prosecutorial and enforcement discretion" and prohibits enforcement based on ambiguous constructions of statutes or

[7] Some independent agencies have adopted modified *Brady* disclosure requirements. *See* Federal Election Commission, Agency Procedure for Document and Information Disclosure During Enforcement, 2011, available at https://www.fec.gov/updates/agency-procedure-for-document-and-information-disclosure-during-enforcement/; FERC Policy Statement on Disclosure of Exculpatory material, PL10-1-000 (Dec. 17, 2009), available at https://www.ferc.gov/legal/major-orders-regulations/policy-statements; Securities and Exchange Commission's Rules of Practice 230, 17 CFR 201.230(b)(3); *First Guar. Metals, Co.*, Nos. 79-55 to -57, 1980 WL 15696, at *9 (C.F.T.C. July 2, 1980)); *see also* Kara Rollins, It's Time For Agencies to Adopt the Brady Rule in Civil Enforcement Actions, Feb 6, 2020, available at https://nclalegal.org/2020/02/its-time-for-agencies-to-adopt-the-brady-rule-in-civil-enforcement-actions/.

regulations in reliance on judge-made deference doctrines. Again, Polyweave believes due process and fair notice prohibit enforcement actions based on a tortured interpretation of statutory or regulatory requirements.[8] *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012) (holding that an agency may not "require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding"). But prior to promulgating 49 CFR § 5.65, the Department never agreed. Instead, DOT routinely relied on deference doctrines to support enforcement actions based on strained and novel legal interpretations, even as some courts refused to grant deference out of a concern for fairness. *See, e.g., ExxonMobil Pipeline Co. v. United States Dep't of Transportation*, 867 F.3d 564, 579 (5th Cir. 2017) (holding that granting *Auer* deference to PHMSA's interpretation of its own regulations "in this enforcement action would constitute unfair surprise and deprive ExxonMobil of the fair notice to which it is entitled.").

As a third example, 49 CFR § 5.67 provides in relevant part "The Department will not initiate enforcement actions as a 'fishing expedition' to find potential violations of law in the absence of sufficient evidence in hand to support the assertion of a violation." 84 Fed. Reg. at 71730. This is a substantive rule providing rights beyond judicial decisions seemingly authorizing "fishing expeditions" without *any* evidence in hand to support the assertion of a violation. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (agencies have a "power of inquisition, if one chooses to call it that," and therefore, "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1947) ("Congress

[8] *See, e.g., Sessions v Dimaya,* 138 S. Ct. 1204, 1229 (2018) (Gorsuch J., concurring) ("[I]n the criminal context this Court has generally insisted that the law must afford ordinary people fair notice of the conduct it punishes. And I cannot see how the Due Process Clause might often require any less than that in the civil context either.") (Internal quotation marks and citation omitted).

has made no requirements in terms of any showing of 'probable cause,' and . . . any possible constitutional requirement of that sort was satisfied by the Administrator's showing in this case . . . that he was proceeding with his investigation in accordance with the mandate of Congress and that the records sought were relevant to that purpose.").

Polyweave believes *Morton Salt* and *Walling* were wrongly decided and the Court today is more likely to take a more constrained view of agency authority. *See Citizens United v. FEC,* 558 U.S. 310, 342 (2010); *see also Dimaya,* 138 S. Ct. 1204, 1229 (2018) (Gorsuch J., concurring); *Fox*, 556 U.S. at 516; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."). Regardless, in Subpart D the Department turned in its fishing license, rendering § 5.67 a substantive rule. *Chrysler Corp.*, 441 U.S. at 301. This belies the Defendant's claim Subpart D did nothing to expand Polyweave's rights or to impose new obligations on the Department. Therefore, Secretary Buttigieg must at least explain his policy shift. *Fox,* 556 U.S. at 516; *Regents*, 140 S. Ct. 1891, 1910–1911.

The same is true of other rights and protections in Subpart D, particularly those imposing binding limits on the Department's enforcement discretion, which is not regulated by other legal authorities. For example, Secretary Buttigieg said rescinding Subpart D has no policy effect because the rights and protections it conferred "can be accomplished by internal directives as the Department *deems necessary and appropriate*." 86 Fed. Reg. at 17293 (emphasis added). But Subpart D indisputably used binding language regarding what DOT personnel "must," "must not," "shall," or "shall not" do and set clear standards for the permissible exercise of civil enforcement authority. *See, e.g.,* 49 CFR §§ 5.65–69.

C. Defendant Unlawfully Failed to Consider Polyweave's Legitimate Reliance Interests.

Defendant unlawfully failed to consider and address whether Polyweave (and others similarly situated, for that matter) had a legitimate reliance interest in Subpart D. *Regents,* 140 S. Ct. at 1913

(citation omitted). When an agency changes course, it must be cognizant of the possibility it has engendered serious reliance interests that must be accounted for. "It would be arbitrary and capricious to ignore such matters." *Id.* (citations omitted). Yet that is what Secretary Buttigieg has done here.

Regents is instructive and controlling. The Court held:

> For its part, the Government does not contend that Duke considered potential reliance interests; it counters that she did not need to. In the Government's view, shared by the lead dissent, DACA recipients have no "legally cognizable reliance interests" because the DACA Memorandum stated that the program "conferred no substantive rights" and provided benefits only in two-year increments. But neither the Government nor the lead dissent cites any legal authority establishing that such features automatically preclude reliance interests, and we are not aware of any. These disclaimers are surely pertinent in considering the strength of any reliance interests, but that consideration must be undertaken by the agency in the first instance, subject to normal APA review. There was no such consideration in the Duke Memorandum.

Id. at 1913 (citations omitted).

Subpart D's substantive provisions, including *Brady* rights, freedom from "fishing expeditions," an end to "tortured" interpretations of statutory or regulatory requirements in enforcement actions, transparent penalty procedures, robust anti-bias provisions, and the host of binding limits on the Department's enforcement discretion left much for the Defendant to consider. Polyweave's reliance interests, and the reliance interests all others regulated by DOT in Subpart D rights, as well as the public's self-evident "good government" reliance interests in having the Department "carry out its enforcement responsibilities in a fair and just manner," 84 Fed. Reg. at 71716, required acknowledgement and consideration. *Regents*, 140 S. Ct. at 1913-14.

II. SECRETARY BUTTIGIEG'S RESCISSION OF SUBPART D IRREPARABLY INJURES POLYWEAVE.

If Subpart D is rescinded in violation of the APA, Polyweave will lose the benefit of its critical due-process and procedural rights, and of its APA right to participate in notice and comment procedures. This is irreparable injury. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) ("When reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is

mandated"); *Bonnell v. Lorenzo*, 241 F.3d 800, 809 (6th Cir.), *cert. denied*, 534 U.S. 951 (2001); *Ass'n of Cmty. Cancer Ctrs. v. Azar*, U.S. Dist. LEXIS 241732, *31 (D. Md. 2020) (citations omitted).

For example, in March 2021, pursuant to 49 CFR § 107.317(d), PHMSA's Chief Counsel served an Order on Polyweave to pay a substantial fine for regulatory violations that allegedly occurred in 2015.[9] On March 22, 2021, Polyweave asked PHMSA's Administrator to conduct a *de novo* review, under 49 CFR § 107.325(d), of the enforcement action against it. Because Subpart D was in force, Polyweave reasonably expected the Department's adversarial personnel would, as a matter of course, reveal any exculpatory evidence bearing on its culpability or the proper extent of any punishment the agency intends to mete out, even if Polyweave does not know such evidence exists or otherwise does not request access to it.

However, Secretary Buttigieg's rescission of 49 CFR § 5.83 effectively extinguishes Polyweave's *Brady* rights in this case and any other that might arise. Without those *Brady* rights, Polyweave (and similarly situated others) will never know whether PHMSA suppressed material exculpatory evidence. As such, Polyweave could not use any withheld evidence in its pending enforcement action before PHMSA. Nor could it present that evidence if it appeals an adverse decision by the PHMSA administrator to a federal court of appeals. *See* 49 U.S.C. § 5127(a). Even if Polyweave were to later learn that PHMSA withheld material exculpatory evidence, it cannot present that evidence in a federal appeal because that appellate review is limited to the administrative record created by the Department. *Id.* § 5127(b). In short, because the *Brady* rights at issue pertain to voluntary and timely disclosure of information, the loss of such rights is by definition irreparable.

[9] Such late order was prohibited by 49 CFR § 5.63's requirement that all DOT enforcement actions be founded on a clear legal authority. *See* 28 U.S.C. § 2462 (prohibiting enforcement of civil fines for alleged conduct that occurred over five years ago). The Department nonetheless proceeded because it knew or expected that 49 CFR § 5.63 was to be rescinded with the rest of Subpart D.

Rescission of Subpart D means Polyweave will lose other important substantive protections as well, each of which constitutes irreparable harm. Without Subpart D:

- Polyweave will no longer be protected from the Department's adversarial personnel having *ex parte* communication with the PHMSA Administrator who decides Polyweave's appeal. *See* 49 CFR § 5.71.

- Polyweave will no longer be protected from adversarial personnel using nonbinding guidance documents to prove a violation. *See* 49 CFR § 5.85.

- Polyweave will no longer be protected from unfair penalty calculations that do not reflect the scale and willfulness of the violation, or mitigating factors, such as the fact that it is a small business. *See* 49 CFR § 5.97 ("the penalty should reflect due regard for fairness, the scale of the violation, the violator's knowledge and intent, and any mitigating factors (such as whether the violator is a small business")).

At bottom, one set of enforcement rules applied in March 2021 when Department served Polyweave with an order to pay civil fines and Polyweave appealed to the PHMSA Administrator. Secretary Buttigieg's rescission of Subpart D in April 2021 means the rules have changed to Polyweave's detriment.[10]

III. INJUNCTIVE RELIEF IS IN THE PUBLIC INTEREST.

Where, as here, the government is the opposing party, Polyweave's likelihood of success on the merits is a strong indicator that a preliminary injunction serves the public interest because there is generally no public interest in the perpetuation of unlawful agency action. *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 102 (D.C. Cir. 2021). Rescission is contrary to the APA, as explained above. On that ground alone Polyweave is entitled to injunctive relief. But this case is not about mere procedural foot-faults.

[10] Improper ex parte communications, using guidance to prove a violation, and unfair civil penalties are all reasons for Polyweave to sue the Department. But practically speaking, a small, regulated business simply lacks the means or the resources to protect its rights from overreaching federal regulators. The regulators know this, and the business knows this. Systemic incentives drive regulated parties to buy peace at the cost of their constitutional and procedural rights.

The Bradbury Memo tacitly acknowledged a persistent pattern of due-process abuse. Subpart D, in turn, was promulgated to cure significant and longstanding problems of substantive bureaucratic due-process violations by expanding regulated persons' rights and reducing the bureaucracy's discretion. Returning to a regime in which rights are granted at the Department's whim, as Secretary Buttigieg intends to do, guarantees abuse.

One of Subpart D's most noteworthy provisions is *Brady* disclosure. 49 CFR § 5.83. Never before has the Department acknowledged or agreed regulated persons subject to its enforcement authorities have *Brady* rights, nor has it provided them with *Brady* disclosure. As the Supreme Court recognized in *Brady*, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. While *Brady* concerned a criminal rather than a civil case, the requirements of a fair adjudication do not change simply because the potential punishment is different. Indeed, the criminal-civil distinction matters less and less as "[o]urs is a world filled with more and more civil laws bearing more and more extravagant punishments." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J. concurring) ("Any suggestion that criminal cases warrant a heightened standard of review does more to persuade me that the criminal standard should be set *above* our precedent's current threshold than to suggest the civil standard should be buried *below* it.").

Recognizing *Brady* is necessary for fair adjudication, some independent agencies have embraced its disclosure principles (albeit in truncated form) in civil enforcement proceedings.[11] DOT

[11] *See* 17 CFR 201.230(b)(3); *FERC Policy Statement on Disclosure of Exculpatory Material*, PL10-1-000 (Dec. 17, 2009), available at https://www.ferc.gov/legal/major-orders-regulations/policy-statements; *First Guar. Metals, Co.*, Nos. 79-55 to -57, 1980 WL 15696, at *9 (C.F.T.C. July 2, 1980) (since *Brady* is premised upon due process grounds, "we hold that its principles are applicable to administrative enforcement actions.") The Federal Election Commission applies "the principles of the due process clause set forth in *Brady v. Maryland* (373 U.S. 83)" to its investigations and civil enforcement actions

finally followed suit in 2019. But Defendant has been directed by the White House to abandon *Brady* and Subpart D, and he has mechanically obeyed. If rescission stands, then Polyweave's due-process rights, and the due-process rights of every other person regulated by the Department, will be harmed, diminished, and terminated. Regardless, APA compliance and fairness in enforcement actions is always in the public interest.

CONCLUSION

For the reasons set forth above, the Court should grant Polyweave's request for a preliminary injunction and enjoin rescission of Subpart D.

Respectfully,

/s/Christopher Wiest
Christopher Wiest (KY Bar No. 90725)
CHRIS WIEST, ATTORNEY AT LAW, PLLC
25 Town Center Blvd, Ste 104
Crestview Hills, KY 41017
(513) 257-1895

Reed Rubenstein
Sheng Li (*pro hac vice pending*)
NEW CIVIL LIBERTIES ALLIANCE
1225 19th St. NW, Suite 450
Washington, DC 20036
(202) 869-5210

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing upon the Defendant by: (i) arranging service of same to be served with the Complaint and Summons in this matter, this 19 day of May, 2021; and (ii) by filing a copy of same with this Court via the Court's CM/ECF system, which will provide notice to all parties of record, also this 19 day of May, 2021.

/s/Christopher Wiest

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to "promote fairness in the enforcement process, promote administrative efficiency and certainty and contribute to the Commission's goal of fair and open investigations." Federal Election Commission, *Agency Procedure for Document and Information Disclosure During Enforcement* (July 1, 2011), available at https://www.fec.gov/updates/agency-procedure-for-document-and-information-disclosure-during-enforcement/.

U.S. Department of Transportation
Office of the Secretary of Transportation

GENERAL COUNSEL

1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

February 15, 2019

MEMORANDUM FOR SECRETARIAL OFFICERS AND HEADS OF OPERATING ADMINISTRATIONS

From: Steven G. Bradbury
General Counsel

Subject: Procedural Requirements for DOT Enforcement Actions

This memorandum clarifies the procedural requirements governing enforcement actions initiated by the Department of Transportation (DOT), including administrative enforcement proceedings and judicial enforcement actions brought in Federal court. The purpose of this memorandum is to ensure that DOT enforcement actions satisfy principles of due process and remain lawful, reasonable, and consistent with Administration policy.

I. APPLICABILITY

The requirements set forth herein apply to all enforcement actions taken by each DOT operating administration (OA) and each component of the Office of the Secretary of Transportation (OST) with enforcement authority.

II. ENFORCEMENT ATTORNEY RESPONSIBILITIES

All attorneys of OST and the OAs involved in enforcement activities are responsible for carrying out and adhering to the policies set forth herein. All supervising attorneys with responsibility over enforcement adjudications, administrative enforcement proceedings, and other enforcement actions are accountable for the successful implementation of these policies and for reviewing and monitoring compliance with this memorandum by the employees under their supervision.

These responsibilities include taking all steps necessary to ensure that the Department provides a fair and impartial process at each stage of enforcement actions. The Office of Litigation and Enforcement (C-30) within the Office of the General Counsel (OGC) is delegated authority to interpret this memorandum and provide guidance on compliance with the policies contained herein. C-30 shall exercise this authority in coordination with the Chief Counsels of the OAs and subject to the direction and supervision of the General Counsel.

III. DEFINITIONS

1. "*Administrative enforcement proceeding*" is to be interpreted broadly, consistent with applicable law and regulations, and includes, but is not limited to, administrative civil penalty proceedings; proceedings involving potential cease-and-desist or corrective action orders; preemption proceedings; safety rating appeals; pilot and mechanic revocation proceedings; grant suspensions, terminations, or other actions to remedy violations of grant conditions; and similar enforcement-related proceedings.

2. "*Administrative law judges*" (ALJs) are adjudicatory hearing officers appointed by a department head to serve as triers of fact in formal and informal administrative proceedings and to issue recommended decisions in adjudications. At DOT, ALJs are to be appointed by the Secretary of Transportation and assigned to the Office of Hearings.[1]

3. "*Administrative Procedure Act*" (APA) is the Federal statute, codified in scattered sections of chapters 5 and 7 of title 5, United States Code, that governs procedures for agency rulemaking and adjudication and provides for judicial review of final agency actions.[2]

4. "*Adversarial personnel*" are those persons who represent a party (including the agency) or a position or interest at issue in an enforcement action taken or proposed to be taken by or for an agency. They include the agency's employees who investigate, prosecute, or advocate on behalf of the agency in connection with the enforcement action.

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[1] *See Lucia v. SEC*, 585 U.S. ___, 138 S. Ct. 2044 (2018) (holding that ALJs of the Securities and Exchange Commission are "Officers of the United States" under the Appointments Clause).

[2] *See* 5 U.S.C. §§ 553 (rulemaking), 554 (adjudication), 556 (formal hearings), and 701-706 (judicial review).

5. "*Decisional personnel*" are employees of the agency responsible for issuing decisions arising out of the agency's enforcement actions, which include formal or informal enforcement adjudications. These employees include ALJs, hearing officers, Administrative Judges (AJs), and agency employees who advise and assist such decision makers.

6. "*Due process*" means procedural rights and protections afforded by the Government to affected parties to provide for a fair process in the enforcement of legal obligations, including in connection with agency actions determining a violation of law, assessing a civil penalty, requiring a party to take corrective action or to cease and desist from conduct, or otherwise depriving a party of a property or liberty interest. Due process always includes two essential elements for a party subject to an agency enforcement action: adequate notice of the proposed agency enforcement action and a meaningful opportunity to be heard by the agency decision maker.[3]

7. "*Enabling act*" means the Federal statute that defines the scope of an agency's authority and authorizes it to undertake an enforcement action.

8. "*Enforcement action*" means an action taken by the Department upon its own initiative or at the request of an affected party in furtherance of its statutory authority and responsibility to execute and ensure compliance with applicable laws. Such actions include administrative enforcement proceedings, enforcement adjudications, and judicial enforcement proceedings.

9. "*Enforcement adjudication*" is the administrative process undertaken by the agency to resolve the legal rights and obligations of specific parties with regard to a particular enforcement issue pending before an agency.[4] The outcome of an enforcement adjudication is a formal or informal decision issued by an appropriate decision maker. Enforcement adjudications require the opportunity for participation by directly affected parties and the right to present a response to a decision maker, including relevant evidence and reasoned arguments.[5]

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[3] *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976).

[4] 5 U.S.C. § 551(7).

[5] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 354 (1978); ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 14 (1973), *available at* https://archive.org/stream/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947#page/n0/mode/2up ("[A]djudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past

10. "*Formal enforcement adjudication*" means an adjudication required by statute to be conducted "on the record."[6] The words "on the record" generally refer to a decision issued by an agency after a proceeding conducted before an ALJ (or the agency head sitting as judge or other presiding employee who is not an ALJ) using trial-type procedures. It is usually the agency's enabling act, not the APA, that determines whether a formal hearing is required.[7]

11. "*Informal enforcement adjudication*" means an adjudication that is not required to be conducted "on the record" with trial-like procedures. The APA provides agencies with a substantial degree of flexibility in establishing practices and procedures for the conduct of informal adjudications.[8]

12. "*Investigators*, *inspectors*, and *special agents*" refer to those agency employees or agents responsible for the investigation and review of an affected party's compliance with the regulations and other legal requirements administered by the agency.

13. "*Judicial enforcement proceeding*" means a proceeding conducted in an Article III court, in which the Department is seeking to enforce an applicable statute, regulation, or order.

14. "*Procedural regulations*" are agency regulations setting forth the procedures to be followed during adjudications consistent with the agency's enabling act, the APA, and other applicable laws.[9]

IV. ENFORCEMENT POLICY AND REQUIRED PROCEDURES

1. *Enforcement Policy Generally.* It is the policy of the Department to provide affected parties appropriate due process in all enforcement actions. In the course of such actions and proceedings, the Department's conduct must be fair and free of bias and should conclude with a well-documented decision as to violations alleged and any violations found to have been committed, the penalties or corrective

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conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action.").

[6] *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972); *see* 5 U.S.C. §§ 554, 556, and 557.

[7] *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950); *see* 5 U.S.C. § 554 (Adjudications).

[8] 5 U.S.C. §§ 555, 558.

[9] CHARLES ALAN WRIGHT & CHARLES H. KOCH, FEDERAL PRACTICE AND PROCEDURE: JUDICIAL REVIEW § 8138.

actions to be imposed for such violations, and the steps needed to ensure future compliance. It is in the public interest and fundamental to good government that the Department carry out its enforcement responsibilities in a fair and just manner.[10]

2. *Investigative Functions.* DOT's investigative powers must be used in a manner consistent with due process, basic fairness, and respect for individual liberty and private property. Congress has granted the Secretary (and by delegation from the Secretary to the OAs) and the FAA Administrator broad investigative powers,[11] and it is an essential part of DOT's safety and consumer protection mission to investigate compliance with the statutes and regulations administered by the Department, including through periodic inspections.[12] The OAs and components of OST with enforcement authority are appropriately given broad discretion in determining whether and how to conduct investigations, periodic inspections, and other compliance reviews, and these investigative functions are often performed by agency investigators or inspectors in the field. The employees and contractors of DOT responsible for inspections and other investigative functions must not use these authorities as a game of "gotcha" with regulated entities and should follow existing statutes and regulations. Rather, to the maximum extent consistent with protecting the integrity of the investigation, the representatives of DOT should promptly disclose to the affected parties the reasons for the investigative review and any compliance issues identified or findings made in the course of the review. The responsible enforcement attorneys within the relevant OA or component of OST shall provide effective legal guidance to investigators and inspectors to ensure adherence to the policies set forth herein.

3. *Clear Legal Foundation.* All DOT enforcement actions against affected parties seeking redress for asserted violations of a statute or regulation must be founded on a grant of statutory authority in the relevant enabling act. The authority to prosecute the asserted violation and the authority to impose monetary penalties, if sought, must be clear in the text of the statute. Unless the terms of the statute clearly and expressly authorize the OA or component of OST to enforce the

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[10] *See Sackett v. EPA*, 566 U.S. 120 (2012).

[11] The Department's investigative powers include, but are not limited to, the power to conduct inspections and other investigations or compliance reviews, to make reports and findings, to issue subpoenas, to conduct fact-finding hearings, to require production of records, and to take depositions and other sworn statements from witnesses. *See, e.g.*, 49 U.S.C. § 60117(a).

[12] *Oklahoma Press Pub. Co. v. Walling*, 317 U.S. 186, 509 (1946).

relevant legal requirement directly through an administrative enforcement proceeding, the proper forum for the enforcement action is Federal court, and the enforcement action must be initiated in court by attorneys of the Department of Justice acting in coordination with DOT counsel.

4. *Proper Exercise of Prosecutorial and Enforcement Discretion.* The Department's attorneys and policy makers have broad discretion in deciding whether to initiate an enforcement action.[13] Nevertheless, in exercising discretion to initiate an enforcement action and in the pursuit of that action, agency counsel must not adopt or rely upon overly broad or unduly expansive interpretations of the governing statutes or regulations, and should ensure that the law is interpreted and applied according to its text. DOT will not rely on judge-made rules of judicial discretion, such as the *Chevron* doctrine,[14] as a device or excuse for straining the limits of a statutory grant of enforcement authority. All decisions by DOT to prosecute or not to prosecute an enforcement action should be based upon a reasonable interpretation of the law about which the public has received fair notice and should be made with due regard for fairness, the facts and evidence adduced through an appropriate investigation or compliance review, the availability of scarce resources, the administrative needs of the responsible OA or OST component, Administration policy, and the importance of the issues involved to the fulfillment of the Department's statutory responsibilities.

5. *Duty to Review for Legal Sufficiency.* In accordance with established agency procedures, enforcement actions should be reviewed by the responsible agency component for legal sufficiency under applicable statutes and regulations, judicial decisions, and other appropriate authorities.[15] If, in the opinion of the responsible agency component or its counsel, the evidence is sufficient to support the assertion of violation(s), then the agency may proceed with the enforcement action. If the evidence is not sufficient to support the proposed enforcement action, the agency may modify or amend the charges and bring an enforcement action in line with the evidence or return the case to the enforcement staff for additional investigation. The reviewing attorney or agency component may also recommend the closure of

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[13] *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980).

[14] *See Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

[15] Though it may not always be feasible or necessary for agency personnel to consult with counsel before initiating an enforcement action, particularly since the OAs utilize a variety of enforcement personnel to staff their enforcement programs, including personnel located in the fields, agency personnel should ensure that the basis for an enforcement action is legally sufficient before initiating it.

the case for lack of sufficient evidence.[16] The Department will not initiate enforcement actions as a "fishing expedition" to find potential violations of law in the absence of sufficient evidence in hand to support the assertion of a violation.

6. *Fair Notice*. Notice to the regulated party is a due process requirement. All documents initiating an enforcement action shall ensure notice reasonably calculated to inform the regulated party of the nature of the action being taken to allow an opportunity to challenge the action. The notice should include legal authorities, statutes or regulations allegedly violated, basic issues, key facts alleged, a clear statement of the grounds for the agency's action, and a reference to or recitation of the procedural rights available to the party to challenge the agency action, including appropriate procedure for seeking administrative and judicial review.

7. *Separation of Functions*. For those OAs or OST components whose regulations provide for a separation of decisional personnel from adversarial personnel in an administrative enforcement proceeding, any agency personnel who have taken an active part in investigating, prosecuting, or advocating in the enforcement action should not serve as a decision maker and should not advise or assist the decision maker in that same or a related case. In such proceedings, the agency's adversarial personnel should not furnish *ex parte* advice or factual materials to decisional personnel. When and as necessary, agency employees involved in enforcement actions should consult legal counsel and applicable regulations and ethical standards for further guidance on these requirements.

8. *Avoiding Bias*. Consistent with all applicable laws and ethical standards relating to recusals and disqualifications, no Federal employee or contractor may participate in a DOT enforcement action in any capacity, including as ALJ, adjudication counsel, adversarial personnel, or decisional personnel, if that person has (1) a financial or other personal interest that would be affected by the outcome of the enforcement action; (2) personal animus against a party to the action or against a group to which a party belongs; (3) prejudgment of the adjudicative facts at issue in the proceeding; or (4) any other prohibited conflict of interest.

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[16] Attorneys at many of the OAs issue Notices of Probable Violations, Notices of Claims, or Demand Letters to initiate enforcement proceedings. At other OAs, these documents are issued by non-attorney program officials. The duty to review applies equally to all agency attorneys whether deciding to issue a document to initiate enforcement proceedings or to continue to prosecute based upon a document previously issued by a non-attorney program official. In the latter situation, it is important that attorneys provide legal input, training, and review of the work product of the program office. At all times, DOT attorneys are encouraged to exercise their best professional judgment in deciding to initiate, continue, or recommend closing a case, consistent with applicable legal and ethical standards.

9. *Formal Enforcement Adjudications*. When a case is referred by the decision maker to the Office of Hearings or another designated hearing officer for formal adjudication (an "on the record" hearing), the assigned ALJ or hearing officer should use trial-type procedures consistent with applicable legal provisions. In formal adjudication, the APA requires findings and reasons on all material issues of fact, law, or discretion (policy).[17] In all formal adjudications, the responsible OA or component of OST shall adhere faithfully and consistently to the procedures established in the relevant procedural regulations. Agency counsel engaged in formal adjudications on behalf of DOT are accountable for compliance with the requirements of this memorandum.

10. *Informal Enforcement Adjudications*. Even though informal adjudications do not require trial-type procedures, the responsible OA or component of OST should afford the applicant or the regulated entity that is the subject of the adjudication (as the case may be), as well as other directly affected parties (if any), adequate notice and an opportunity to be heard on the matter under review, either through an oral presentation or through a written submission. Except in cases of a safety emergency or when the clear text of the relevant enabling act expressly authorizes exigent enforcement action without a prior hearing, the responsible OA or component of OST shall give the regulated entity appropriate advance notice of the proposed enforcement action and shall advise the entity of the opportunity for an informal hearing in a manner and sufficiently in advance that the entity's representatives have a fair opportunity to prepare for and to participate in the hearing, whether in person or by writing. The notice should be in plain language and, when appropriate, contain basic information about the applicable adjudicatory process.[18] In all informal adjudications, the responsible OA or component of OST shall adhere faithfully and consistently to the procedures established in any applicable procedural regulations.

11. *The Hearing Record.* In formal hearings, the agency shall comply with the APA, and include in the record, the testimony, exhibits, papers, and requests that were filed, in addition to the ALJ's or hearing officer's decision or the decision on appeal.[19] For informal hearings, the record shall include the information that the agency considered "at the time it reached the decision" and its contemporaneous

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[17] 5 U.S.C. § 557(c).

[18] 5 U.S.C. § 554(b)-(c).

[19] 5 U.S.C. § 556(e).

findings.[20] The administrative record does not include privileged documents, such as attorney-client communications, or deliberative or draft documents. Agencies are encouraged to make the record available to all interested parties to the fullest extent allowed by law, consistent with appropriate protections for the handling of confidential information.

12. *Contacts with the Public.* After the initiation of an enforcement proceeding, communications between persons outside the agency and agency decisional personnel should occur on the record. Consistent with applicable regulations and procedures, if oral, written, or electronic *ex parte* communications occur, they should be placed on the record as soon as practicable. Notice should be given to the parties that such communications are being placed into the record. When performing departmental functions, all DOT employees should properly identify themselves as employees of the Department, including the OA or component of OST in which they work; they should properly show official identification if the contact is made in person; and they should clearly state the nature of their business and the reasons for the contact. All contacts by DOT personnel with the public shall be professional, fair, honest, direct, and consistent with all applicable ethical standards.

13. *Duty to Disclose Exculpatory Evidence.* It is the Department's policy that each responsible OA or component of OST will voluntarily follow in its civil enforcement actions the principle articulated in *Brady v. Maryland*,[21] in which the Supreme Court held that the Due Process Clause of the Fifth Amendment requires disclosure of exculpatory evidence "material to guilt or punishment" known to the government but unknown to the defendant in criminal cases. Adopting the "*Brady* rule" and making affirmative disclosures of exculpatory evidence in all enforcement actions will contribute to the Department's goal of open and fair investigations and administrative enforcement proceedings. This policy requires the agency's adversarial personnel to disclose materially exculpatory evidence in the agency's possession to the representatives of the regulated entity whose conduct is the subject of the enforcement action. These affirmative disclosures should include any material evidence known to the Department's adversarial personnel that may be favorable to the regulated entity in the enforcement action—including evidence that tends to negate or diminish the party's responsibility for a violation, that could be relied upon to reduce the potential fine or other penalties, or that

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[20] *Camp v. Pitts*, 411 U.S. 138 (1973).

[21] *Brady v. Maryland*, 373 U.S. 83 (1963).

could be used by the party to support or impeach the credibility of a witness (including an agency employee). The regulated entity need not request such favorable information; it should be disclosed as a matter of course.[22] Agency counsel should recommend appropriate remedies to DOT decision makers where a *Brady* rule violation has occurred, using the factors identified by courts when applying the *Brady* rule in the criminal context.[23]

14. *Use of Guidance Documents in Administrative Enforcement Cases*. The Department of Justice issued a memorandum on January 25, 2018, outlining the permissible uses of agency guidance documents. That memorandum states in relevant part: "Guidance documents cannot create binding requirements that do not already exist by statute or regulation. Accordingly, the Department [of Justice] may not use its enforcement authority effectively to convert agency guidance documents into binding rules. Likewise, prosecuting attorneys may not use non-compliance with guidance documents as a basis for proving violations of applicable law. The Department should not treat a party's noncompliance with an agency guidance document as presumptively or conclusively establishing that the party violated the applicable statute or regulation."[24] DOT will follow the advice set forth in this Department of Justice memorandum and the DOT Memorandum entitled "Review and Clearance of Guidance Documents."

15. *Alternative Dispute Resolution (ADR)*. The OAs and the components of OST with enforcement authority are encouraged to use ADR to resolve enforcement cases where appropriate. The Department's ADR policy describes a variety of problem-solving processes that can be used in lieu of litigation or other adversarial proceedings to resolve disputes over compliance.[25]

16. *Duty to Adjudicate Proceedings Promptly*. Agency attorneys should promptly initiate proceedings or prosecute matters referred to them. In addition, cases should not be allowed to linger unduly after the adjudicatory process has begun. Attorneys should seek to settle matters where possible or refer the case to a decision maker for proper disposition when settlement negotiations have reached an impasse.

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[22] *Kyles v. Whitley*, 514 U.S. 419, 434 (1955); *United States v. Bagley*, 473 U.S. 667 (1985).

[23] *See Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S. at 434.

[24] Mem. from Associate Attorney General, U.S. Department of Justice, re "Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases" (Jan. 25, 2018), *available at* http://src.bna.com/vY4.

[25] *See* Statement of Policy on Alternative Dispute Resolution, 67 Fed. Reg. 40,367 (June 12, 2002).

17. *Agency Decisions.* Agency counsel may be used in the conduct of informal hearings and to prepare initial recommended decisions for the agency decision maker. The agency must notify the directly affected parties of its decision, and the decision must reasonably inform the parties in a timely manner of the additional procedural rights available to them.

18. *Settlements.* Settlement conferences may be handled by appropriate agency counsel without the involvement of the agency's decision maker. Once a matter is settled by compromise, that agreement should be reviewed and accepted by an appropriate supervisor. The responsible OA or component of OST should issue an order adopting the terms of the settlement agreement as the final agency decision, where and as authorized by statute or regulation. No DOT settlement agreement, consent order, or consent decree should be used to adopt or impose new regulatory obligations for entities that are not parties to the settlement. Unless required by law, settlement agreements are not confidential and are subject to public disclosure.

19. *OGC Approval Required for Certain Settlement Terms.* Whenever a proposed settlement agreement, consent order, or consent decree would impose behavioral commitments or obligations on a regulated entity that go beyond the requirements of relevant statutes and regulations, including the appointment of an independent monitor or the imposition of novel, unprecedented, or extraordinary obligations, the responsible OA or OST component should obtain the approval of OGC before finalizing the settlement agreement, consent order, or consent decree.

20. *Basis for Civil Penalties and Disclosures Thereof.* No civil penalties will be sought in any DOT enforcement action except when and as supported by clear statutory authority and sufficient findings of fact. Where applicable statutes vest the agency with discretion with regard to the amount or type of penalty sought or imposed, the penalty should reflect due regard for fairness, the scale of the violation, the violator's knowledge and intent, and any mitigating factors (such as whether the violator is a small business). The assessment of proposed or final penalties in a DOT enforcement action shall be communicated in writing to the subject of the action, along with a full explanation of the basis for the calculation of asserted penalties. In addition, the agency shall voluntarily share penalty calculation worksheets, manuals, charts, or other appropriate materials that sheds light on the way penalties are calculated to ensure fairness in the process and to encourage a negotiated resolution where possible.

21. *Publication of Decisions.* The agency's decisions in informal adjudications are not required to be published under the APA.[26] However, where the agency intends to rely on its opinions in future cases, those opinions must generally be made available on agency Web sites or in agency reading rooms (and publication on Westlaw, Lexis, or similar legal services is also highly recommended).[27] The APA has been read to require that opinions in formal adjudications must be made "available for public inspection and copying."[28] Agencies are strongly encouraged to publish all formal decisions on Westlaw, Lexis, or similar legal services.

22. *Coordination with the Office of Inspector General on Criminal Matters.* All Department employees must comply with DOT Orders 8000.8 and 8000.5A, which cover referrals of potential criminal matters to the Office of Inspector General (OIG). DOT Order 8000.8 delineates the respective roles of the OIG and DOT OAs and components of OST in criminal investigations, and Order 8000.5A provides a summary of the OIG's investigative procedures under the Inspector General Act of 1978, as amended.

23. *Standard Operating Procedures.* All legal offices that participate in or render advice in connection with enforcement actions should, to the extent practicable, operate under standard operating procedures. Such offices include, but are not limited to, those that oversee investigatory matters and serve as adversarial personnel in the agency's enforcement matters. These standard operating procedures, which can be contained in manuals, can be used to outline step-by-step requirements for attorney actions in the investigative stage and the prosecution stage; the role of an attorney as counselor, adjudicator, or litigator; the rulemaking process; and the process for issuance of guidance documents, letters of interpretation, preemption decisions, legislative guidance, and a variety of other legal functions performed in the legal office.

24. *Referral of Matters for Judicial Enforcement.* In considering whether to refer a matter for judicial enforcement by the Department of Justice, DOT attorneys should consult the applicable procedures set forth by the General Counsel, including in the document entitled "Partnering for Excellence: Coordination of Legal Work Within the U.S. Department of Transportation," and any update or supplement to such document issued hereafter by the General Counsel. The specific procedures for initiating an affirmative litigation request are currently

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[26] 5 U.S.C. § 552(a)(2)(A).

[27] WRIGHT & KOCH § 8242.

[28] *Id.*

found in the coordination document at Section II.B.1., "Affirmative Litigation Requests to the Department of Justice." In most instances, requests to commence affirmative litigation must be reviewed by OGC, with such reviews coordinated through the Office of Litigation and Enforcement (C-30).

25. *No Third-Party Rights or Benefits.* This memorandum is intended to improve the internal management of the Department. As such, it is for the use of DOT personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies, officers, or any person.

A variety of reference materials are listed at the end of this memorandum, and DOT attorneys should consult these materials where appropriate. Any questions concerning the implementation of this memorandum should be directed to C-30's Assistant General Counsel for Litigation and Enforcement.

REFERENCES

a) Administrative Conference of the United States (ACUS), *Recommendation 2016-4: Evidentiary Hearings Not Required by the Administrative Procedure Act.*[29]

b) Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559; §§ 571-584 and §§ 701-706.

c) ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1973), *available at* https://archive.org/stream/AttorneyGeneralsManualOnTheAdministrativeProcedureActOf1947#page/n0/mode/2up.

d) DOT Orders 8000.8 (Office of Inspector General Investigative Responsibilities) and 8000.5A (Office of Inspector General Investigative Procedures).

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[29] ACUS is an independent Federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative decision-making procedures. On December 13, 2016, ACUS adopted recommendations for non-ALJ proceedings (referred to as Type B proceedings). A variety of these recommendations may be useful and OAs are encouraged to review ACUS's recommendations and make changes to their due process procedures. Many of ACUS's recommendations have been incorporated within this memorandum, but, for the sake of clarity and brevity, this document does not include specific citations to the Recommendations (https://www.acus.gov/recommendation/evidentiary-hearings-not-required-administrative-procedure-act).

e) Partnering for Excellence: Coordination of Legal Work Within the U.S. Department of Transportation (June 2015).

f) Statement of Policy on Alternative Dispute Resolution, 67 Fed. Reg. 40,367 (June 12, 2002).

Presidential Documents

Executive Order 13892 of October 9, 2019

Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* The rule of law requires transparency. Regulated parties must know in advance the rules by which the Federal Government will judge their actions. The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* was enacted to provide that ''administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.'' *Morton* v. *Ruiz,* 415 U.S. 199, 232 (1974). The Freedom of Information Act, America's landmark transparency law, amended the APA to further advance this goal. The Freedom of Information Act, as amended, now generally requires that agencies publish in the *Federal Register* their substantive rules of general applicability, statements of general policy, and interpretations of law that are generally applicable and both formulated and adopted by the agency (5 U.S.C. 552(a)(1)(D)). The Freedom of Information Act also generally prohibits an agency from adversely affecting a person with a rule or policy that is not so published, except to the extent that the person has actual and timely notice of the terms of the rule or policy (5 U.S.C. 552(a)(1)).

Unfortunately, departments and agencies (agencies) in the executive branch have not always complied with these requirements. In addition, some agency practices with respect to enforcement actions and adjudications undermine the APA's goals of promoting accountability and ensuring fairness.

Agencies shall act transparently and fairly with respect to all affected parties, as outlined in this order, when engaged in civil administrative enforcement or adjudication. No person should be subjected to a civil administrative enforcement action or adjudication absent prior public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct. Moreover, the Federal Government should, where feasible, foster greater private-sector cooperation in enforcement, promote information sharing with the private sector, and establish predictable outcomes for private conduct. Agencies shall afford regulated parties the safeguards described in this order, above and beyond those that the courts have interpreted the Due Process Clause of the Fifth Amendment to the Constitution to impose.

Sec. 2. *Definitions.* For the purposes of this order:

(a) ''Agency'' has the meaning given to ''Executive agency'' in section 105 of title 5, United States Code, but excludes the Government Accountability Office.

(b) ''Collection of information'' includes any conduct that would qualify as a ''collection of information'' as defined in section 3502(3)(A) of title 44, United States Code, or section 1320.3(c) of title 5, Code of Federal Regulations, and also includes any request for information, regardless of the number of persons to whom it is addressed, that is:

(i) addressed to all or a substantial majority of an industry; or

(ii) designed to obtain information from a representative sample of individual persons in an industry.

(c) ''Guidance document'' means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation, but does not include the following:

(i) rules promulgated pursuant to notice and comment under section 553 of title 5, United States Code, or similar statutory provisions;

(ii) rules exempt from rulemaking requirements under section 553(a) of title 5, United States Code;

(iii) rules of agency organization, procedure, or practice;

(iv) decisions of agency adjudications under section 554 of title 5, United States Code, or similar statutory provisions;

(v) internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties; or

(vi) internal executive branch legal advice or legal opinions addressed to executive branch officials.

(d) ''Legal consequence'' means the result of an action that directly or indirectly affects substantive legal rights or obligations. The meaning of this term should be informed by the Supreme Court's discussion in *U.S. Army Corps of Engineers* v. *Hawkes Co.,* 136 S. Ct. 1807, 1813–16 (2016), and includes, for example, agency orders specifying which commodities are subject to or exempt from regulation under a statute, *Frozen Food Express* v. *United States,* 351 U.S. 40, 44–45 (1956), as well as agency letters or orders establishing greater liability for regulated parties in a subsequent enforcement action, *Rhea Lana, Inc.* v. *Dep't of Labor,* 824 F.3d 1023, 1030 (DC Cir. 2016). In particular, ''legal consequence'' includes subjecting a regulated party to potential liability.

(e) ''Unfair surprise'' means a lack of reasonable certainty or fair warning of what a legal standard administered by an agency requires. The meaning of this term should be informed by the examples of lack of fair notice discussed by the Supreme Court in *Christopher* v. *SmithKline Beecham Corp.,* 567 U.S. 142, 156 & n.15 (2012).

(f) ''Pre-enforcement ruling'' means a formal written communication from an agency in response to an inquiry from a person concerning compliance with legal requirements that interprets the law or applies the law to a specific set of facts supplied by the person. The term includes informal guidance under section 213 of the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Title II), as amended (SBREFA), letter rulings, advisory opinions, and no-action letters.

(g) ''Regulation'' means a legislative rule promulgated pursuant to section 553 of title 5, United States Code, or similar statutory provisions.

Sec. 3. *Proper Reliance on Guidance Documents.* Guidance documents may not be used to impose new standards of conduct on persons outside the executive branch except as expressly authorized by law or as expressly incorporated into a contract. When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it must establish a violation of law by applying statutes or regulations. The agency may not treat noncompliance with a standard of conduct announced solely in a guidance document as itself a violation of applicable statutes or regulations. When an agency uses a guidance document to state the legal applicability of a statute or regulation, that document can do no more, with respect to prohibition of conduct, than articulate the agency's understanding of how a statute or regulation applies to particular circumstances. An agency may cite a guidance document to convey that understanding in an administrative enforcement action or adjudication only if it has notified the public of such document in advance through publication, either in full or by citation if publicly available, in the *Federal Register* (or on the portion of the agency's website

that contains a single, searchable, indexed database of all guidance documents in effect).

Sec. 4. *Fairness and Notice in Administrative Enforcement Actions and Adjudications.* When an agency takes an administrative enforcement action, engages in adjudication, or otherwise makes a determination that has legal consequence for a person, it may apply only standards of conduct that have been publicly stated in a manner that would not cause unfair surprise. An agency must avoid unfair surprise not only when it imposes penalties but also whenever it adjudges past conduct to have violated the law.

Sec. 5. *Fairness and Notice in Jurisdictional Determinations.* Any decision in an agency adjudication, administrative order, or agency document on which an agency relies to assert a new or expanded claim of jurisdiction—such as a claim to regulate a new subject matter or an explanation of a new basis for liability—must be published, either in full or by citation if publicly available, in the *Federal Register* (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect) before the conduct over which jurisdiction is sought occurs. If an agency intends to rely on a document arising out of litigation (other than a published opinion of an adjudicator), such as a brief, a consent decree, or a settlement agreement, to establish jurisdiction in future administrative enforcement actions or adjudications involving persons who were not parties to the litigation, it must publish that document, either in full or by citation if publicly available, in the *Federal Register* (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect) and provide an explanation of its jurisdictional implications. An agency may not seek judicial deference to its interpretation of a document arising out of litigation (other than a published opinion of an adjudicator) in order to establish a new or expanded claim or jurisdiction unless it has published the document or a notice of availability in the *Federal Register* (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect).

Sec. 6. *Opportunity to Contest Agency Determination.* (a) Except as provided in subsections (b) and (c) of this section, before an agency takes any action with respect to a particular person that has legal consequence for that person, including by issuing to such a person a no-action letter, notice of noncompliance, or other similar notice, the agency must afford that person an opportunity to be heard, in person or in writing, regarding the agency's proposed legal and factual determinations. The agency must respond in writing and articulate the basis for its action.

(b) Subsection (a) of this section shall not apply to settlement negotiations between agencies and regulated parties, to notices of a prospective legal action, or to litigation before courts.

(c) An agency may proceed without regard to subsection (a) of this section where necessary because of a serious threat to health, safety, or other emergency or where a statute specifically authorizes proceeding without a prior opportunity to be heard. Where an agency proceeds under this subsection, it nevertheless must afford any person an opportunity to be heard, in person or in writing, regarding the agency's legal determinations and respond in writing as soon as practicable.

Sec. 7. *Ensuring Reasonable Administrative Inspections.* Within 120 days of the date of this order, each agency that conducts civil administrative inspections shall publish a rule of agency procedure governing such inspections, if such a rule does not already exist. Once published, an agency must conduct inspections of regulated parties in compliance with the rule.

Sec. 8. *Appropriate Procedures for Information Collections.* (a) Any agency seeking to collect information from a person about the compliance of that person or of any other person with legal requirements must ensure that such collections of information comply with the provisions of the Paperwork Reduction Act, section 3512 of title 44, United States Code, and section

1320.6(a) of title 5, Code of Federal Regulations, applicable to collections of information (other than those excepted under section 3518 of title 44, United States Code).

(b) To advance the purposes of subsection (a) of this section, any collection of information during the conduct of an investigation (other than those investigations excepted under section 3518 of title 44, United States Code, and section 1320.4 of title 5, Code of Federal Regulations, or civil investigative demands under 18 U.S.C. 1968) must either:

(i) display a valid control number assigned by the Director of the Office of Management and Budget; or

(ii) inform the recipient through prominently displayed plain language that no response is legally required.

Sec. 9. *Cooperative Information Sharing and Enforcement.* (a) Within 270 days of the date of this order, each agency, as appropriate, shall, to the extent practicable and permitted by law, propose procedures:

(i) to encourage voluntary self-reporting of regulatory violations by regulated parties in exchange for reductions or waivers of civil penalties;

(ii) to encourage voluntary information sharing by regulated parties; and

(iii) to provide pre-enforcement rulings to regulated parties.

(b) Any agency that believes additional procedures are not practicable—because, for example, the agency believes it already has adequate procedures in place or because it believes it lacks the resources to institute additional procedures—shall, within 270 days of the date of this order, submit a report to the President describing, as appropriate, its existing procedures, its need for more resources, or any other basis for its conclusion.

Sec. 10. *SBREFA Compliance.* Within 180 days of the date of this order, each agency shall submit a report to the President demonstrating that its civil administrative enforcement activities, investigations, and other actions comply with SBREFA, including section 223 of that Act. A copy of this report, subject to redactions for any applicable privileges, shall be posted on the agency's website.

Sec. 11. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Notwithstanding any other provision in this order, nothing in this order shall apply:

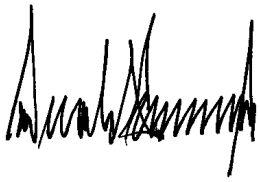
(i) to any action that pertains to foreign or military affairs, or to a national security or homeland security function of the United States (other than procurement actions and actions involving the import or export of non-defense articles and services);

(ii) to any action related to a criminal investigation or prosecution, including undercover operations, or any civil enforcement action or related investigation by the Department of Justice, including any action related to a civil investigative demand under 18 U.S.C. 1968;

(iii) to any action related to detention, seizure, or destruction of counterfeit goods, pirated goods, or other goods that infringe intellectual property rights;

(iv) to any investigation of misconduct by an agency employee or any disciplinary, corrective, or employment action taken against an agency employee; or

(v) in any other circumstance or proceeding to which application of this order, or any part of this order, would, in the judgment of the head of the agency, undermine the national security.



THE WHITE HOUSE,
October 9, 2019.

[FR Doc. 2019–22624
Filed 10–11–19; 11:15 am]
Billing code 3295–F0–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Parts 11, 300, and 302

49 CFR Parts 1, 5, 7, 106, 211, 389, 553, and 601

RIN 2105–AE84

Administrative Rulemaking, Guidance, and Enforcement Procedures

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

ACTION: Final rule.

SUMMARY: This final rule sets forth a comprehensive revision and update of the Department's regulations on rulemaking procedures and consolidates all of the Department's existing administrative procedures in one location. This final rule also incorporates and reflects the Department's current policies and procedures relating to the issuance of rulemaking documents. In addition, this update codifies the Department's internal procedural requirements governing the review and clearance of guidance documents and the initiation and conduct of enforcement actions, including administrative enforcement proceedings and judicial enforcement actions brought in Federal court.

DATES: Effective on January 27, 2020.

FOR FURTHER INFORMATION CONTACT: Jill Laptosky, Office of Regulation, Office of the General Counsel, 202–493–0308, *Jill.Laptosky@dot.gov.*

SUPPLEMENTARY INFORMATION: This final rule substantially incorporates three internal administrative procedure directives of the U.S. Department of Transportation (the Department or DOT) into one place in the Code of Federal Regulations (CFR) at 49 CFR part 5: (1) DOT Order 2100.6, ''Policies and Procedures for Rulemakings'' (December 20, 2018),[1] which sets forth updated policies and procedures governing the development and issuance of regulations by the Department's operating administrations and components of the Office of the Secretary; (2) a General Counsel memorandum, ''Review and Clearance of Guidance Documents'' (December 20, 2018),[2] which establishes enhanced procedures for the review and clearance of guidance documents; and (3) a General Counsel memorandum, ''Procedural Requirements for DOT Enforcement Actions'' (February 15, 2019),[3] which clarifies the procedural requirements governing enforcement actions initiated by the Department, including administrative enforcement proceedings and judicial enforcement actions brought in Federal court.

This final rule removes the existing procedures on rulemaking, which are outdated and inconsistent with current departmental practice, and replaces them with a comprehensive set of procedures that will increase transparency, provide for more robust public participation, and strengthen the overall quality and fairness of the Department's administrative actions. This final rule also responds to a December 20, 2018, petition for rulemaking that we received from the New Civil Liberties Alliance that asked the Department to promulgate regulations prohibiting departmental components from issuing, relying on, or defending improper agency guidance.

Rulemaking Procedures

This final rule incorporates into the Code of Federal Regulations at 49 CFR part 5, subpart B, the policies and procedures found in DOT Order 2100.6, titled: ''Policies and Procedures for Rulemakings.'' All citations to OST or OA regulations in this preamble refer to sections of the Code of Federal Regulations as amended by this final rule.

The procedures contained in this final rule apply to all phases of the Department's rulemaking process, from advance notices of proposed rulemakings to the promulgation of final rules, including substantive rules, rules of interpretation, and rules prescribing agency procedures and practice requirements applicable to outside parties. The final rule outlines the Department's regulatory policies, such as ensuring that there are no more regulations than necessary, that where they impose burdens, regulations are narrowly tailored to address identified market failures or statutory mandates, and that they specify performance objectives when appropriate. These and other policies applicable to the Department's rulemaking process can be found at 49 CFR 5.5.

This final rule reflects the existing role of the Department's Regulatory Reform Task Force in the development of the Department's regulatory portfolio and ongoing review of regulations. Established in response to Executive Order 13777, ''Enforcing the Regulatory Reform Agenda'' (February 24, 2017), the Regulatory Reform Task Force is the Department's internal body, chaired by the Regulatory Reform Officer, tasked with evaluating proposed and existing regulations and making recommendations to the Secretary of Transportation regarding their promulgation, repeal, replacement, or modification, consistent with applicable law. This final rule outlines the structure, membership, and responsibilities of the Regulatory Reform Task Force at 49 CFR 5.9.

This final rule also prescribes the procedures the Department must follow for all stages of the rulemaking process, including the initiation of new rulemakings, the development of economic analyses, the contents of rulemaking documents, their review and clearance, and the opportunity for fair and sufficient public participation. The final rule also reflects the Department's existing policies regarding contacts with outside parties during the rulemaking process as well as the ongoing review of existing regulations. These policies and procedures can be found at 49 CFR 5.11, 5.13, and 5.19.

Consistent with the Department's regulatory philosophy that rules imposing the greatest costs on the public should be subject to heightened procedural requirements, this final rule also incorporates the Department's enhanced procedures for economically significant and high-impact rulemakings. Economically significant rulemakings are defined as those rules that would result in a total annualized cost on the U.S. economy of $100 million or more, or a total net loss of at least 75,000 full-time jobs in the United States over 5 years. 49 CFR 5.17(a)(1). High-impact rulemakings would result in a total annualized cost on the U.S. economy of $500 million or more, or a total net loss of at least 250,000 full-time jobs in the United States over 5 years. 49 CFR 5.17(a)(2). These costly rulemakings may be subject to enhanced rulemaking procedures, such as advance notices of proposed rulemakings and formal hearings. The procedures for economically significant and high-impact rulemakings are provided at 49 CFR 5.17.

While much of part 5 is outdated in light of the Department's new

[1] See U.S. Department of Transportation, DOT Order 2100.6, ''Policies and Procedures for Rulemakings,'' available at *https://www.transportation.gov/regulations/2018-dot-rulemaking-order.*

[2] See U.S. Department of Transportation, ''Review and Clearance of Guidance Documents,'' available at *https://www.transportation.gov/regulations/2018-guidance-memorandum.*

[3] See U.S. Department of Transportation, ''Procedural Requirements for DOT Enforcement Actions,'' available at *https://www.transportation.gov/sites/dot.gov/files/docs/mission/administrations/office-general-counsel/331596/c1-mem-enforcement-actions-signed-21519.pdf.*

procedures, this final rule will retain and revise some procedures. The Department's existing procedures for the filing of rulemaking petitions will be retained (see 49 CFR 5.13(c)), though we are revising these regulations to give the public greater opportunities to petition the Department. In addition to petitions for rulemaking, our procedures will also explicitly allow the public to file petitions for the performance of retrospective regulatory reviews. With regard to direct final rules, the Department will be removing language that requires the withdrawal of a direct final rule if a notice of intent to file an adverse comment is received; instead withdrawal will be required upon the actual receipt of an adverse comment. Individuals who intend to file an adverse comment, but do not have enough time to do so, may instead ask the Department to extend the comment period of a direct final rule so that they may have more time to file an adverse comment. For this reason, the existing direct final rule procedures are unnecessarily duplicative of procedures that provide for requesting the extension of a comment period and can be removed in part 5 and elsewhere throughout the Department's regulations issued by its operating administrations.[4]

This rulemaking will update references throughout DOT regulations as needed to account for updated internal procedures. This final rule will revise the regulations at 14 CFR 300.2 to replace a reference to rescinded DOT Order 2100.2 with the current DOT Order 2100.6. This final rule also updates the procedures for petitions for rulemakings found in 14 CFR 302.16, including providing that interested parties may file petitions for the Department to perform retrospective reviews. Other minor conforming amendments are being made to our regulations at 49 CFR parts 1 and 7. Finally, given that this final rule codifies the DOT policy regarding contacts with outside parties during the rulemaking process (5 CFR 5.19), Appendix 1 to 14 CFR part 11, Oral Communications With the Public During Rulemaking, is no longer necessary and has been removed.

Guidance Document Procedures

This final rule incorporates into the Code of Federal Regulations at 49 CFR part 5, subpart C, the policies and procedures found in the General Counsel's memorandum, titled: ''Review and Clearance of Guidance Documents.''

The procedures contained in this final rule apply to all guidance documents, which the Department defines as any statement of agency policy or interpretation concerning a statute, regulation, or technical matter within the jurisdiction of the agency that is intended to have general applicability and future effect, but which is not intended to have the force or effect of law in its own right and is not otherwise required by statute to satisfy the rulemaking procedures of the Administrative Procedure Act.

This final rule codifies the Department's existing procedures regarding the review and clearance of guidance documents. These procedures ensure that all guidance documents receive legal review and, when appropriate, Office of the Secretary review. Before guidance documents are issued, they must be reviewed to ensure they are written in plain language and do not impose any substantive legal requirements above and beyond statute or regulation. If a guidance document purports to describe, approve, or recommend specific conduct that stretches beyond what is required by existing law, then it must include a clear and prominent statement effectively stating that the contents of the guidance document do not have the force and effect of law and are not meant to bind the public in any way, and the guidance document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. The procedures for the review and clearance of guidance documents can be found at 49 CFR 5.27, 5.29, and 5.35.

In recognition of the fact that, even though guidance documents are not legally binding, they could nevertheless have a substantial economic impact on regulated entities that alter their conduct to conform to the guidance, this final rule requires a good faith cost assessment of the impact of the guidance document. This policy is outlined at 49 CFR 5.33.

This final rule also incorporates other policies and procedures, such as describing when guidance documents are subject to notice and an opportunity for public comment and how they will be made available to the public after issuance. See 49 CFR 5.31 and 5.39. These procedures are intended to ensure that the public has access to guidance documents issued by the Department and a fair and sufficient opportunity to comment on guidance documents when appropriate and practicable. The final rule also provides a process for interested parties to petition the Department for the withdrawal or modification of guidance documents. See 49 CFR 5.43.

This final rule also responds to Executive Order 13891, titled: ''Promoting the Rule of Law Through Improved Agency Guidance Documents'' (October 9, 2019). In that Executive Order, Federal agencies are required to finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents.[5] This final rule incorporates requirements found in the Executive Order that were not otherwise provided for in the Department's existing procedures, primarily a requirement that the comment period for significant guidance documents be at least 30 days, except when the agency for good cause finds that notice and public comment are impracticable, unnecessary, or contrary to the public interest.[6]

Enforcement Procedures

This final rule incorporates into the Code of Federal Regulations at 49 CFR part 5, subpart D, the policies and procedures found in the General Counsel's memorandum, titled: ''Procedural Requirements for DOT Enforcement Actions.''

The procedures contained in this final rule clarify the procedural requirements governing enforcement actions initiated by DOT, including administrative enforcement proceedings and judicial enforcement actions brought in Federal court. The purpose of these procedural policies is to ensure that DOT enforcement actions satisfy principles of due process and remain lawful, reasonable, and consistent with Administration policy. The procedures also fulfill the Department's goal of establishing standard operating procedures within its various enforcement programs.

The final rule consolidates these procedural requirements into one centralized location. The Department is committed to proper due process in enforcement proceedings and encourages regulated entities to contact a supervisor or the U.S. Small Business Administration, when appropriate, with any concerns arising from our duty to review compliance with the Department's regulations related to our authority and jurisdiction.

[4] Direct final rule procedures for the following operating administrations are amended: Federal Aviation Administration, Pipeline and Hazardous Materials Safety Administration, Federal Railroad Administration, Federal Motor Carrier Safety Administration, National Highway Traffic Safety Administration, and Federal Transit Administration.

[5] See section 4(a) of Executive Order 13891.

[6] See section 4(a)(iii)(A) of Executive Order 13891.

This final rule ensures that DOT provides affected parties appropriate due process in all enforcement actions, that the Department's conduct is fair and free of bias and concludes with a well-documented decision as to violations alleged and any violations found to have been committed, that the penalties or corrective actions imposed for such violations are reasonable, and that proper steps needed to ensure future compliance were undertaken by the regulated party. It is in the public interest and fundamental to good government that the Department carry out its enforcement responsibilities in a fair and just manner.

This final rule also responds to Executive Order 13892, titled: ''Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication'' (October 9, 2019). Under that Executive Order, Federal agencies are required to provide more transparency to the regulated community when conducting enforcement actions and adjudications. This final rule incorporates requirements found in the Executive Order related to cooperative information sharing, the Small Business Regulatory Enforcement Fairness (SBREFA) Act, and ensuring reasonable administrative inspections.[7]

Administrative Procedure

Under the Administrative Procedure Act, an agency may waive the normal notice and comment procedures if the action is a rule of agency organization, procedure, or practice. See 5 U.S.C. 553(b)(3)(A). Since this final rule merely incorporates existing internal procedures applicable to the Department's administrative procedures into the Code of Federal Regulations, notice and comment are not necessary.

Rulemaking Analyses and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This rulemaking is not a significant regulatory action under Executive Order 12866. The Department does not anticipate that this rulemaking will have an economic impact on regulated entities. This is a rule of agency procedure and practice. The final rule describes the Department's existing internal procedures for the promulgation and processing of rulemaking and guidance documents, and for initiating and conducting enforcement proceedings. The Department has adopted these internal procedures as part of its regulatory reform initiative, and has not incurred any additional resource costs in doing so. The adoption of these practices has been accomplished through a realignment of existing agency resources, and it is anticipated that the public will benefit from the resulting increase in efficiency in delivery of government services.

This final rule compiles existing procedures on rulemaking as a comprehensive set of regulations that will increase accountability, ensure more robust public participation, and strengthen the overall quality and fairness of the Department's administrative actions. The Department has a long history of Federal leadership in adopting good regulatory practices, and this action is consistent with that history. While the direct impact of this rule has already been experienced internally to the Department in the form of streamlined and clarified regulatory processes, we expect additional secondary and positive impacts due to improved decision making. However, these additional impacts will be small because this rule, which has been substantively implemented, simply reflects the procedures that have evolved in response to new rulemaking demands.

Regulated entities and the public will continue to benefit from these enhanced procedures through increased agency deliberations and more opportunities to comment on rulemakings and guidance documents. With regard to the enforcement procedures, we anticipate that there will be no additional costs on regulated entities, as individual regulations already published by DOT agencies account for current costs of compliance. This final rule will simply clarify the internal DOT procedural requirements necessary to ensure fair and reasonable enforcement processes where violations are alleged to have occurred by the regulated community.

B. Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)

This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

C. Regulatory Flexibility Act

Since notice and comment rulemaking is not necessary for this rule, the provisions of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612) do not apply.

D. Executive Order 13132 (Federalism)

Executive Order 13132 requires agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct 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. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (August 4, 1999), and DOT has determined that this action will not have a substantial direct effect or federalism implications on the States and would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions. Therefore, consultation with the States is not necessary.

E. Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Because this rulemaking does not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13175 do not apply.

F. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that DOT consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. The DOT has determined there are no new information collection requirements associated with this final rule.

G. National Environmental Policy Act

The agency has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (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, October 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on

[7] See sections 7, 9, and 10, of Executive Order 13892.

the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). The purpose of this rulemaking is to update the Department's administrative procedures for rulemaking, guidance documents, and enforcement actions. The agency does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in the spring and fall of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects

14 CFR Part 11

Administrative practice and procedure, Reporting and recordkeeping requirements.

14 CFR Part 300

Administrative practice and procedure, Conflicts of interests.

14 CFR Part 302

Administrative practice and procedure, Air carriers, Airports, Postal Service.

49 CFR Part 1

Authority delegations (Government agencies), Organization and functions (Government agencies).

49 CFR Part 5

Administrative practice and procedure.

49 CFR Part 106

Administrative practice and procedure, Hazardous materials transportation.

49 CFR Part 211

Administrative practice and procedure, Railroad safety.

49 CFR Part 389

Administrative practice and procedure, Highway safety, Motor carriers, Motor vehicle safety.

49 CFR Part 553

Administrative practice and procedure, Motor vehicle safety.

49 CFR Part 601

Authority delegations (Government agencies), Freedom of information, Organization and functions (Government agencies).

Issued in Washington, DC, on December 3, 2019.

Elaine L. Chao,

Secretary.

In consideration of the foregoing, the Office of the Secretary of Transportation amends 14 CFR parts 11, 300, and 302 and 49 CFR parts 5, 106, 211, 389, 553, and 601, as follows:

Title 14—Aeronautics and Space

PART 11—GENERAL RULEMAKING PROCEDURES

■ 1. The authority citation for part 11 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40101, 40103, 40105, 40109, 40113, 44110, 44502, 44701–44702, 44711, 46102, and 51 U.S.C. 50901–50923.

■ 2. Amend § 11.13 by revising the last sentence to read as follows:

§ 11.13 What is a direct final rule?

* * * If we receive an adverse comment, we will either publish a document withdrawing the direct final rule before it becomes effective and may issue an NPRM, or proceed by any other means permitted under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.,* consistent with procedures at 49 CFR 5.13(l).

§ 11.31 [Amended]

■ 3. Amend § 11.31 by removing ''or notice of intent to file an adverse comment'' in paragraphs (a) introductory text, (b), and (c).

■ 4. Amend § 11.40 by revising the last sentence to read as follows:

§ 11.40 Can I get more information about a rulemaking?

* * * The Department of Transportation policy regarding public contacts during rulemaking appears at 49 CFR 5.19.

Appendix 1 to Part 11 [Removed]

■ 5. Remove appendix 1 to part 11.

PART 300—RULES OF CONDUCT IN DOT PROCEEDINGS UNDER THIS CHAPTER

■ 6. The authority citation for part 300 continues to read as follows:

Authority: 49 U.S.C. subtitle I and chapters 401, 411, 413, 415, 417, 419, 421, 449, 461, 463, and 465.

■ 7. Amend § 300.2 by revising paragraph (b)(4)(ii) to read as follows:

§ 300.2 Prohibited Communications.

* * * * *

(b) * * *

(4) * * *

(ii) A rulemaking proceeding involving a hearing as described in paragraph (b)(4)(i) of this section or an exemption proceeding covered by this chapter. (Other rulemaking proceedings are covered by the ex parte communication policies of DOT Order 2100.6 and 49 CFR 5.19.)

* * * * *

PART 302—RULES OF PRACTICE IN PROCEEDINGS

■ 8. The authority citation for part 302 continues to read as follows:

Authority: 39 U.S.C. 5402; 42 U.S.C. 4321, 49 U.S.C. Subtitle I and Chapters 401, 411, 413, 415, 417, 419, 461, 463, and 471.

■ 9. Revise § 302.16 to read as follows:

§ 302.16 Petitions for rulemaking.

Any interested person may petition the Department for the issuance, amendment, modification, or repeal of any regulation or guidance document, or for the Department to perform a retrospective review of an existing rule, subject to the provisions of part 5, Rulemaking Procedures, of the Office of the Secretary regulations (49 CFR 5.13(c) and 5.43).

Title 49—Transportation

PART 1—ORGANIZATION AND DELEGATION OF POWERS AND DUTIES

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

Authority: 49 U.S.C. 322.

■ 11. Amend § 1.27 by revising paragraph (e) to read as follows:

§ 1.27 Delegations to the General Counsel.

* * * * *

(e) Respond to petitions for rulemaking or petitions for exemptions in accordance with 49 CFR 5.13(c)(2) (Processing of petitions), and notify petitioners of decisions in accordance with 49 CFR 5.13(c)(4)(v).

* * * * *

■ 12. Revise part 5 to read as follows:

PART 5—ADMINISTRATIVE RULEMAKING, GUIDANCE, AND ENFORCEMENT PROCEDURES

Subpart A—GENERAL

Subpart B—Rulemaking Procedures

Authority: 49 U.S.C. 322(a).

Subpart A—General

§ 5.1 Applicability.

(a) This part prescribes general procedures that apply to rulemakings, guidance documents, and enforcement actions of the U.S. Department of Transportation (the Department or DOT), including each of its operating administrations (OAs) and all components of the Office of Secretary of Transportation (OST).

(b) For purposes of this part, *Administrative Procedure Act (APA)* is the Federal statute, codified in scattered sections of chapters 5 and 7 of title 5, United States Code, that governs procedures for agency rulemaking and adjudication and provides for judicial review of final agency actions.

Subpart B—Rulemaking Procedures

§ 5.3 General.

(a) This subpart governs all DOT employees and contractors involved with all phases of rulemaking at DOT.

(b) Unless otherwise required by statute, this subpart applies to all DOT regulations, which shall include all rules of general applicability promulgated by any components of the Department that affect the rights or obligations of persons outside the Department, including substantive rules, rules of interpretation, and rules prescribing agency procedures and practice requirements applicable to outside parties.

(c) Except as provided in paragraph (d) of this section, this subpart applies to all regulatory actions intended to lead to the promulgation of a rule and any other generally applicable agency directives, circulars, or pronouncements concerning matters within the jurisdiction of an OA or component of OST that are intended to have the force or effect of law or that are required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. 553 or 5 U.S.C. 556.

(d) This subpart does not apply to:

(1) Any rulemaking in which a notice of proposed rulemaking was issued before December 20, 2018, and which was still in progress on that date;

(2) Regulations issued with respect to a military or foreign affairs function of the United States;

(3) Rules addressed solely to internal agency management or personnel matters;

(4) Regulations related to Federal Government procurement; or

(5) Guidance documents, which are not intended to, and do not in fact, have the force or effect of law for parties outside of the Department, and which are governed by part 5, subpart C of this chapter.

§ 5.5 Regulatory policies.

The policies in paragraphs (a) through (j) of this section govern the development and issuance of regulations at DOT:

(a) There should be no more regulations than necessary. In considering whether to propose a new regulation, policy makers should consider whether the specific problem to be addressed requires agency action, whether existing rules (including standards incorporated by reference) have created or contributed to the problem and should be revised or eliminated, and whether any other reasonable alternatives exist that obviate the need for a new regulation.

(b) All regulations must be supported by statutory authority and consistent with the Constitution.

(c) Where they rest on scientific, technical, economic, or other specialized factual information, regulations should be supported by the best available evidence and data.

(d) Regulations should be written in plain English, should be straightforward, and should be clear.

(e) Regulations should be technologically neutral, and, to the extent feasible, they should specify performance objectives, rather than prescribing specific conduct that regulated entities must adopt.

(f) Regulations should be designed to minimize burdens and reduce barriers to market entry whenever possible, consistent with the effective promotion of safety. Where they impose burdens, regulations should be narrowly tailored to address identified market failures or specific statutory mandates.

(g) Unless required by law or compelling safety need, regulations should not be issued unless their benefits are expected to exceed their costs. For each new significant regulation issued, agencies must identify at least two existing regulatory burdens to be revoked.

(h) Once issued, regulations and other agency actions should be reviewed periodically and revised to ensure that they continue to meet the needs they were designed to address and remain cost-effective and cost-justified.

(i) Full public participation should be encouraged in rulemaking actions, primarily through written comment and engagement in public meetings. Public participation in the rulemaking process should be conducted and documented, as appropriate, to ensure that the public is given adequate knowledge of

substantive information relied upon in the rulemaking process.

(j) The process for issuing a rule should be sensitive to the economic impact of the rule; thus, the promulgation of rules that are expected to impose greater economic costs should be accompanied by additional procedural protections and avenues for public participation.

§ 5.7 Responsibilities.

(a) The Secretary of Transportation supervises the overall planning, direction, and control of the Department's Regulatory Agenda; approves regulatory documents for issuance and submission to the Office of Management and Budget (OMB) under Executive Order (E.O.) 12866, ''Regulatory Planning and Review'' (Oct. 4, 1993); identifies an approximate regulatory budget for each fiscal year as required by E.O. 13771, ''Reducing Regulation and Controlling Regulatory Costs'' (Jan. 30, 2017); establishes the Department's Regulatory Reform Task Force (RRTF); and designates the members of the RRTF and the Department's Regulatory Reform Officer (RRO) in accordance with E.O. 13777, ''Enforcing the Regulatory Reform Agenda'' (Feb. 24, 2017).

(b) The Deputy Secretary of Transportation assists the Secretary in overseeing overall planning, direction, and control of the Department's Regulatory Agenda and approves the initiation of regulatory action, as defined in E.O. 12866, by the OAs and components of OST. Unless otherwise designated by the Secretary, the Deputy Secretary serves as the Chair of the Leadership Council of the RRTF and as the Department's RRO.

(c) The General Counsel of DOT is the chief legal officer of the Department with final authority on all questions of law for the Department, including the OAs and components of OST; serves on the Leadership Council of the RRTF; and serves as the Department's Regulatory Policy Officer pursuant to section 6(a)(2) of E.O. 12866.

(d) The RRO of DOT is delegated authority by the Secretary to oversee the implementation of the Department's regulatory reform initiatives and policies to ensure the effective implementation of regulatory reforms, consistent with E.O. 13777 and applicable law.

(e) DOT's noncareer Deputy General Counsel is a member of the RRTF and serves as the Chair of the RRTF Working Group.

(f) DOT's Assistant General Counsel for Regulation supervises the Office of Regulation within the Office of the General Counsel (OGC); oversees the process for DOT rulemakings; provides legal advice on compliance with APA and other administrative law requirements and executive orders, related OMB directives, and other procedures for rulemaking and guidance documents; circulates regulatory documents for departmental review and seeks concurrence from reviewing officials; submits regulatory documents to the Secretary for approval before issuance or submission to OMB; coordinates with the Office of Information and Regulatory Affairs (OIRA) within OMB on the designation and review of regulatory documents and the preparation of the Unified Agenda of Regulatory and Deregulatory Actions; publishes the monthly internet report on significant rulemakings; and serves as a member of the RRTF Working Group.

(g) Pursuant to delegations from the Secretary under part 1 of this title, OA Administrators and Secretarial officers exercise the Secretary's rulemaking authority under 49 U.S.C. 322(a), and they have responsibility for ensuring that the regulatory data included in the Regulatory Management System (RMS), or a successor data management system, for their OAs and OST components is accurate and is updated at least once a month.

(h) OA Chief Counsels supervise the legal staffs of the OAs; interpret and provide guidance on all statutes, regulations, executive orders, and other legal requirements governing the operation and authorities of their respective OAs; and review all rulemaking documents for legal sufficiency.

(i) Each OA or OST component responsible for rulemaking will have a Regulatory Quality Officer, designated by the Administrator or Secretarial office head, who will have responsibility for reviewing all rulemaking documents for plain language, technical soundness, and general quality.

§ 5.9 Regulatory Reform Task Force.

(a) *Purpose.* The Regulatory Reform Task Force (RRTF) evaluates proposed and existing regulations and makes recommendations to the Secretary regarding their promulgation, repeal, replacement, or modification, consistent with applicable law, E.O. 13777, E.O. 13771, and E.O. 12866.

(b) *Structure.* The RRTF comprises a Leadership Council and a Working Group.

(1) The Working Group coordinates with leadership in the Secretarial offices and OAs, reviews and develops recommendations for regulatory and deregulatory action, and presents recommendations to the Leadership Council.

(2) The Leadership Council reviews the Working Group's recommendations and advises the Secretary.

(c) *Membership.* (1) The Leadership Council comprises the following:

(i) The Regulatory Reform Officer (RRO), who serves as Chair;

(ii) The Department's Regulatory Policy Officer, designated under section 6(a)(2) of E.O. 12866;

(iii) A representative from the Office of the Under Secretary of Transportation for Policy;

(iv) At least three additional senior agency officials as determined by the Secretary.

(2) The Working Group comprises the following:

(i) At least one senior agency official from the Office of the General Counsel, including at a minimum the Assistant General Counsel for Regulation, as determined by the RRO;

(ii) At least one senior agency official from the Office of the Under Secretary of Transportation for Policy, as determined by the RRO;

(iii) Other senior agency officials from the Office of the Secretary, as determined by the RRO.

(d) *Functions and responsibilities.* In addition to the functions and responsibilities enumerated in E.O. 13777, the RRTF performs the following duties:

(1) Reviews each request for a new rulemaking action initiated by an OA or OST component; and

(2) Considers each regulation and regulatory policy question (which may include proposed guidance documents) referred to it and makes a recommendation to the Secretary for its disposition.

(e) *Support.* The Office of Regulation within OGC provides support to the RRTF.

(f) *Meetings.* The Leadership Council meets approximately monthly and will hold specially scheduled meetings when necessary to address particular regulatory matters. The Working Group meets approximately monthly with each OA and each component of OST with regulatory authority, and the Working Group may establish subcommittees, as appropriate, to focus on specific regulatory matters.

(g) *Agenda.* The Office of Regulation prepares an agenda for each meeting and distributes it to the members in advance of the meeting, together with any documents to be discussed at the meeting. The OA or OST component responsible for matters on the agenda

will be invited to attend to respond to questions.

(h) *Minutes.* The Office of Regulation prepares summary minutes following each meeting and distributes them to the meeting's attendees.

§ 5.11 Initiating a rulemaking.

(a) Before an OA or component of OST may proceed to develop a regulation, the Administrator of the OA or the Secretarial officer who heads the OST component must consider the regulatory philosophy and principles of regulation identified in section 1 of E.O. 12866 and the policies set forth in § 5.5 of this subpart. If the OA Administrator or OST component head determines that rulemaking is warranted consistent with those policies and principles, the Administrator or component head may prepare a Rulemaking Initiation Request.

(b) The Rulemaking Initiation Request should specifically state or describe:

(1) A proposed title for the rulemaking;

(2) The need for the regulation, including a description of the market failure or statutory mandate necessitating the rulemaking;

(3) The legal authority for the rulemaking;

(4) Whether the rulemaking is expected to be regulatory or deregulatory;

(5) Whether the rulemaking is expected to be significant or nonsignificant, as defined by E.O. 12866;

(6) Whether the final rule in question is expected to be an economically significant rule or high-impact rule, as defined in § 5.17(a) of this subpart;

(7) A description of the economic impact associated with the rulemaking, including whether the rulemaking is likely to impose quantifiable costs or cost savings;

(8) The tentative target dates for completing each stage of the rulemaking; and

(9) Whether there is a statutory or judicial deadline, or some other urgency, associated with the rulemaking.

(c) The OA or OST component submits the Rulemaking Initiation Request to the Office of Regulation, together with any other documents that may assist in the RRTF's consideration of the request.

(d) The Office of Regulation includes the Rulemaking Initiation Request on the agenda for consideration at the OA's or OST component's next Working Group meeting.

(e) If the Working Group recommends the approval of the Rulemaking Initiation Request, then the Request is referred to the Leadership Council for consideration. In lieu of consideration at a Leadership Council meeting, the Working Group, at its discretion, may submit a memorandum to the RRO seeking approval of the Rulemaking Initiation Request.

(f) The OA or OST component may assign a Regulatory Information Number (RIN) to the rulemaking only upon the Leadership Council's (or RRO's) approval of the Rulemaking Initiation Request.

(g) The Secretary may initiate a rulemaking on his or her own motion. The process for initiating a rulemaking as described herein may be waived or modified for any rule with the approval of the RRO. Unless otherwise determined by the RRO, the Administrator of the Federal Aviation Administration (FAA) may promulgate an emergency rule under 49 U.S.C. 106(f)(3)(B)(ii) or 49 U.S.C. 46105(c), without first submitting a Rulemaking Initiation Request.

(h) Rulemaking Initiation Requests will be considered on a rolling basis; however, the Office of Regulation will establish deadlines for submission of Rulemaking Initiation Requests so that new rulemakings may be included in the Unified Agenda of Regulatory and Deregulatory Actions.

§ 5.13 General rulemaking procedures.

(a) *Definitions*—(1) *Significant rulemaking* means a regulatory action designated by OIRA under E.O. 12866 as likely to result in a rule that may:

(i) Have an annual effect on the U.S. economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

(2) *Nonsignificant rulemaking* means a regulatory action not designated significant by OIRA.

(b) *Departmental review process.* (1) OST review and clearance.

(i) Except as provided herein or as otherwise provided in writing by OGC, all departmental rulemakings are to be reviewed and cleared by the Office of the Secretary.

(ii) The FAA Administrator may promulgate emergency rules pursuant to 49 U.S.C. 106(f)(3)(B)(ii) and 49 U.S.C. 46105(c), without prior approval from OST; provided that, to the maximum extent practicable and consistent with law, the FAA Administrator will give OST advance notice of such emergency rules and will allow OST to review the rules in accordance with the provisions of this subpart at the earliest opportunity after they are promulgated.

(2) Leadership within the proposing OA or component of OST shall:

(i) Ensure that the OA's or OST component's Regulatory Quality Officer reviews all rulemaking documents for plain language, technical soundness, and general quality;

(ii) Ensure that the OA's Office of Chief Counsel (or for OST rules, the Office within OGC responsible for providing programmatic advice) reviews all rulemaking documents for legal support and legal sufficiency; and

(iii) Approve the submission of all rulemaking documents, including any accompanying analyses (*e.g.,* regulatory impact analysis), to the Office of Regulation through the Regulatory Management System (RMS), or a successor data management system, for OST review and clearance.

(3) To effectuate departmental review under this subpart, the following Secretarial offices ordinarily review and approve DOT rulemakings: The Office of the Under Secretary for Policy, the Office of Public Affairs, the Office of Budget and Programs and Chief Financial Officer, OGC, and the Office of Governmental Affairs. The Office of Regulation may also require review and clearance by other Secretarial offices and OAs depending on the nature of the particular rulemaking document.

(4) Reviewing offices should provide comments or otherwise concur on rulemaking documents within 7 calendar days, unless exceptional circumstances apply that require expedited review.

(5) The Office of Regulation provides a passback of comments to the proposing OA or OST component for resolution. Comments should be resolved and a revised draft submitted to the Office of Regulation by the OA or OST component within 14 calendar days.

(6) The Office of Regulation prepares a rulemaking package for the General Counsel to request the Secretary's approval for the rulemaking to be submitted to OMB for review (for significant rulemakings) or to the **Federal Register** for publication (for

nonsignificant rulemakings). These rulemaking packages are submitted through the General Counsel to the Office of the Executive Secretariat.

(7) The Office of Regulation notifies the proposing OA or OST component when the Secretary approves or disapproves the submission of the rulemaking to OMB or to the **Federal Register**.

(8) The Office of Regulation is responsible for coordination with OIRA staff on the designation of all rulemaking documents, submission and clearance of all significant rulemaking documents, and all discussions or meetings with OMB concerning these documents. OAs and OST components should not schedule their own meetings with OIRA without Office of Regulation involvement. Each OA or OST component should coordinate with the Office of Regulation before holding any discussions with OIRA concerning regulatory policy or requests to modify regulatory documents.

(c) *Petitions for rulemaking, exemption, and retrospective review.* (1) Any person may petition an OA or OST component with rulemaking authority to:

(i) Issue, amend, or repeal a rule;

(ii) Issue an exemption, either permanently or temporarily, from any requirements of a rule; or

(iii) Perform a retrospective review of an existing rule.

(2) When an OA or OST component receives a petition under this paragraph (c), the petition should be filed with the Docket Clerk in a timely manner. If a petition is filed directly with the Docket Clerk, the Docket Clerk will submit the petition in a timely manner to the OA or component of OST with regulatory responsibility over the matter described in the petition.

(3) The OA or component of OST should provide clear instructions on its website to members of the public regarding how to submit petitions, including, but not limited to, an email address or Web portal where petitions can be submitted, a mailing address where hard copy requests can be submitted, and an office responsible for coordinating such requests.

(4) Unless otherwise provided by statute or in OA regulations or procedures, the following procedures apply to the processing of petitions for rulemaking, exemption, or retrospective review:

(i) *Contents.* Each petition filed under this section must:

(A) Be submitted, either by paper submission or electronically, to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590;

(B) Describe the nature of the request and set forth the text or substance of the rule or specify the rule that the petitioner seeks to have issued, amended, exempted, repealed, or retrospectively reviewed, as the case may be;

(C) Explain the interest of the petitioner in the action requested, including, in the case of a petition for an exemption, the nature and extent of the relief sought and a description of the persons to be covered by the exemption;

(D) Contain any information and arguments available to the petitioner to support the action sought; and

(E) In the case of a petition for exemption, unless good cause is shown in that petition, be submitted at least 60 days before the proposed effective date of the exemption.

(ii) *Processing.* Each petition received under this paragraph (c) is referred to the head of the office responsible for the subject matter of that petition, the Office of Regulation, and the RRO. No public hearing, argument, or other proceeding must necessarily be held directly on a petition for its disposition under this section.

(iii) *Grants.* If the OA or component of OST with regulatory responsibility over the matter described in the petition determines that the petition contains adequate justification, it may request the initiation of a rulemaking action under § 5.11 or grant the petition, as appropriate.

(iv) *Denials.* If the OA or component of OST determines that the petition is not justified, the OA or component of OST denies the petition in coordination with the Office of Regulation.

(v) *Notification.* Whenever the OA or OST component determines that a petition should be granted or denied, and after consultation with the Office of Regulation in the case of denial, the office concerned prepares a notice of that grant or denial for issuance to the petitioner, and issues it to the petitioner.

(d) *Review of existing regulations.* (1) All departmental regulations are on a 10-year review cycle, except economically significant and high-impact rules, which are reviewed every 5 years in accordance with § 5.17(f) of this subpart.

(2) The OA or OST component that issued the regulation will review it for the following:

(i) *Continued cost justification*: Whether the regulation requires adjustment due to changed market conditions or is no longer cost-effective or cost-justified in accordance with § 5.5(h);

(ii) *Regulatory flexibility*: Whether the regulation has a significant economic impact on a substantial number of small entities and, thus, requires review under 5 U.S.C. 610 (section 610 of the Regulatory Flexibility Act);

(iii) *Innovation*: Whether there are new or emerging technologies, especially those that could achieve current levels of safety at the same or lower levels of cost or achieve higher levels of safety, use of which is precluded or limited by the regulation.

(iv) *General updates*: Whether the regulation may require technical corrections, updates (*e.g.,* updated versions of voluntary consensus standards), revisions, or repeal;

(v) *Plain language*: Whether the regulation requires revisions for plain language; and

(vi) Other considerations as required by relevant executive orders and laws.

(3) The results of each OA's or OST component's review will be reported annually to the public.

(4) Any member of the public may petition the Department to conduct a retrospective review of a regulation by filing a petition in accordance with the procedures contained in paragraph (c) of this section.

(e) *Supporting economic analysis.* (1) Rulemakings shall include, at a minimum:

(i) An assessment of the potential costs and benefits of the regulatory action (which may entail a regulatory impact analysis) or a reasoned determination that the expected impact is so minimal or the safety need so significant and urgent that a formal analysis of costs and benefits is not warranted; and

(ii) If the regulatory action is expected to impose costs, either a reasoned determination that the benefits outweigh the costs or, if the particular rulemaking is mandated by statute or compelling safety need notwithstanding a negative cost-benefit assessment, a detailed discussion of the rationale supporting the specific regulatory action proposed and an explanation of why a less costly alternative is not an option.

(2) To the extent practicable, economic assessments shall quantify the foreseeable annual economic costs and cost savings within the United States that would likely result from issuance of the proposed rule and shall be conducted in accordance with the requirements of sections 6(a)(2)(B) and 6(a)(2)(C) of E.O. 12866 and OMB Circular A–4, as specified by OIRA in consultation with the Office of Regulation. If the proposing OA or OST

component has estimated that the proposed rule will likely impose economic costs on persons outside the United States, such costs should be reported separately.

(3) Deregulatory rulemakings (including nonsignificant rulemakings) shall be evaluated for quantifiable cost savings. If it is determined that quantification of cost savings is not possible or appropriate, then the proposing OA or OST component shall provide a detailed justification for the lack of quantification upon submission of the rulemaking to the Office of Regulation. Other nonsignificant rulemakings shall include, at a minimum, the economic cost-benefit analysis described in paragraph (e)(1) of this section.

(f) *Regulatory flexibility analysis.* All rulemakings subject to the requirements of 5 U.S.C. 603–604 (sections 603–604 of the Regulatory Flexibility Act), and any amendment thereto, shall include a detailed statement setting forth the required analysis regarding the potential impact of the rule on small business entities.

(g) *Advance notices of proposed rulemaking.* Whenever the OA or OST component responsible for a proposed rulemaking is required to publish an advance notice of proposed rulemaking (ANPRM) in the **Federal Register**, or whenever the RRTF determines it appropriate to publish an ANPRM, the ANPRM shall:

(1) Include a written statement identifying, at a minimum:

(i) The nature and significance of the problem the OA or OST component may address with a rule;

(ii) The legal authority under which a rule may be proposed; and

(iii) Any preliminary information available to the OA or OST component that may support one or another potential approach to addressing the identified problem;

(2) Solicit written data, analysis, views, and recommendations from interested persons concerning the information and issues addressed in the ANPRM; and

(3) Provide for a reasonably sufficient period for public comment.

(h) *Notices of proposed rulemaking*—(1) *When required.* Before determining to propose a rule, and following completion of the ANPRM process under paragraph (g) of this section, if applicable, the responsible OA or OST component shall consult with the RRTF concerning the need for the potential rule. If the RRTF thereafter determines it appropriate to propose a rule, the proposing OA or OST component shall publish a notice of proposed rulemaking (NPRM) in the **Federal Register**, unless a controlling statute provides otherwise or unless the RRTF (in consultation with OIRA, as appropriate) determines that an NPRM is not necessary under established exceptions.

(2) *Contents.* The NPRM shall include, at a minimum:

(i) A statement of the time and place for submission of public comments and the time, place, and nature of related public rulemaking proceedings, if any;

(ii) Reference to the legal authority under which the rule is proposed;

(iii) The terms of the proposed rule;

(iv) A description of information known to the proposing OA or OST component on the subject and issues of the proposed rule, including but not limited to:

(A) A summary of material information known to the OA or OST component concerning the proposed rule and the considerations specified in § 5.11(a) of this subpart;

(B) A summary of any preliminary risk assessment or regulatory impact analysis performed by the OA or OST component; and

(C) Information specifically identifying all material data, studies, models, available voluntary consensus standards and conformity assessment requirements, and other evidence or information considered or used by the OA or OST component in connection with its determination to propose the rule;

(v) A reasoned preliminary analysis of the need for the proposed rule based on the information described in the preamble to the NPRM, and an additional statement of whether a rule is required by statute;

(vi) A reasoned preliminary analysis indicating that the expected economic benefits of the proposed rule will meet the relevant statutory objectives and will outweigh the estimated costs of the proposed rule in accordance with any applicable statutory requirements;

(vii) If the rulemaking is significant, a summary discussion of:

(A) The alternatives to the proposed rule considered by the OA or OST component;

(B) The relative costs and benefits of those alternatives;

(C) Whether the alternatives would meet relevant statutory objectives; and

(D) Why the OA or OST component chose not to propose or pursue the alternatives;

(viii) A statement of whether existing rules have created or contributed to the problem the OA or OST component seeks to address with the proposed rule, and, if so, whether or not the OA or OST component proposes to amend or rescind any such rules and why; and

(ix) All other statements and analyses required by law, including, without limitation, the Regulatory Flexibility Act (5 U.S.C. 601–612) or any amendment thereto.

(3) *Information access and quality.* (i) To inform public comment when the NPRM is published, the proposing OA or OST component shall place in the docket for the proposed rule and make accessible to the public, including by electronic means, all material information relied upon by the OA or OST component in considering the proposed rule, unless public disclosure of the information is prohibited by law or the information would be exempt from disclosure under 5 U.S.C. 552(b). Material provided electronically should be made available in accordance with the requirements of 29 U.S.C. 794d (section 508 of the Rehabilitation Act of 1973, as amended).

(ii) If the proposed rule rests upon scientific, technical, or economic information, the proposing OA or OST component shall base the proposal on the best and most relevant scientific, technical, and economic information reasonably available to the Department and shall identify the sources and availability of such information in the NPRM.

(iii) A single copy of any relevant copyrighted material (including consensus standards and other relevant scientific or technical information) should be placed in the docket for public review if such material was relied on as a basis for the rulemaking.

(i) *Public comment.* (1) Following publication of an NPRM, the Department will provide interested persons a fair and sufficient opportunity to participate in the rulemaking through submission of written data, analysis, views, and recommendations.

(2) The Department, in coordination with OIRA for significant rulemakings, will ensure that the public is given an adequate period for comment, taking into account the scope and nature of the issues and considerations involved in the proposed regulatory action.

(3) Generally, absent special considerations, the comment period for nonsignificant DOT rules should be at least 30 days, and the comment period for significant DOT rules should be at least 45 days.

(4) Any person may petition the responsible OA or OST component for an extension of time to submit comments in response to a notice of proposed rulemaking. Petitions must be received no later than 3 days before the expiration of the time stated in the notice. The filing of the petition does not automatically extend the time for

comments. The OA or OST component may grant the petition only if the petitioner shows a substantive interest in the proposed rule and good cause for the extension, or if the extension is otherwise in the public interest. If an extension is granted, it is granted as to all persons and published in the **Federal Register**.

(5) All timely comments are considered before final action is taken on a rulemaking proposal. Late-filed comments may be considered so far as possible without incurring additional expense or delay.

(j) *Exemptions from notice and comment.* (1) Except when prior notice and an opportunity for public comment are required by statute or determined by the Secretary to be advisable for policy or programmatic reasons, the responsible OA or OST component may, subject to the approval of the RRTF (in consultation with OIRA, as appropriate), publish certain final rules in the **Federal Register** without prior notice and comment. These may include:

(i) Rules of interpretation and rules addressing only DOT organization, procedure, or practice, provided such rules do not alter substantive obligations for parties outside the Department;

(ii) Rules for which notice and comment is unnecessary to inform the rulemaking, such as rules correcting de minimis technical or clerical errors or rules addressing other minor and insubstantial matters, provided the reasons to forgo public comment are explained in the preamble to the final rule; and

(iii) Rules that require finalization without delay, such as rules to address an urgent safety or national security need, and other rules for which it would be impracticable or contrary to public policy to accommodate a period of public comment, provided the responsible OA or OST component makes findings that good cause exists to forgo public comment and explains those findings in the preamble to the final rule.

(2) Except when required by statute, issuing substantive DOT rules without completing notice and comment, including as interim final rules (IFRs) and direct final rules (DFRs), must be the exception. IFRs and DFRs are not favored. DFRs must follow the procedures in paragraph (l) of this section. In most cases where an OA or OST component has issued an IFR, the RRTF will expect the OA or OST component to proceed at the earliest opportunity to replace the IFR with a final rule.

(k) *Final rules.* The responsible OA or OST component shall adopt a final rule only after consultation with the RRTF. The final rule, which shall include the text of the rule as adopted along with a supporting preamble, shall be published in the **Federal Register** and shall satisfy the following requirements:

(1) The preamble to the final rule shall include:

(i) A concise, general statement of the rule's basis and purpose, including clear reference to the legal authority supporting the rule;

(ii) A reasoned, concluding determination by the adopting OA or OST component regarding each of the considerations required to be addressed in an NPRM under paragraphs (h)(2)(v) through (ix) of this section;

(iii) A response to each significant issue raised in the comments to the proposed rule;

(iv) If the final rule has changed in significant respects from the rule as proposed in the NPRM, an explanation of the changes and the reasons why the changes are needed or are more appropriate to advance the objectives identified in the rulemaking; and

(v) A reasoned, final determination that the information upon which the OA or OST component bases the rule complies with the Information Quality Act (section 515 of Pub. L. 106–554—Appendix C, 114 Stat. 2763A–153–54 (2001)), or any subsequent amendment thereto.

(2) If the rule rests on scientific, technical, economic, or other specialized factual information, the OA or OST component shall base the final rule on the best and most relevant evidence and data known to the Department and shall ensure that such information is clearly identified in the preamble to the final rule and is available to the public in the rulemaking record, subject to reasonable protections for information exempt from disclosure under 5 U.S.C. 552(b). If the OA or OST component intends to support the final rule with specialized factual information identified after the close of the comment period, the OA or OST component shall allow an additional opportunity for public comment on such information.

(3) All final rules issued by the Department:

(i) Shall be written in plain and understandable English;

(ii) Shall be based on a reasonable and well-founded interpretation of relevant statutory text and shall not depend upon a strained or unduly broad reading of statutory authority; and

(iii) Shall not be inconsistent or incompatible with, or unnecessarily duplicative of, other Federal regulations.

(4) Effective dates for final rules must adhere to the following:

(i) Unless required to address a safety emergency or otherwise required by law, approved by the RRTF (or RRO), or approved by the Director of OMB (as appropriate), no regulation may be issued by an OA or component of OST if it was not included on the most recent version or update of the published Unified Agenda.

(ii) No significant regulatory action may take effect until it has appeared in either the Unified Agenda or the monthly internet report of significant rulemakings for at least 6 months prior to its issuance, unless good cause exists for an earlier effective date or the action is otherwise approved by the RRTF (or RRO).

(iii) Absent good cause, major rules (as defined by the Congressional Review Act, 5 U.S.C. 801–808) cannot take effect until 60 days after publication in the **Federal Register** or submission to Congress, whichever is later. Nonmajor rules cannot take effect any sooner than submission to Congress.

(l) *Direct final rules.* (1) Rules that the OA or OST component determines to be noncontroversial and unlikely to result in adverse public comment may be published as direct final rules. These include noncontroversial rules that:

(i) Affect internal procedures of the Department, such as filing requirements and rules governing inspection and copying of documents,

(ii) Are nonsubstantive clarifications or corrections to existing rules,

(iii) Update existing forms,

(iv) Make minor changes in the substantive rules regarding statistics and reporting requirements,

(v) Make changes to the rules implementing the Privacy Act, or

(vi) Adopt technical standards set by outside organizations.

(2) The **Federal Register** document will state that any adverse comment must be received in writing by the OA or OST component within the specified time after the date of publication and that, if no written adverse comment is received, the rule will become effective a specified number of days after the date of publication.

(3) If no written adverse comment is received by the OA or OST component within the original or extended comment period, the OA or OST component will publish a notice in the **Federal Register** indicating that no adverse comment was received and confirming that the rule will become effective on the date that was indicated in the direct final rule.

(4) If the OA or OST component receives any written adverse comment

within the specified time of publication in the **Federal Register**, the OA or OST component may proceed as follows:

(i) Publish a document withdrawing the direct final rule in the rules and regulations section of the **Federal Register** and, if the OA or OST component decides a rulemaking is warranted, a proposed rule; or

(ii) Any other means permitted under the Administrative Procedure Act. (5) An ''adverse'' comment for the purpose of this subpart means any comment that the OA or OST component determines is critical of the rule, suggests that the rule should not be adopted or suggests a material change that should be made in the rule. A comment suggesting that the policy or requirements of the rule should or should not also be extended to other Departmental programs outside the scope of the rule is not adverse. A notice of intent to submit an adverse comment is not, in and of itself, an adverse comment.

(m) *Reports to Congress and GAO.* For each final rule adopted by DOT, the responsible OA or OST component shall submit the reports to Congress and the U.S. Government Accountability Office to comply with the procedures specified by 5 U.S.C. 801 (the Congressional Review Act), or any subsequent amendment thereto.

(n) *Negotiated rulemakings.* (1) DOT negotiated rulemakings are to be conducted in accordance with the Negotiated Rulemaking Act, 5 U.S.C. 561–571, and the Federal Advisory Committee Act, 5 U.S.C. App. 2, as applicable.

(2) Before initiating a negotiated rulemaking process, the OA or OST component should:

(i) Assess whether using negotiated rulemaking procedures for the proposed rule in question is in the public interest, in accordance with 5 U.S.C. 563(a), and present these findings to the RRTF;

(ii) Consult with the Office of Regulation on the appropriateness of negotiated rulemaking and the procedures therefor; and

(iii) Receive the approval of the RRTF for the use of negotiated rulemaking.

(3) Unless otherwise approved by the General Counsel, all DOT negotiated rulemakings should involve the assistance of a convener and a facilitator, as provided in the Negotiated Rulemaking Act. A convener is a person who impartially assists the agency in determining whether establishment of a negotiated rulemaking committee is feasible and appropriate in a particular rulemaking. A facilitator is a person who impartially aids in the discussions and negotiations among members of a negotiated rulemaking committee to develop a proposed rule. The same person may serve as both convener and facilitator.

(4) All charters, membership appointments, and **Federal Register** notices must be approved by the Secretary. Any operating procedures (*e.g.,* bylaws) for negotiated rulemaking committees must be approved by OGC.

§ 5.15 Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda).

(a) Fall editions of the Unified Agenda include the Regulatory Plan, which presents the Department's statement of regulatory priorities for the coming year. Fall editions also include the outcome and status of the Department's reviews of existing regulations, conducted in accordance with § 5.13(d).

(b) The OAs and components of OST with rulemaking authority must:

(1) Carefully consider the principles contained in E.O. 13771, E.O. 13777, and E.O. 12866 in the preparation of all submissions for the Unified Agenda;

(2) Ensure that all data pertaining to the OA's or OST component's regulatory and deregulatory actions are accurately reflected in the Department's Unified Agenda submission; and

(3) Timely submit all data to the Office of Regulation in accordance with the deadlines and procedures communicated by that office.

§ 5.17 Special procedures for economically significant and high-impact rulemakings.

(a) *Definitions*—(1) *Economically significant rule* means a significant rule likely to impose:

(i) A total annual cost on the U.S. economy (without regard to estimated benefits) of $100 million or more, or

(ii) A total net loss of at least 75,000 full-time jobs in the U.S. over the five years following the effective date of the rule (not counting any jobs relating to new regulatory compliance).

(2) *High-impact rule* means a significant rule likely to impose:

(i) A total annual cost on the U.S. economy (without regard to estimated benefits) of $500 million or more, or

(ii) A total net loss of at least 250,000 full-time jobs in the U.S. over the five years following the effective date of the rule (not counting any jobs relating to new regulatory compliance).

(b) *ANPRM required.* Unless directed otherwise by the RRTF or otherwise required by law, in the case of a rulemaking for an economically significant rule or a high-impact rule, the proposing OA or OST component shall publish an ANPRM in the **Federal Register**.

(c) *Additional requirements for NPRM.* (1) In addition to the requirements set forth in § 5.13, an NPRM for an economically significant rule or a high-impact rule shall include a discussion explaining an achievable objective for the rule and the metrics by which the OA or OST component will measure progress toward that objective.

(2) Absent unusual circumstances and unless approved by the RRTF (in consultation with OIRA, as appropriate), the comment period for an economically significant rule shall be at least 60 days and for a high-impact rule at least 90 days. If a rule is determined to be an economically significant rule or high-impact rule after the publication of the NPRM, the responsible OA or OST component shall publish a notice in the **Federal Register** that informs the public of the change in classification and discusses the achievable objective for the rule and the metrics by which the OA or OST component will measure progress toward that objective, and shall extend or reopen the comment period by not less than 30 days and allow further public comment as appropriate, including comment on the change in classification.

(d) *Procedures for formal hearings*—(1) *Petitions for hearings.* Following publication of an NPRM for an economically significant rule or a high-impact rule, and before the close of the comment period, any interested party may file in the rulemaking docket a petition asking the proposing OA or OST component to hold a formal hearing on the proposed rule in accordance with this subsection.

(2) *Mandatory hearing for high-impact rule.* In the case of a proposed high-impact rule, the responsible OA or OST component shall grant the petition for a formal hearing if the petition makes a plausible prima facie showing that:

(i) The proposed rule depends on conclusions concerning one or more specific scientific, technical, economic, or other complex factual issues that are genuinely in dispute or that may not satisfy the requirements of the Information Quality Act;

(ii) The ordinary public comment process is unlikely to provide the OA or OST component an adequate examination of the issues to permit a fully informed judgment on the dispute; and

(iii) The resolution of the disputed factual issues would likely have a material effect on the costs and benefits of the proposed rule or on whether the proposed rule would achieve the statutory purpose.

(3) *Authority to deny hearing for economically significant rule.* In the case of a proposed economically significant rule, the responsible OA or

OST component may deny a petition for a formal hearing that includes the showing described in paragraph (d)(2) of this section but only if the OA or OST component reasonably determines that:

(i) The requested hearing would not advance the consideration of the proposed rule and the OA's or OST component's ability to make the rulemaking determinations required under this subpart; or

(ii) The hearing would unreasonably delay completion of the rulemaking in light of a compelling safety need or an express statutory mandate for prompt regulatory action.

(4) *Denial of petition.* If the OA or OST component denies a petition for a formal hearing under this subsection in whole or in part, the OA or OST component shall include a detailed explanation of the factual basis for the denial in the rulemaking record, including findings on each of the relevant factors identified in paragraph (d)(2) or (3) of this section. The denial of a good faith petition for a formal hearing under this section shall be disfavored.

(5) *Notice and scope of hearing.* If the OA or OST component grants a petition for a formal hearing under this section, the OA or OST component shall publish notification of the hearing in the **Federal Register** not less than 45 days before the date of the hearing. The document shall specify the proposed rule at issue and the specific factual issues to be considered in the hearing. The scope of the hearing shall be limited to the factual issues specified in the notice.

(6) *Hearing process.* (i) A formal hearing for purposes of this section shall be conducted using procedures borrowed from 5 U.S.C. 556 and 5 U.S.C. 557, or similar procedures as approved by the Secretary, and interested parties shall have a reasonable opportunity to participate in the hearing through the presentation of testimony and written submissions.

(ii) The OA or OST component shall arrange for an administrative judge or other neutral administrative hearing officer to preside over the hearing and shall provide a reasonable opportunity for cross-examination of witnesses at the hearing.

(iii) After the formal hearing and before the record of the hearing is closed, the presiding hearing officer shall render a report containing findings and conclusions addressing the disputed issues of fact identified in the hearing notice and specifically advising on the accuracy and sufficiency of the factual information in the record relating to those disputed issues on which the OA or OST component proposes to base the rule.

(iv) Interested parties who have participated in the hearing shall be given an opportunity to file statements of agreement or objection in response to the hearing officer's report, and the complete record of the proceeding shall be made part of the rulemaking record.

(7) *Actions following hearing.* (i) Following completion of the formal hearing process, the responsible OA or OST component shall consider the record of the hearing and, subject to the approval of the RRTF (in consultation with OIRA, as appropriate), shall make a reasoned determination whether:

(A) To terminate the rulemaking;

(B) To proceed with the rulemaking as proposed; or

(C) To modify the proposed rule.

(ii) If the decision is made to terminate the rulemaking, the OA or OST component shall publish a notice in the **Federal Register** announcing the decision and explaining the reasons therefor.

(iii) If the decision is made to finalize the proposed rule without material modifications, the OA or OST component shall explain the reasons for its decision and its responses to the hearing record in the preamble to the final rule, in accordance with paragraph (e) of this section.

(iv) If the decision is made to modify the proposed rule in material respects, the OA or OST component shall, subject to the approval of the RRTF (in consultation with OIRA, as appropriate), publish a new or supplemental NPRM in the **Federal Register** explaining the OA's or OST component's responses to and analysis of the hearing record, setting forth the modifications to the proposed rule, and providing an additional reasonable opportunity for public comment on the proposed modified rule.

(8) *Relationship to interagency process.* The formal hearing procedures under this subsection shall not impede or interfere with OIRA's interagency review process for the proposed rulemaking.

(e) *Additional requirements for final rules.* (1) In addition to the requirements set forth in § 5.13(k), the preamble to a final economically significant rule or a final high-impact rule shall include:

(i) A discussion explaining the OA's or OST component's reasoned final determination that the rule as adopted is necessary to achieve the objective identified in the NPRM in light of the full administrative record and does not deviate from the metrics previously identified by the OA or OST component for measuring progress toward that objective; and

(ii) In accordance with paragraph (d)(7)(iii) of this section, the OA's or OST component's responses to and analysis of the record of any formal hearing held under paragraph (d) of this section.

(2) Absent exceptional circumstances and unless approved by the RRTF or Secretary (in consultation with OIRA, as appropriate), the OA or OST component shall adopt as a final economically significant rule or final high-impact rule the least costly regulatory alternative that achieves the relevant objectives.

(f) *Additional requirements for retrospective reviews.* For each economically significant rule or high-impact rule, the responsible OA or OST component shall publish a regulatory impact report in the **Federal Register** every 5 years after the effective date of the rule while the rule remains in effect. The regulatory impact report shall include, at a minimum:

(1) An assessment of the impacts, including any costs, of the rule on regulated entities;

(2) A determination about how the actual costs and benefits of the rule have varied from those anticipated at the time the rule was issued; and

(3) An assessment of the effectiveness and benefits of the rule in producing the regulatory objectives it was adopted to achieve.

(g) *Waiver and modification.* The procedures required by this section may be waived or modified as necessary with the approval of the RRO or the Secretary.

§ 5.19 Public contacts in informal rulemaking.

(a) *Agency contacts with the public during informal rulemakings conducted in accordance with 5 U.S.C. 553.* (1) DOT personnel may have meetings or other contacts with interested members of the public concerning an informal rulemaking under 5 U.S.C. 553 or similar procedures at any stage of the rulemaking process, provided the substance of material information submitted by the public that DOT relies on in proposing or finalizing the rule is adequately disclosed and described in the public rulemaking docket such that all interested parties have notice of the information and an opportunity to comment on its accuracy and relevance.

(2) After the issuance of the NPRM and pending completion of the final rule, DOT personnel should avoid giving persons outside the Executive Branch information regarding the rulemaking that is not available generally to the public.

(3) If DOT receives an unusually large number of requests for meetings with interested members of the public during the comment period for a proposed rule or after the close of the comment period, the issuing OA or component of OST should consider whether there is a need to extend or reopen the comment period, to allow for submission of a second round of ''reply comments,'' or to hold a public meeting on the proposed rule.

(4) If the issuing OA or OST component meets with interested persons on the rulemaking after the close of the comment period, it should be open to giving other interested persons a similar opportunity to meet.

(5) If DOT learns of significant new information, such as new studies or data, after the close of the comment period that the issuing OA or OST component wishes to rely upon in finalizing the rule, the OA or OST component should reopen the comment period to give the public an opportunity to comment on the new information. If the new information is likely to result in a change to the rule that is not within the scope of the NPRM, the OA or OST component should consider issuing a Supplemental NPRM to ensure that the final rule represents a logical outgrowth of DOT's proposal.

(b) *Contacts during OIRA review.* (1) E.O. 12866 and E.O. 13563 lay out the procedures for review of significant regulations by OIRA, which include a process for members of the public to request meetings with OIRA regarding rules under OIRA review. Per E.O. 12866, OIRA invites the Department to attend these meetings. The Office of Regulation will forward these invitations to the appropriate regulatory contact in the OA or component of OST responsible for issuing the regulation.

(2) If the issuing OA or OST component wishes to attend the OIRA-sponsored meeting or if its participation is determined to be necessary by the Office of Regulation, the regulatory contact should identify to the Office of Regulation up to two individuals from the OA or OST component who will attend the meeting along with a representative from the Office of Regulation. Attendance at these meetings can be by phone or in person. These OIRA meetings are generally listening sessions for DOT.

(3) The attending DOT personnel should refrain from debating particular points regarding the rulemaking and should avoid disclosing the contents of a document or proposed regulatory action that has not yet been disclosed to the public, but may answer questions of fact regarding a public document.

(4) Following the OIRA meeting, the attendee(s) from the issuing OA or OST component will draft a summary report of the meeting and submit it to the Office of Regulation for review. After the report is reviewed and finalized in coordination with the Office of Regulation, the responsible OA or OST component will place the final report in the rulemaking docket.

§ 5.21 Policy updates and revisions.

This subpart shall be reviewed from time to time to reflect improvements in the rulemaking process or changes in Administration policy.

§ 5.23 Disclaimer.

This subpart is intended to improve the internal management of the Department. It is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, officers or employees, or any other person. In addition, this subpart shall not be construed to create any right to judicial review involving the compliance or noncompliance with this subpart by the Department, its OAs or OST components, its [8] officers or employees, or any other person.

Subpart C—Guidance Procedures

§ 5.25 General.

(a) This subpart governs all DOT employees and contractors involved with all phases of issuing DOT guidance documents.

(b) Subject to the qualifications and exemptions contained in this subpart and in appendix A to the Memorandum on the Review and Clearance of Guidance Documents (available online at the website of the Office of the General Counsel's Office of Regulation [1]), these procedures apply to all guidance documents issued by all components of the Department after December 20, 2018.

(c) For purposes of this subpart, the term *guidance document* includes any statement of agency policy or interpretation concerning a statute, regulation, or technical matter within the jurisdiction of the agency that is intended to have general applicability and future effect, but which is not intended to have the force or effect of law in its own right and is not otherwise required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. 553 or 5 U.S.C. 556. The term is not confined to formal written documents; guidance may come in a variety of forms, including (but not limited to) letters, memoranda, circulars, bulletins, advisories, and may include video, audio, and Web-based formats. *See* OMB Bulletin 07–02, ''Agency Good Guidance Practices,'' (January 25, 2007) (''OMB Good Guidance Bulletin'').

(d) This subpart does not apply to:

(1) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);

(2) Rules of agency organization, procedure, or practice;

(3) Decisions of agency adjudications under 5 U.S.C. 554 or similar statutory provisions;

(4) Internal executive branch legal advice or legal advisory opinions addressed to executive branch officials;

(5) Agency statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions (*e.g.,* case or investigatory letters responding to complaints, warning letters), notices regarding particular locations or facilities (*e.g.,* guidance pertaining to the use, operation, or control of a government facility or property), and correspondence with individual persons or entities (*e.g.,* congressional correspondence), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public;

(6) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;

(7) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and individual presentations, editorials, media interviews, press materials, or congressional testimony that do not set forth for the first time a new regulatory policy;

(8) Guidance pertaining to military or foreign affairs functions;

(9) Grant solicitations and awards;

(10) Contract solicitations and awards; or

(11) Purely internal agency policies or guidance directed solely to DOT employees or contractors or to other Federal agencies that are not intended to have substantial future effect on the behavior of regulated parties.

§ 5.27 Review and clearance by Chief Counsels and the Office of the General Counsel.

All DOT guidance documents, as defined in § 5.25(c), require review and

[8]

[1] See Appendix A to ''Memorandum on the Review and Clearance of Guidance Documents,'' available at *https://www.transportation.gov/sites/dot.gov/files/docs/regulations/328566/gen-counsel-mem-guidance-documents-signed-122018.pdf.*

clearance in accordance with this subpart.

(a) Guidance proposed to be issued by an OA of the Department must be reviewed and cleared by the OA's Office of Chief Counsel. In addition, as provided elsewhere in this subpart, some OA guidance documents will require review and clearance by OGC.

(b) Guidance proposed to be issued by a component of OST must be reviewed and cleared by OGC.

§ 5.29 Requirements for clearance.

DOT's review and clearance of guidance shall ensure that each guidance document proposed to be issued by an OA or component of OST satisfies the following requirements:

(a) The guidance document complies with all relevant statutes and regulation (including any statutory deadlines for agency action);

(b) The guidance document identifies or includes:

(1) The term ''guidance'' or its functional equivalent;

(2) The issuing OA or component of OST;

(3) A unique identifier, including, at a minimum, the date of issuance and title of the document and its Z–RIN, if applicable;

(4) The activity or entities to which the guidance applies;

(5) Citations to applicable statutes and regulations;

(6) A statement noting whether the guidance is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance; and

(7) A short summary of the subject matter covered in the guidance document at the top of the document.

(c) The guidance document avoids using mandatory language, such as ''shall,'' ''must,'' ''required,'' or ''requirement,'' unless the language is describing an established statutory or regulatory requirement or is addressed to DOT staff and will not foreclose the Department's consideration of positions advanced by affected private parties;

(d) The guidance document is written in plain and understandable English;

(e) All guidance documents include a clear and prominent statement declaring that the contents of the document do not have the force and effect of law and are not meant to bind the public in any way, and the document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

§ 5.31 Public access to effective guidance documents.

Each OA and component of OST responsible for issuing guidance documents shall:

(a) Ensure all effective guidance documents, identified by a unique identifier which includes, at a minimum, the document's title and date of issuance or revision and its Z–RIN, if applicable, are on its website in a single, searchable, indexed database, and available to the public in accordance with 49 CFR 7.12(a)(2);

(b) Note on its website that guidance documents lack the force and effect of law, except as authorized by law or as incorporated into a contract;

(c) Maintain and advertise on its website a means for the public to comment electronically on any guidance documents that are subject to the notice-and-comment procedures described in § 5.39 and to submit requests electronically for issuance, reconsideration, modification, or rescission of guidance documents in accordance with § 5.41; and

(d) Designate an office to receive and address complaints from the public that the OA or OST component is not following the requirements of OMB's Good Guidance Bulletin or is improperly treating a guidance document as a binding requirement.

§ 5.33 Good faith cost estimates.

Even though not legally binding, some agency guidance may result in a substantial economic impact. For example, the issuance of agency guidance may induce private parties to alter their conduct to conform to recommended standards or practices, thereby incurring costs beyond the costs of complying with existing statutes and regulations. While it may be difficult to predict with precision the economic impact of voluntary guidance, the proposing OA or component of OST shall, to the extent practicable, make a good faith effort to estimate the likely economic cost impact of the guidance document to determine whether the document might be significant. When an OA or OST component is assessing or explaining whether it believes a guidance document is significant, it should, at a minimum, provide the same level of analysis that would be required for a major determination under the Congressional Review Act.[2] When an agency determines that a guidance document will be economically significant, the OA or OST component should conduct and publish a Regulatory Impact Analysis of the sort that would accompany an economically significant rulemaking, to the extent reasonably possible.

§ 5.35 Approved procedures for guidance documents identified as ''significant'' or ''otherwise of importance to the Department's interests.''

(a) For guidance proposed to be issued by an OA, if there is a reasonable possibility the guidance may be considered ''significant'' or ''otherwise of importance to the Department's interests'' within the meaning of § 5.37 or if the OA is uncertain whether the guidance may qualify as such, the OA should email a copy of the proposed guidance document (or a summary of it) to the Office of Regulation for review and further direction before issuance. Unless exempt under appendix A to the Memorandum on the Review and Clearance of Guidance Documents,[3] each proposed DOT guidance document determined to be significant or otherwise of importance to the Department's interests must be approved by the Secretary before issuance. In such instances, the Office of Regulation will request that the proposing OA or component of OST obtain a Z–RIN for departmental review and clearance through the Regulatory Management System (RMS), or a successor data management system, and OGC will coordinate submission of the proposed guidance document to the Secretary for approval.

(b) As with significant regulations, OGC will submit significant DOT guidance documents to OMB for coordinated review. In addition, OGC may determine that it is appropriate to coordinate with OMB in the review of guidance documents that are otherwise of importance to the Department's interests.

(c) If the guidance document is determined not to be either significant or otherwise of importance to the Department's interests within the meaning of § 5.37, the Office of Regulation will advise the proposing OA or component of OST to proceed with issuance of the guidance either through the Office of the Executive Secretariat (for **Federal Register** notices) or through its standard clearance process. For each guidance document coordinated through the Office of the Executive Secretariat, the issuing OA or component of OST should include a

[2] See OMB Memorandum M–19–14, Guidance on Compliance with the Congressional Review Act (April 11, 2019).

[3] See Appendix A to ''Memorandum on the Review and Clearance of Guidance Documents,'' available at *https://www.transportation.gov/sites/dot.gov/files/docs/regulations/328566/gen-counsel-mem-guidance-documents-signed-122018.pdf.*

statement in the action memorandum indicating that the guidance document has been reviewed and cleared in accordance with this process.

§ 5.37 Definitions of ''significant guidance document'' and guidance documents that are ''otherwise of importance to the Department's interests.''

(a) The term ''significant guidance document'' means a guidance document that will be disseminated to regulated entities or the general public and that may reasonably be anticipated:

(1) To lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the U.S. economy, a sector of the U.S. economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) To create serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency;

(3) To alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) To raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866, as further amended.

(b) The term ''significant guidance document'' does not include the categories of documents excluded by § 5.25(b) or any other category of guidance documents exempted in writing by OGC in consultation with OMB's Office of Information and Regulatory Affairs (OIRA).

(c) Significant and economically significant guidance documents must be reviewed by OIRA under E.O. 12866 before issuance; and and must demonstrate compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in E.O. 12866, E.O. 13563, E.O. 13609, E.O. 13771, and E.O. 13777.

(d) Even if not ''significant,'' a guidance document will be considered ''otherwise of importance to the Department's interests'' within the meaning of this paragraph if it may reasonably be anticipated:

(1) To relate to a major program, policy, or activity of the Department or a high-profile issue pending for decision before the Department;

(2) To involve one of the Secretary's top policy priorities;

(3) To garner significant press or congressional attention; or

(4) To raise significant questions or concerns from constituencies of importance to the Department, such as Committees of Congress, States or Indian tribes, the White House or other departments of the Executive Branch, courts, consumer or public interest groups, or leading representatives of industry.

§ 5.39 Designation procedures.

(a) The Office of Regulation may request an OA or OST component to prepare a designation request for certain guidance documents. Designation requests must include the following information:

(1) A summary of the guidance document; and

(2) The OA or OST component's recommended designation of ''not significant,'' ''significant,'' or ''economically significant,'' as well as a justification for that designation.

(b) Except as otherwise provided in paragraph (c) of this section, the Office of Regulation will seek significance determinations from OIRA for certain guidance documents, as appropriate, in the same manner as for rulemakings. Prior to publishing these guidance documents, and with sufficient time to allow OIRA to review the document in the event that a significance determination is made, the Office of Regulation should provide OIRA with an opportunity to review the designation request or the guidance document, if requested, to determine if it meets the definition of ''significant'' or ''economically significant'' under Executive Order 13891.

(c) Unless they present novel issues, significant risks, interagency considerations, unusual circumstances, or other unique issues, the categories of guidance documents found in appendix A [4] do not require designation by OIRA.

§ 5.41 Notice-and-comment procedures.

(a) Except as provided in paragraph (b) of this section, all proposed DOT guidance documents determined to be a ''significant guidance document'' within the meaning of § 5.37 shall be subject to the following informal notice-and-comment procedures. The issuing OA or component of OST shall publish a notice in the **Federal Register** announcing that a draft of the proposed guidance document is publicly available, shall post the draft guidance document on its website, shall invite public comment on the draft document for a minimum of 30 days, and shall prepare and post a public response to major concerns raised in the comments, as appropriate, on its website, either before or when the guidance document is finalized and issued.

(b) The requirements of paragraph (a) of this section will not apply to any significant guidance document or categories of significant guidance documents for which OGC finds, in consultation with OIRA, the proposing OA or component of OST, and the Secretary, good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest (and incorporates the finding of good cause and a brief statement of reasons therefor in the guidance issued). Unless OGC advises otherwise in writing, the categories of guidance documents listed in appendix A [5] will be exempt from the requirements of paragraph (a) of this section.

(c) Where appropriate, OGC or the proposing OA or component of OST may recommend to the Secretary that a particular guidance document that is otherwise of importance to the Department's interests shall also be subject to the informal notice-and-comment procedures described in paragraph (a) of this section.

§ 5.43 Petitions for guidance.

Any person may petition an OA or OST component to withdraw or modify a particular guidance document by using the procedures found in § 5.13(c). The OA or OST component should respond to all requests in a timely manner, but no later than 90 days after receipt of the request.

§ 5.45 Rescinded guidance.

No OA or component of OST may cite, use, or rely on guidance documents that are rescinded, except to establish historical facts.

§ 5.47 Exigent circumstances.

In emergency situations or when the issuing OA or component of OST is required by statutory deadline or court order to act more quickly than normal review procedures allow, the issuing OA or component of OST shall coordinate with OGC to notify OIRA as soon as possible and, to the extent practicable, shall comply with the requirements of this subpart at the earliest opportunity. Wherever practicable, the issuing OA or component of OST should schedule its proceedings to permit sufficient time to

[4] See Appendix A to ''Memorandum on the Review and Clearance of Guidance Documents,'' available at *https://www.transportation.gov/sites/dot.gov/files/docs/regulations/328566/gen-counsel-mem-guidance-documents-signed-122018.pdf.*

[5] See Appendix A to ''Memorandum on the Review and Clearance of Guidance Documents,'' available at *https://www.transportation.gov/sites/dot.gov/files/docs/regulations/328566/gen-counsel-mem-guidance-documents-signed-122018.pdf.*

comply with the procedures set forth in this subpart.

§ 5.49 Reports to Congress and GAO.

Unless otherwise determined in writing by OGC, it is the policy of the Department that upon issuing a guidance document determined to be ''significant'' within the meaning of § 5.37, the issuing OA or component of OST will submit a report to Congress and GAO in accordance with the procedures described in 5 U.S.C. 801 (the ''Congressional Review Act'').

§ 5.51 No judicial review or enforceable rights.

This subpart is intended to improve the internal management of the Department of Transportation. As such, it is for the use of DOT personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person.

Subpart D—Enforcement Procedures

§ 5.53 General.

The requirements set forth in this subpart apply to all enforcement actions taken by each DOT operating administration (OA) and each component of the Office of the Secretary of Transportation (OST) with enforcement authority.

§ 5.55 Enforcement attorney responsibilities.

All attorneys of OST and the OAs involved in enforcement activities are responsible for carrying out and adhering to the policies set forth in this subpart. All supervising attorneys with responsibility over enforcement adjudications, administrative enforcement proceedings, and other enforcement actions are accountable for the successful implementation of these policies and for reviewing and monitoring compliance with this subpart by the employees under their supervision. These responsibilities include taking all steps necessary to ensure that the Department provides a fair and impartial process at each stage of enforcement actions. The Office of Litigation and Enforcement within the Office of the General Counsel (OGC) is delegated authority to interpret this subpart and provide guidance on compliance with the policies contained herein. The Office of Litigation and Enforcement shall exercise this authority in coordination with the Chief Counsels of the OAs and subject to the direction and supervision of the General Counsel.

§ 5.57 Definitions.

Administrative enforcement proceeding is to be interpreted broadly, consistent with applicable law and regulations, and includes, but is not limited to, administrative civil penalty proceedings; proceedings involving potential cease-and-desist or corrective action orders; preemption proceedings; safety rating appeals; pilot and mechanic revocation proceedings; grant suspensions, terminations, or other actions to remedy violations of grant conditions; and similar enforcement-related proceedings.

Administrative law judges (ALJs) are adjudicatory hearing officers appointed by a department head to serve as triers of fact in formal and informal administrative proceedings and to issue recommended decisions in adjudications. At DOT, ALJs are to be appointed by the Secretary of Transportation and assigned to the Office of Hearings.

Adversarial personnel are those persons who represent a party (including the agency) or a position or interest at issue in an enforcement action taken or proposed to be taken by or for an agency. They include the agency's employees who investigate, prosecute, or advocate on behalf of the agency in connection with the enforcement action.

Decisional personnel are employees of the agency responsible for issuing decisions arising out of the agency's enforcement actions, which include formal or informal enforcement adjudications. These employees include ALJs, hearing officers, Administrative Judges (AJs), and agency employees who advise and assist such decision makers.

Due process means procedural rights and protections afforded by the Government to affected parties to provide for a fair process in the enforcement of legal obligations, including in connection with agency actions determining a violation of law, assessing a civil penalty, requiring a party to take corrective action or to cease and desist from conduct, or otherwise depriving a party of a property or liberty interest. Due process always includes two essential elements for a party subject to an agency enforcement action: adequate notice of the proposed agency enforcement action and a meaningful opportunity to be heard by the agency decision maker.

Enabling act means the Federal statute that defines the scope of an agency's authority and authorizes it to undertake an enforcement action.

Enforcement action means an action taken by the Department upon its own initiative or at the request of an affected party in furtherance of its statutory authority and responsibility to execute and ensure compliance with applicable laws. Such actions include administrative enforcement proceedings, enforcement adjudications, and judicial enforcement proceedings.

Enforcement adjudication is the administrative process undertaken by the agency to resolve the legal rights and obligations of specific parties with regard to a particular enforcement issue pending before an agency. The outcome of an enforcement adjudication is a formal or informal decision issued by an appropriate decision maker. Enforcement adjudications require the opportunity for participation by directly affected parties and the right to present a response to a decision maker, including relevant evidence and reasoned arguments.

Formal enforcement adjudication means an adjudication required by statute to be conducted ''on the record.'' The words ''on the record'' generally refer to a decision issued by an agency after a proceeding conducted before an ALJ (or the agency head sitting as judge or other presiding employee who is not an ALJ) using trial-type procedures. It is usually the agency's enabling act, not the APA, that determines whether a formal hearing is required.

Informal enforcement adjudication means an adjudication that is not required to be conducted ''on the record'' with trial-like procedures. The APA provides agencies with a substantial degree of flexibility in establishing practices and procedures for the conduct of informal adjudications.

Investigators, inspectors, and special agents refer to those agency employees or agents responsible for the investigation and review of an affected party's compliance with the regulations and other legal requirements administered by the agency.

Judicial enforcement proceeding means a proceeding conducted in an Article III court, in which the Department is seeking to enforce an applicable statute, regulation, or order.

Procedural regulations are agency regulations setting forth the procedures to be followed during adjudications consistent with the agency's enabling act, the APA, and other applicable laws.

§ 5.59 Enforcement policy generally.

It is the policy of the Department to provide affected parties appropriate due process in all enforcement actions. In the course of such actions and

proceedings, the Department's conduct must be fair and free of bias and should conclude with a well-documented decision as to violations alleged and any violations found to have been committed, the penalties or corrective actions to be imposed for such violations, and the steps needed to ensure future compliance. It is in the public interest and fundamental to good government that the Department carry out its enforcement responsibilities in a fair and just manner. No person should be subject to an administrative enforcement action or adjudication absent prior public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct. The Department should, where feasible, foster greater private-sector cooperation in enforcement, promote information sharing with the private sector, and establish predictable outcomes for private conduct.

§ 5.61 Investigative functions.

DOT's investigative powers must be used in a manner consistent with due process, basic fairness, and respect for individual liberty and private property. Congress has granted the Secretary (and by delegation from the Secretary to the OAs) and the FAA Administrator broad investigative powers, and it is an essential part of DOT's safety and consumer protection mission to investigate compliance with the statutes and regulations administered by the Department, including through periodic inspections. The OAs and components of OST with enforcement authority are appropriately given broad discretion in determining whether and how to conduct investigations, periodic inspections, and other compliance reviews, and these investigative functions are often performed by agency investigators or inspectors in the field. The employees and contractors of DOT responsible for inspections and other investigative functions must not use these authorities as a game of ''gotcha'' with regulated entities and should follow existing statutes and regulations. Rather, to the maximum extent consistent with protecting the integrity of the investigation, the representatives of DOT should promptly disclose to the affected parties the reasons for the investigative review and any compliance issues identified or findings made in the course of the review. The responsible enforcement attorneys within the relevant OA or component of OST shall provide effective legal guidance to investigators and inspectors to ensure adherence to the policies and procedures set forth herein.

§ 5.63 Clear legal foundation.

All DOT enforcement actions against affected parties seeking redress for asserted violations of a statute or regulation must be founded on a grant of statutory authority in the relevant enabling act. The authority to prosecute the asserted violation and the authority to impose monetary penalties, if sought, must be clear in the text of the statute. Unless the terms of the relevant statute or regulation with government-wide applicability, such as 2 CFR part 180, clearly and expressly authorize the OA or component of OST to enforce the relevant legal requirement directly through an administrative enforcement proceeding, the proper forum for the enforcement action is Federal court, and the enforcement action must be initiated in court by attorneys of the Department of Justice acting in coordination with DOT counsel.

§ 5.65 Proper exercise of prosecutorial and enforcement discretion.

The Department's attorneys and policy makers have broad discretion in deciding whether to initiate an enforcement action. Nevertheless, in exercising discretion to initiate an enforcement action and in the pursuit of that action, agency counsel must not adopt or rely upon overly broad or unduly expansive interpretations of the governing statutes or regulations, and should ensure that the law is interpreted and applied according to its text. DOT will not rely on judge-made rules of judicial discretion, such as the *Chevron* doctrine, as a device or excuse for straining the limits of a statutory grant of enforcement authority. All decisions by DOT to prosecute or not to prosecute an enforcement action should be based upon a reasonable interpretation of the law about which the public has received fair notice and should be made with due regard for fairness, the facts and evidence adduced through an appropriate investigation or compliance review, the availability of scarce resources, the administrative needs of the responsible OA or OST component, Administration policy, and the importance of the issues involved to the fulfillment of the Department's statutory responsibilities.

§ 5.67 Duty to review for legal sufficiency.

In accordance with established agency procedures, enforcement actions should be reviewed by the responsible agency component for legal sufficiency under applicable statutes and regulations, judicial decisions, and other appropriate authorities.[6] If, in the opinion of the responsible agency component or its counsel, the evidence is sufficient to support the assertion of violation(s), then the agency may proceed with the enforcement action. If the evidence is not sufficient to support the proposed enforcement action, the agency may modify or amend the charges and bring an enforcement action in line with the evidence or return the case to the enforcement staff for additional investigation. The reviewing attorney or agency component may also recommend the closure of the case for lack of sufficient evidence.[7] The Department will not initiate enforcement actions as a ''fishing expedition'' to find potential violations of law in the absence of sufficient evidence in hand to support the assertion of a violation.

§ 5.69 Fair notice.

Notice to the regulated party is a due process requirement. All documents initiating an enforcement action shall ensure notice reasonably calculated to inform the regulated party of the nature and basis for the action being taken to allow an opportunity to challenge the action and to avoid unfair surprise. The notice should include legal authorities, statutes or regulations allegedly violated, basic issues, key facts alleged, a clear statement of the grounds for the agency's action, and a reference to or recitation of the procedural rights available to the party to challenge the agency action, including appropriate procedure for seeking administrative and judicial review.

§ 5.71 Separation of functions.

For those OAs or OST components whose regulations provide for a separation of decisional personnel from adversarial personnel in an

[6] Though it may not always be feasible or necessary for agency personnel to consult with counsel before initiating an enforcement action, particularly since the OAs utilize a variety of enforcement personnel to staff their enforcement programs, including personnel located in the fields, agency personnel should ensure that the basis for an enforcement action is legally sufficient before initiating it.

[7] Attorneys at many of the OAs issue Notices of Probable Violations, Notice of Claims, or Demand Letters to initiate enforcement proceedings. At other OAs, these documents are issued by non-attorney program officials. The duty to review applies equally to all agency attorneys whether deciding to issue a document to initiate enforcement proceedings or to continue to prosecute based upon a document previously issued by a non-attorney program official. In the latter situation, it is important that attorneys provide legal input, training, and review of the work product of the program office. At all times, DOT attorneys are encouraged to exercise their best professional judgment in deciding to initiate, continue, or recommend closing a case, consistent with applicable legal and ethical standards.

administrative enforcement proceeding, any agency personnel who have taken an active part in investigating, prosecuting, or advocating in the enforcement action should not serve as a decision maker and should not advise or assist the decision maker in that same or a related case. In such proceedings, the agency's adversarial personnel should not furnish ex parte advice or factual materials to decisional personnel. When and as necessary, agency employees involved in enforcement actions should consult legal counsel and applicable regulations and ethical standards for further guidance on these requirements.

§ 5.73 Avoiding bias.

Consistent with all applicable laws and ethical standards relating to recusals and disqualifications, no Federal employee or contractor may participate in a DOT enforcement action in any capacity, including as ALJ, adjudication counsel, adversarial personnel, or decisional personnel, if that person has:

(a) A financial or other personal interest that would be affected by the outcome of the enforcement action;

(b) Personal animus against a party to the action or against a group to which a party belongs;

(c) Prejudgment of the adjudicative facts at issue in the proceeding; or

(d) Any other prohibited conflict of interest.

§ 5.75 Formal enforcement adjudications.

When a case is referred by the decision maker to the Office of Hearings or another designated hearing officer for formal adjudication (an ''on the record'' hearing), the assigned ALJ or hearing officer should use trial-type procedures consistent with applicable legal provisions. In formal adjudication, the APA requires findings and reasons on all material issues of fact, law, or discretion (policy). In all formal adjudications, the responsible OA or component of OST shall adhere faithfully and consistently to the procedures established in the relevant procedural regulations. Agency counsel engaged in formal adjudications on behalf of DOT are accountable for compliance with the requirements of this subpart.

§ 5.77 Informal enforcement adjudications.

Even though informal adjudications do not require trial-type procedures, the responsible OA or component of OST should ordinarily afford the applicant or the regulated entity that is the subject of the adjudication (as the case may be), as well as other directly affected parties (if any), adequate notice and an opportunity to be heard on the matter under review, either through an oral presentation or through a written submission. Except in cases of a safety emergency or when the clear text of the relevant enabling act or government-wide regulation, such as 2 CFR part 180, expressly authorizes exigent enforcement action without a prior hearing, the responsible OA or component of OST shall give the regulated entity appropriate advance notice of the proposed enforcement action and shall advise the entity of the opportunity for an informal hearing in a manner and sufficiently in advance that the entity's representatives have a fair opportunity to prepare for and to participate in the hearing, whether in person or by writing. The notice should be in plain language and, when appropriate, contain basic information about the applicable adjudicatory process. In all informal adjudications, the responsible OA or component of OST shall adhere faithfully and consistently to the procedures established in any applicable procedural regulations.

§ 5.79 The hearing record.

In formal hearings, the agency shall comply with the APA and shall include in the record of the hearing the testimony, exhibits, papers, and requests that are filed by parties to the hearing, in addition to the ALJ's or hearing officer's decision or the decision on appeal. For informal hearings, the record shall include the information that the agency considered ''at the time it reached the decision'' and its contemporaneous findings. The administrative record does not include privileged documents, such as attorney-client communications or deliberative or draft documents. Agencies are encouraged to make the record available to all interested parties to the fullest extent allowed by law, consistent with appropriate protections for the handling of confidential information.

§ 5.81 Contacts with the public.

After the initiation of an enforcement proceeding, communications between persons outside the agency and agency decisional personnel should occur on the record. Consistent with applicable regulations and procedures, if oral, written, or electronic ex parte communications occur, they should be placed on the record as soon as practicable. Notice should be given to the parties that such communications are being placed into the record. When performing departmental functions, all DOT employees should properly identify themselves as employees of the Department, including the OA or component of OST in which they work; they should properly show official identification if the contact is made in person; and they should clearly state the nature of their business and the reasons for the contact. All contacts by DOT personnel with the public shall be professional, fair, honest, direct, and consistent with all applicable ethical standards.

§ 5.83 Duty to disclose exculpatory evidence.

It is the Department's policy that each responsible OA or component of OST will voluntarily follow in its civil enforcement actions the principle articulated in *Brady* v. *Maryland,*[8] in which the Supreme Court held that the Due Process Clause of the Fifth Amendment requires disclosure of exculpatory evidence ''material to guilt or punishment'' known to the government but unknown to the defendant in criminal cases. Adopting the ''Brady rule'' and making affirmative disclosures of exculpatory evidence in all enforcement actions will contribute to the Department's goal of open and fair investigations and administrative enforcement proceedings. This policy requires the agency's adversarial personnel to disclose materially exculpatory evidence in the agency's possession to the representatives of the regulated entity whose conduct is the subject of the enforcement action. These affirmative disclosures should include any material evidence known to the Department's adversarial personnel that may be favorable to the regulated entity in the enforcement action—including evidence that tends to negate or diminish the party's responsibility for a violation or that could be relied upon to reduce the potential fine or other penalties. The regulated entity need not request such favorable information; it should be disclosed as a matter of course. Agency counsel should recommend appropriate remedies to DOT decision makers where a *Brady* rule violation has occurred, using the factors identified by courts when applying the *Brady* rule in the criminal context.

§ 5.85 Use of guidance documents in administrative enforcement cases.

Guidance documents cannot create binding requirements that do not already exist by statute or regulation. Accordingly, the Department may not use its enforcement authority to convert agency guidance documents into

[8] *Brady* v. *Maryland,* 373 U.S. 83 (1963).

binding rules. Likewise, enforcement attorneys may not use noncompliance with guidance documents as a basis for proving violations of applicable law. Guidance documents can do no more, with respect to prohibition of conduct, than articulate the agency or Department's understanding of how a statute or regulation applies to particular circumstances. The Department may cite a guidance document to convey this understanding in an administrative enforcement action or adjudication only if it has notified the public of such document in advance through publication in the **Federal Register** or on the Department's website. Additional procedures related to guidance documents are contained in part 5, subpart C, of this chapter.

§ 5.87 Alternative Dispute Resolution (ADR).

The OAs and the components of OST with enforcement authority are encouraged to use ADR to resolve enforcement cases where appropriate. The Department's ADR policy describes a variety of problem-solving processes that can be used in lieu of litigation or other adversarial proceedings to resolve disputes over compliance.

§ 5.89 Duty to adjudicate proceedings promptly.

Agency attorneys should promptly initiate proceedings or prosecute matters referred to them. In addition, cases should not be allowed to linger unduly after the adjudicatory process has begun. Attorneys should seek to settle matters where possible or refer the case to a decision maker for proper disposition when settlement negotiations have reached an impasse.

§ 5.91 Agency decisions.

Agency counsel may be used in the conduct of informal hearings and to prepare initial recommended decisions for the agency decision maker. The agency must notify the directly affected parties of its decision, and the decision must reasonably inform the parties in a timely manner of the additional procedural rights available to them.

§ 5.93 Settlements.

Settlement conferences may be handled by appropriate agency counsel without the involvement of the agency's decision maker. Once a matter is settled by compromise, that agreement should be reviewed and accepted by an appropriate supervisor. The responsible OA or component of OST should issue an order adopting the terms of the settlement agreement as the final agency decision, where and as authorized by statute or regulation. No DOT settlement agreement, consent order, or consent decree should be used to adopt or impose new regulatory obligations for entities that are not parties to the settlement. Unless required by law, settlement agreements are not confidential and are subject to public disclosure.

§ 5.95 OGC approval required for certain settlement terms.

Whenever a proposed settlement agreement, consent order, or consent decree would impose behavioral commitments or obligations on a regulated entity that go beyond the requirements of relevant statutes and regulations, including the appointment of an independent monitor or the imposition of novel, unprecedented, or extraordinary obligations, the responsible OA or OST component should obtain the approval of OGC before finalizing the settlement agreement, consent order, or consent decree.

§ 5.97 Basis for civil penalties and disclosures thereof.

No civil penalties will be sought in any DOT enforcement action except when and as supported by clear statutory authority and sufficient findings of fact. Where applicable statutes vest the agency with discretion with regard to the amount or type of penalty sought or imposed, the penalty should reflect due regard for fairness, the scale of the violation, the violator's knowledge and intent, and any mitigating factors (such as whether the violator is a small business). The assessment of proposed or final penalties in a DOT enforcement action shall be communicated in writing to the subject of the action, along with a full explanation of the basis for the calculation of asserted penalties. In addition, the agency shall voluntarily share penalty calculation worksheets, manuals, charts, or other appropriate materials that shed light on the way penalties are calculated to ensure fairness in the process and to encourage a negotiated resolution where possible.

§ 5.99 Publication of decisions.

The agency's decisions in informal adjudications are not required to be published under the APA. However, where the agency intends to rely on its opinions in future cases, those opinions must generally be made available on agency websites or in agency reading rooms (and publication on Westlaw, Lexis, or similar legal services is also highly recommended). The APA has been read to require that opinions in formal adjudications must be made ''available for public inspection and copying.'' Agencies are strongly encouraged to publish all formal decisions on Westlaw, Lexis, or similar legal services.

§ 5.101 Coordination with the Office of Inspector General on criminal matters.

All Department employees must comply with the operative DOT Order(s) addressing referrals of potential criminal matters to the Office of Inspector General (OIG), consistent with the respective roles of the OIG and DOT OAs and components of OST in criminal investigations and the OIG's investigative procedures under the Inspector General Act of 1978, as amended.

§ 5.103 Standard operating procedures.

All legal offices that participate in or render advice in connection with enforcement actions should, to the extent practicable, operate under standard operating procedures. Such offices include, but are not limited to, those that oversee investigatory matters and serve as adversarial personnel in the agency's enforcement matters. These standard operating procedures, which can be contained in manuals, can be used to outline step-by-step requirements for attorney actions in the investigative stage and the prosecution stage; the role of an attorney as counselor, adjudicator, or litigator; the rulemaking process; and the process for issuance of guidance documents, letters of interpretation, preemption decisions, legislative guidance, contract administration, and a variety of other legal functions performed in the legal office. Each DOT OA and each OST component that conducts administrative inspections shall operate under those procedures governing such inspections and shall adopt such administrative inspection procedures if they do not exist. Those procedures shall be updated in a timely manner as needed.

§ 5.105 Cooperative Information Sharing.

The Department, as appropriate and to the extent practicable and permitted by law, shall:

(a) Encourage voluntary self-reporting of regulatory violations by regulated parties in exchange for reduction or waivers of civil penalties;

(b) Encourage voluntary information sharing by regulated parties; and

(c) Provide pre-enforcement rulings to regulated parties (formal and informal interpretations).

§ 5.107 Small Business Regulatory Enforcement Fairness Act Compliance (SBREFA).

The Department shall comply with the terms of SBREFA when conducting administrative inspections and adjudications, including section 223 of SBREFA (reduction or waivers of civil penalties, where appropriate). The Department will also cooperate with the Small Business Administration (SBA) when a small business files a comment or complaint related to DOT's inspection authority and when requested to answer SBREFA compliance requests.

§ 5.109 Referral of matters for judicial enforcement.

In considering whether to refer a matter for judicial enforcement by the Department of Justice, DOT attorneys should consult the applicable procedures set forth by the General Counsel, including in the document entitled ''Partnering for Excellence: Coordination of Legal Work Within the U.S. Department of Transportation,'' and any update or supplement to such document issued hereafter by the General Counsel. The specific procedures for initiating an affirmative litigation request are currently found in the coordination document at Section 11.B.l., ''Affirmative Litigation Requests to the Department of Justice.'' In most instances, requests to commence affirmative litigation must be reviewed by OGC, with such reviews coordinated through the Office of Litigation and Enforcement.

§ 5.111 No third-party rights or benefits.

This subpart is intended to improve the internal management of the Department. As such, it is for the use of DOT personnel only and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies, officers, or any person.

Title 49—Transportation

PART 7—PUBLIC AVAILABILITY OF INFORMATION

■ 11. The authority citation for part 7 continues to read as follows:

Authority: 5 U.S.C. 552; 31 U.S.C. 9701; 49 U.S.C. 322; E.O. 12600; E.O. 13392.

■ 12. Amend § 7.12 by revising paragraph (a)(2) to read as follows:

§ 7.12 What records are available in reading rooms, and how are they accessed?

(a) * * *

(2) Statements of policy and interpretations, including guidance documents as defined in 49 CFR 5.25(c), that have been adopted by DOT;

* * * * *

PART 106—RULEMAKING PROCEDURES

■ 13. The authority citation for part 106 continues to read as follows:

Authority: 49 U.S.C. 5101–5127; 49 CFR 1.53.

■ 14. Amend § 106.40 by revising the introductory text, the first sentence of paragraph (c), and paragraph (d)(1) to read as follows:

§ 106.40 Direct final rule.

A direct final rule makes regulatory changes and states that the regulatory changes will take effect on a specified date unless PHMSA receives an adverse comment within the comment period—generally 60 days after the direct final rule is published in the **Federal Register**.

* * * * *

(c) *Confirmation of effective date.* We will publish a confirmation document in the **Federal Register**, generally within 15 days after the comment period closes, if we have not received an adverse comment. * * *

(d) * * *

(1) If we receive an adverse comment, we will either publish a document withdrawing the direct final rule before it becomes effective and may issue an NPRM, or proceed by any other means permitted under the Administrative Procedure Act, consistent with procedures at 49 CFR 5.13(l).

* * * * *

PART 211—RULES OF PRACTICE

■ 15. The authority citation for part 211 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20114, 20306, 20502–20504, and 49 CFR 1.89.

■ 16. Amend § 211.33 by revising paragraph (b) to read as follows:

§ 211.33 Direct final rulemaking procedures.

* * * * *

(b) The **Federal Register** document will state that any adverse comment must be received in writing by the Federal Railroad Administration within the specified time after the date of publication and that, if no written adverse comment or request for oral hearing (if such opportunity is required by statute) is received, the rule will become effective a specified number of days after the date of publication.

* * * * *

PART 389—RULEMAKING PROCEDURES—FEDERAL MOTOR CARRIER SAFETY REGULATIONS

■ 17. The authority citation for part 389 continues to read as follows:

Authority: 49 U.S.C. 113, 501 *et seq.,* subchapters I and III of chapter 311, chapter 313, and 31502; 42 U.S.C. 4917; and 49 CFR 1.87.

■ 18. Amend § 389.39 by revising the introductory text and paragraphs (c) and (d)(1) to read as follows:

§ 389.39 Direct final rulemaking procedures.

A direct final rule makes regulatory changes and states that those changes will take effect on a specified date unless FMCSA receives an adverse comment by the date specified in the direct final rule published in the **Federal Register**.

* * * * *

(c) *Confirmation of effective date.* FMCSA will publish a confirmation rule document in the **Federal Register**, if it has not received an adverse comment by the date specified in the direct final rule. The confirmation rule document tells the public the effective date of the rule.

(d) * * *

(1) If FMCSA receives an adverse comment within the comment period, it will either publish a document withdrawing the direct final rule before it becomes effective and may issue an NPRM, or proceed by any other means permitted under the Administrative Procedure Act, consistent with procedures at 49 CFR 5.13(l).

* * * * *

PART 553—RULEMAKING PROCEDURES

■ 19. The authority citation for part 553 is revised to read as follows:

Authority: 49 U.S.C. 322, 30103, 30122, 30124, 30125, 30127, 30146, 30162, 32303, 32502, 32504, 32505, 32705, 32901, 32902, 33102, 33103, and 33107; delegation of authority at 49 CFR 1.95.

■ 20. Amend § 553.14 by revising paragraphs (b), (c), and (d) to read as follows:

§ 553.14 Direct final rulemaking.

* * * * *

(b) The **Federal Register** document will state that any adverse comment must be received in writing by NHTSA within the specified time after the date of publication of the direct final rule

and that, if no written adverse comment is received in that period, the rule will become effective a specified number of days (no less than 45) after the date of publication of the direct final rule. NHTSA will provide a minimum comment period of 30 days.

(c) If no written adverse comment is received by NHTSA within the specified time after the date of publication in the **Federal Register**, NHTSA will publish a document in the **Federal Register** indicating that no adverse comment was received and confirming that the rule will become effective on the date that was indicated in the direct final rule.

(d) If NHTSA receives any written adverse comment within the specified time after publication of the direct final rule in the **Federal Register**, the agency will either publish a document withdrawing the direct final rule before it becomes effective and may issue an NPRM, or proceed by any other means permitted under the Administrative Procedure Act, consistent with procedures at 49 CFR 5.13(l).

* * * * *

PART 601—ORGANIZATION, FUNCTIONS, AND PROCEDURES

■ 21. The authority citation for part 601 is revised to read as follows:

Authority: 5 U.S.C. 552; 49 U.S.C. 5334; 49 CFR 1.91.

■ 22. Amend § 601.36 by revising paragraphs (b), (c), and (d) to read as follows:

§ 601.36 Procedures for direct final rulemaking.

* * * * *

(b) The **Federal Register** document will state that any adverse comment must be received in writing by FTA within the specified time after the date of publication and that, if no written adverse comment is received, the rule will become effective a specified number of days after the date of publication.

(c) If no written adverse comment is received by FTA within the specified time of publication in the **Federal Register**, FTA will publish a notice in the **Federal Register** indicating that no adverse comment was received and confirming that the rule will become effective on the date that was indicated in the direct final rule.

(d) If FTA receives any written adverse comment within the specified time of publication in the **Federal Register**, FTA will either publish a document withdrawing the direct final rule before it becomes effective and may issue an NPRM, or proceed by any other means permitted under the Administrative Procedure Act, consistent with procedures at 49 CFR 5.13(l).

* * * * *

[FR Doc. 2019–26672 Filed 12–26–19; 8:45 am]

BILLING CODE 4910–9X–P

(3) If the modification specified in paragraph (4) of EASA AD 2019–0064R1 is done, it must be done at the compliance time specified in paragraph (3) of EASA AD 2019–0064R1.

(4) Although the service information referenced in EASA AD 2019–0064R1 specifies to discard or scrap certain parts, this AD does not include that requirement.

(5) Where paragraph (3) of EASA AD 2019–0064R1 specifies to do a modification ''in accordance with the instructions of section 3 of the modification ASB'' this AD excludes paragraph 3.B.5. of ''the modification ASB.''

(6) Where paragraph (4) of EASA AD 2019–0064R1 refers to ''Eurocopter AS 322 SB No. 52.00.28,'' for this AD use ''Eurocopter AS 332 SB No. 52.00.28.''

(i) Terminating Action for AD 2019–09–03

Accomplishing the actions required by this AD terminates all requirements of AD 2019–09–03.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Validation Branch, send it to the attention of the person identified in paragraph (k) of this AD. Information may be emailed to: *9-AVS-AIR-730-AMOC@faa.gov.*

(2) Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(k) Related Information

For more information about this AD, contact Kathleen Arrigotti, Aviation Safety Engineer, Large Aircraft Section, International Validation Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3218; email *kathleen.arrigotti@faa.gov.*

(l) Material Incorporated by Reference

(1) The Director of the Federal Register approved the incorporation by reference (IBR) of the service information listed in this paragraph under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) You must use this service information as applicable to do the actions required by this AD, unless this AD specifies otherwise.

(i) European Union Aviation Safety Agency (EASA) AD 2019–0064R1, dated December 19, 2019.

(ii) [Reserved]

(3) For EASA AD 2019–0064R1, contact the EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu;* Internet *www.easa.europa.eu.* You may find this EASA AD on the EASA website at *https://ad.easa.europa.eu.*

(4) You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call 817–222–5110. This material may be found in the AD docket on the internet at *https://www.regulations.gov* by searching for and locating Docket No. FAA–2020–0909.

(5) You may view this material that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fedreg.legal@nara.gov,* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued on February 25, 2021.

Gaetano A. Sciortino,

Deputy Director for Strategic Initiatives, Compliance & Airworthiness Division, Aircraft Certification Service.

[FR Doc. 2021–06780 Filed 4–1–21; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Parts 302 and 399

49 CFR Parts 1, 5, and 7

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 106

Federal Motor Carrier Safety Administration

49 CFR Part 389

National Highway Traffic Safety Administration

49 CFR Part 553

Federal Transit Administation

49 CFR Part 601

RIN 2105–AF00

Administrative Rulemaking, Guidance, and Enforcement Procedures

AGENCY: Office of the Secretary of Transportation (OST), Pipeline and Hazardous Materials Administration, Federal Motor Carrier Safety Administration, National Highway Traffic Safety Administration, and Federal Transit Administation, U.S. Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule removes the Department's internal policies and procedures relating to the issuance of rulemaking and guidance documents from the Code of Federal Regulations. In addition, this final rule removes regulations concerning the initiation and conduct of enforcement actions, including administrative enforcement proceedings and judicial enforcement actions brought in Federal court.

DATES: Effective on May 3, 2021.

FOR FURTHER INFORMATION CONTACT: Jill Laptosky, Office of Regulation, Office of the General Counsel, 202–493–0308, *Jill.Laptosky@dot.gov.*

SUPPLEMENTARY INFORMATION: The Department is issuing this final rule in response to two recently issued Executive orders. Executive Order (E.O.) 13992, ''Revocation of Certain Executive Orders Concerning Federal Regulation'' (January 20, 2021), revokes several executive orders that directed action by the Federal Government in the context of rulemaking, guidance, and regulatory enforcement. It also directs the Director of the Office of Management and Budget and heads of agencies to promptly take steps to rescind any orders, rules, regulations, guidelines, or policies, or portions thereof, implementing or enforcing any of the revoked orders, as appropriate and consistent with applicable law. E.O. 13990, ''Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis'' (January 20, 2021), directs all executive departments and agencies to review immediately and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions that conflict with the objectives stated in E.O. 13990.

On December 27, 2019, the Department published a final rule, ''Administrative Rulemaking, Guidance, and Enforcement Procedures'' (84 FR 71714), that codified at 49 CFR part 5 the Department's internal procedures relating to the review and clearance of rulemaking and guidance documents, as well as the initiation and conduct of enforcement actions. In accordance with 49 CFR 5.21, ''Policy updates and revisions,'' the Department has reviewed the amendments made to 49 CFR part 5 by that final rule to determine whether any revisions are necessary in light of E.O. 13992 and E.O. 13990.

Many of the policies and procedures codified at 49 CFR part 5 were prompted by Executive orders that have since been revoked by E.O. 13992.[1] As

[1] For purposes of this rulemaking, the relevant revoked executives orders include the following: E.O. 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs), E.O. 13777 of February 24, 2017 (Enforcing the Regulatory Reform Agenda), E.O. 13891 of October 9, 2019 (Promoting the Rule of Law Through Improved Agency Guidance Documents), and E.O. 13892 of October 9, 2019 (Promoting the Rule of

a result, the Department will rescind those policies and procedures, or portions thereof, that implemented or enforced any of the revoked orders. This final rule removes from 49 CFR part 5 those provisions that reflect revoked policies and procedures that are no longer in effect.

With respect to the provisions of 49 CFR part 5 that are not directly attributable to now-revoked executive orders, the Department has determined to rescind many of the other regulations promulgated on December 27, 2019, concerning rulemaking, guidance documents, and enforcement actions for four primary reasons. First, the Department has found that a majority of the provisions contained in 49 CFR part 5 not directly attributable to the now-revoked executive orders solely apply to the Department's internal operations and thus need not be codified in the Code of Federal Regulations. Second, the regulations found in 49 CFR part 5 are duplicative of existing procedures contained in internal departmental procedural directives.[2] Because these procedures are already contained in existing internal procedures, it is not necessary that they also be published in the Code of Federal Regulations in order for them to be effective. Third, with regard to the regulations on enforcement matters, many of these provisions are derived from the Administrative Procedure Act (APA) and significant judicial decisions and thus need not be adopted by regulation in order to be effective. Application of the APA and these decisions to enforcement matters can be accomplished by internal directives as the Department deems necessary and appropriate. Therefore, 49 CFR part 5, subpart D—Enforcement Procedures is rescinded in its entirety. Fourth, removing these provisions from 49 CFR part 5 ensures that the Department is able to effectively and efficiently promulgate new Federal regulations and other actions to support the objectives stated in E.O. 13990.

The Code of Federal Regulations will continue to include those provisions that impact the public's ability to interact with the Department on rulemaking matters and activities. For example, the Department will maintain in 49 CFR part 5 procedures for the public to petition for rulemakings and exemptions. In addition to rulemakings and exemptions, the Department's procedures, as amended in 2019, explicitly provided for the public to petition for retrospective reviews of existing rules and the modification or rescission of guidance documents. While the Department is revising its petition procedures to remove references to retrospective reviews and guidance document petitions, the Department will nevertheless accept and process these types of petitions. The revised petition procedures thus define ''rule'' expansively, consistent with the APA, to ensure that the Department will continue to consider a broad range of requests from the public regarding our regulatory programs.

E.O. 13992 also directs agencies to take prompt action to rescind any rules or regulations, or portions thereof, implementing revoked Executive orders, as appropriate and consistent with applicable law, that threaten to frustrate the Federal Government's ability to confront urgent challenges facing the Nation, including the coronavirus disease 2019 pandemic, economic recovery, racial justice, and climate change. The Department is reviewing its internal procedures (*e.g.,* DOT Order 2100.6) and will revise them accordingly. As a result, departmental internal procedures will be updated to reflect the call of E.O. 13992 to revoke those procedures that reflect outdated policy that could hamstring the Department's ability to respond quickly and effectively to the challenges facing our Nation.

This final rule also makes a number of conforming edits to the regulations of its subcomponent operating administrations to ensure that they are updated properly to reflect the repeal of certain provisions of 49 CFR part 5.

Administrative Procedure Act

Under the Administrative Procedure Act, the normal notice and comment procedures do not apply to an action that is a rule of agency organization, procedure, or practice. See 5 U.S.C. 553(b)(A). Since this final rule revises only internal processes applicable to the Department's administrative procedures, this is a rule of agency procedure for which notice and comment are not required.

Rulemaking Analyses and Notices

A. E.O. 12866 and DOT Regulatory Policies and Procedures

This rulemaking is not a significant regulatory action under Executive Order 12866. The Department does not anticipate that this rulemaking will have an economic impact on regulated entities. This is a rule of agency procedure and practice that does not change the Department's procedures in and of itself. This action merely removes duplicative regulations from the Code of Federal Regulations that would be better managed in departmental operating procedures.

B. Regulatory Flexibility Act

Since notice and comment rulemaking is not necessary for this rule, the analytical provisions of the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612) do not apply.

C. Executive Order 13132 (Federalism)

Executive Order 13132 requires agencies to ensure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct 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. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (August 4, 1999), and DOT has determined that this action will not have a substantial direct effect or federalism implications on the States and would not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions. Therefore, consultation with the States is not necessary.

D. Executive Order 13175 (Tribal Consultation)

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments.'' Because this rulemaking does not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that DOT consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or

Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication).

[2] See, *e.g.,* U.S. Department of Transportation, DOT Order 2100.6, ''Policies and Procedures for Rulemakings,'' available at *https://www.transportation.gov/regulations/2018-dot-rulemaking-order.* Note that, consistent with the authorities described in this final rule, DOT is also reviewing the procedures and policies contained in this order to determine what revisions are necessary.

requires through regulations. The DOT has determined there are no new information collection requirements associated with this final rule.

F. National Environmental Policy Act

The agency has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (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, October 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). The purpose of this rulemaking is to update the Department's administrative procedures for rulemaking, guidance documents, and enforcement actions. The agency does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in the spring and fall of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects

14 CFR Part 302

Administrative practice and procedure, Air carriers, Airports, Postal Service.

14 CFR Part 399

Administrative practice and procedure, Air carriers, Air rates and fares, Air taxis, Consumer protection, Law enforcement, Policies, Rulemaking procedures, Small businesses.

49 CFR Part 1

Authority delegations (Government agencies), Organization and functions (Government agencies).

49 CFR Part 5

Administrative practice and procedure.

49 CFR Part 7

Freedom of information, Reporting and recordkeeping requirements.

49 CFR Part 106

Administrative practice and procedure, Hazardous materials transportation.

49 CFR Part 389

Administrative practice and procedure, Highway safety, Motor carriers, Motor vehicle safety.

49 CFR Part 553

Administrative practice and procedure, Motor vehicle safety.

49 CFR Part 601

Authority delegations (Government agencies), Freedom of information, Organization and functions (Government agencies).

In consideration of the foregoing, the Office of the Secretary of Transportation amends 14 CFR parts 302 and 399, and 49 CFR parts 1, 5, 7, 106, 389, 553, and 601, as follows:

Title 14—Aeronautics and Space

PART 302—RULES OF PRACTICE IN PROCEEDINGS

■ 1. The authority citation for part 302 continues to read as follows:

Authority: 39 U.S.C. 5402; 42 U.S.C. 4321, 49 U.S.C. Subtitle I and Chapters 401, 411, 413, 415, 417, 419, 461, 463, and 471.

■ 2. Revise § 302.16 to read as follows:

§ 302.16 Petitions for rulemaking.

Any interested person may petition the Department for the issuance, amendment, modification, or repeal of any regulation or guidance document, subject to the provisions of 49 CFR 5.3.

PART 399—STATEMENTS OF GENERAL POLICY

■ 3. The authority citation for part 399 continues to read as follows:

Authority: 49 U.S.C. 41712, 40113(a).

■ 4. Amend § 399.75 by revising paragraph (b) introductory text to read as follows:

§ 399.75 Rulemakings relating to unfair and deceptive practices.

* * * * *

(b) *Procedural requirements.* When issuing a proposed regulation under paragraph (a) of this section, unless the regulation is specifically required by statute, the Department shall adhere to the following procedural requirements:

* * * * *

§ 399.79 [Amended]

■ 5. Amend § 399.79 by removing the first sentence of paragraph (e)(1).

Title 49—Transportation

PART 1—ORGANIZATION AND DELEGATION OF POWERS AND DUTIES

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

Authority: 49 U.S.C. 322.

■ 7. Amend § 1.27 by revising paragraph (e) to read as follows:

§ 1.27 Delegations to the General Counsel.

* * * * *

(e) Respond to petitions for rulemaking or petitions for exemptions in accordance with 49 CFR 5.3, and notify petitioners of decisions in accordance with 49 CFR 5.3(d)(5).

* * * * *

■ 8. Revise part 5 to read as follows:

PART 5—ADMINISTRATIVE PROCEDURES

Subpart A—GENERAL

Subpart B—Rulemaking Procedures

Authority: 49 U.S.C. 322(a).

Subpart A—General

§ 5.1 Applicability.

(a) This part prescribes general procedures that apply to rulemakings of the U.S. Department of Transportation (the Department or DOT), including each of its operating administrations (OAs) and all components of the Office of Secretary of Transportation (OST).

(b) For purposes of this part, *Administrative Procedure Act (APA)* is the Federal statute, codified in scattered sections of chapters 5 and 7 of title 5, United States Code, that governs procedures for agency rulemaking and adjudication and provides for judicial review of final agency actions.

Subpart B—Rulemaking Procedures

§ 5.3 Petitions.

(a) Any person may petition an OA or OST component with rulemaking authority to:

(1) Issue, amend, or repeal a rule, as defined in 5 U.S.C. 551; or

(2) Issue an exemption, either permanently or temporarily, from any requirements of a rule, consistent with applicable statutory or regulatory provisions.

(b) When an OA or OST component receives a petition under this section, the petition should be filed with the

Docket Clerk in a timely manner. If a petition is filed directly with the Docket Clerk, the Docket Clerk will submit the petition in a timely manner to the OA or component of OST with regulatory responsibility over the matter described in the petition.

(c) The OA or component of OST should provide clear instructions on its website to members of the public regarding how to submit petitions, including, but not limited to, an email address or Web portal where petitions can be submitted, a mailing address where hard copy requests can be submitted, and an office responsible for coordinating such requests.

(d) Unless otherwise provided by statute or in OA regulations or procedures, the following procedures apply to the processing of petitions for rulemaking or exemption:

(1) *Contents.* Each petition filed under this section must:

(i) Be submitted, either by paper submission to the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, or electronically by emailing: *regulationC50.law@dot.gov;*

(ii) Describe the nature of the request and set forth the text or substance of the rule, or specify the rule that the petitioner seeks to have issued, amended, exempted, or repealed, as the case may be;

(iii) Explain the interest of the petitioner in the action requested, including, in the case of a petition for an exemption, the nature and extent of the relief sought and a description of the persons to be covered by the exemption;

(iv) Contain any information and arguments available to the petitioner to support the action sought; and

(v) In the case of a petition for exemption, unless good cause is shown in that petition, be submitted at least 60 days before the proposed effective date of the exemption, as appropriate.

(2) *Processing.* Each petition received under this section is referred to the head of the office responsible for the subject matter of that petition, and the Office of Regulation.

(3) *Grants.* If the OA or component of OST with regulatory responsibility over the matter described in the petition determines that the petition contains adequate justification, it may request the initiation of a rulemaking action in accordance with departmental procedures or grant the petition, as appropriate.

(4) *Denials.* If the OA or component of OST determines that the petition is not justified, the OA or component of OST denies the petition in coordination with the Office of Regulation.

(5) *Notification.* Whenever the OA or OST component determines that a petition should be granted or denied, and after consultation with the Office of Regulation in the case of denial, the office concerned prepares a notice of that grant or denial for issuance to the petitioner, and issues it to the petitioner.

§ 5.5 Public contacts in informal rulemaking.

(a) *Agency contacts with the public during informal rulemakings conducted in accordance with 5 U.S.C. 553.* (1) DOT personnel may have meetings or other contacts with interested members of the public concerning an informal rulemaking under 5 U.S.C. 553 or similar procedures at any stage of the rulemaking process, provided the substance of material information submitted by the public that DOT relies on in proposing or finalizing the rule is adequately disclosed and described in the public rulemaking docket such that all interested parties have notice of the information and an opportunity to comment on its accuracy and relevance.

(2) During the pendency of a rulemaking proceeding, DOT personnel must avoid giving persons outside the executive branch information regarding the rulemaking that is not available generally to the public.

(3) If DOT receives an unusually large number of requests for meetings with interested members of the public during the comment period for a proposed rule or after the close of the comment period, the issuing OA or component of OST should consider whether there is a need to extend or reopen the comment period, to allow for submission of a second round of ''reply comments,'' or to hold a public meeting on the proposed rule.

(4) If the issuing OA or OST component meets with interested persons on the rulemaking after the close of the comment period, it should be open to giving other interested persons a similar opportunity to meet.

(5) If DOT learns of significant new information, such as new studies or data, after the close of the comment period that the issuing OA or OST component wishes to rely upon in finalizing the rule, the OA or OST component should reopen the comment period to give the public an opportunity to comment on the new information. If the new information is likely to result in a change to the rule that is not within the scope of the notice of proposed rulemaking (NPRM), the OA or OST component should consider issuing a supplemental NPRM to ensure that the final rule represents a logical outgrowth of DOT's proposal.

(b) [Reserved]

§ 5.7 Policy updates and revisions.

This subpart shall be reviewed from time to time to reflect improvements in the rulemaking process or changes in Administration policy.

§ 5.9 Disclaimer.

This subpart is intended to improve the internal management of the Department. It is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, officers or employees, or any other person. In addition, this subpart shall not be construed to create any right to judicial review involving the compliance or noncompliance with this subpart by the Department, its OAs or OST components, its officers or employees, or any other person.

PART 7—PUBLIC AVAILABILITY OF INFORMATION

■ 9. The authority citation for part 7 continues to read as follows:

Authority: 5 U.S.C. 552; 31 U.S.C. 9701; 49 U.S.C. 322; E.O. 12600; E.O. 13392.

■ 10. Amend § 7.12 by revising paragraph (a)(2) to read as follows:

§ 7.12 What records are available in reading rooms, and how are they accessed?

(a) * * *

(2) Statements of policy and interpretations that have been adopted by DOT;

* * * * *

PART 106—RULEMAKING PROCEDURES

■ 11. The authority citation for part 106 continues to read as follows:

Authority: 49 U.S.C. 5101–5128; 49 CFR 1.81 and 1.97.

■ 12. Amend § 106.40 by revising paragraph (d)(1) to read as follows:

§ 106.40 Direct final rule.

* * * * *

(d) * * *

(1) If we receive an adverse comment, we will either publish a document withdrawing the direct final rule before it becomes effective and may issue an NPRM, or proceed by any other means permitted under the Administrative Procedure Act.

* * * * *

PART 389—RULEMAKING PROCEDURES—FEDERAL MOTOR CARRIER SAFETY REGULATIONS

■ 13. The authority citation for part 389 continues to read as follows:

Authority: 49 U.S.C. 113, 501 *et seq.,* subchapters I and III of chapter 311, chapter 313, and 31502; sec. 5204 of Pub. L. 114–94, 129 Stat. 1312, 1536; 42 U.S.C. 4917; and 49 CFR 1.87.

§ 389.13 [Amended]

■ 14. Amend § 389.13 by removing the first sentence of paragraph (a).

■ 15. Amend § 389.39 by revising paragraph (d)(1) to read as follows:

§ 389.39 Direct final rulemaking procedures.

* * * * *

(d) * * *

(1) If FMCSA receives an adverse comment within the comment period, it will either publish a document withdrawing the direct final rule before it becomes effective and may issue an NPRM, or proceed by any other means permitted under the Administrative Procedure Act.

* * * * *

PART 553—RULEMAKING PROCEDURES

■ 16. The authority citation for part 553 continues to read as follows:

Authority: 49 U.S.C. 322, 30103, 30122, 30124, 30125, 30127, 30146, 30162, 32303, 32502, 32504, 32505, 32705, 32901, 32902, 33102, 33103, and 33107; delegation of authority at 49 CFR 1.95.

■ 17. Amend § 553.14 by revising paragraphs (d) to read as follows:

§ 553.14 Direct final rulemaking.

* * * * *

(d) If NHTSA receives any written adverse comment within the specified time after publication of the direct final rule in the **Federal Register**, the agency will either publish a document withdrawing the direct final rule before it becomes effective and may issue an NPRM, or proceed by any other means permitted under the Administrative Procedure Act.

* * * * *

PART 601—ORGANIZATION, FUNCTIONS, AND PROCEDURES

■ 18. The authority citation for part 601 continues to read as follows:

Authority: 5 U.S.C. 552; 49 U.S.C. 5334; 49 CFR 1.91.

■ 19. Amend § 601.36 by revising paragraph (d) to read as follows:

§ 601.36 Procedures for direct final rulemaking.

* * * * *

(d) If FTA receives any written adverse comment within the specified time of publication in the **Federal Register**, FTA will either publish a document withdrawing the direct final rule before it becomes effective and may issue an NPRM, or proceed by any other means permitted under the Administrative Procedure Act.

* * * * *

Signed in Washington, DC, on March 24, 2021.

Peter Paul Montgomery Buttigieg,

Secretary.

[FR Doc. 2021–06416 Filed 4–1–21; 8:45 am]

BILLING CODE 4910–9X–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1231

[Docket No. CPSC–2015–0031]

Safety Standard for High Chairs

AGENCY: Consumer Product Safety Commission.

ACTION: Direct final rule.

SUMMARY: In June 2018, the U.S. Consumer Product Safety Commission (CPSC) published a consumer product safety standard for high chairs under section 104 of the Consumer Product Safety Improvement Act of 2008 (CPSIA). The standard incorporated by reference the ASTM voluntary standard that was in effect for high chairs at the time. The CPSIA sets forth a process for updating mandatory standards for durable infant or toddler products that are based on a voluntary standard, when a voluntary standards organization revises the standard. In December 2020, ASTM published a revised voluntary standard for high chairs, and it notified the Commission of this revised standard in January 2021. This direct final rule updates the mandatory standard for high chairs to incorporate by reference ASTM's 2020 version of the voluntary standard for high chairs.

DATES: The rule is effective on July 3, 2021, unless CPSC receives a significant adverse comment by May 3, 2021. If CPSC receives such a comment, it will publish notification in the **Federal Register**, withdrawing this direct final rule before its effective date. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of July 3, 2021.

ADDRESSES: You can submit comments, identified by Docket No. CPSC–2015–0031, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: *https://www.regulations.gov.* Follow the instructions for submitting comments. CPSC typically does not accept comments submitted by electronic mail (email), except through *https://www.regulations.gov.* CPSC encourages you to submit electronic comments by using the Federal eRulemaking Portal, as described above.

Mail/hand delivery/courier Written Submissions: Submit comments by mail/hand delivery/courier to: Division of the Secretariat, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone: (301) 504–7479. Alternatively, as a temporary option during the COVID–19 pandemic, you can email such submissions to: *cpsc-os@cpsc.gov.*

Instructions: All submissions must include the agency name and docket number for this document. CPSC may post all comments without change, including any personal identifiers, contact information, or other personal information provided, to: *https://www.regulations.gov.* Do not submit electronically: Confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If you wish to submit such information, please submit it according to the instructions for mail/hand delivery/courier written submissions.

Docket: For access to the docket to read background documents or comments received, go to: *https://www.regulations.gov,* and insert the docket number, CPSC–2015–0031, into the ''Search'' box, and follow the prompts.

FOR FURTHER INFORMATION CONTACT: Keysha Walker, Compliance Officer, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–6820; email: *kwalker@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Authority

Section 104(b)(1) of the CPSIA requires the Commission to assess the effectiveness of voluntary standards for durable infant or toddler products and adopt mandatory standards for these products. 15 U.S.C. 2056a(b)(1). The mandatory standard must be ''substantially the same as'' the voluntary standard, or it may be ''more

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

POLYWEAVE PACKAGING, INC.,
Plaintiff

v.

PETER PAUL MONTGOMERY BUTTIGIEG,
Secretary, United States Department of Transportation,
Defendant

---/

AFFIDAVIT OF NEIL J. WERTHMANN, JR.

STATE OF INDIANA
COUNTY OF VANDENBURGH

BEFORE ME, the undersigned Notary, NEIL J. WERTHMANN, JR., on this 29th day of April, 2021, personally appeared and, after being by me duly sworn, deposes and says the following:

1. My birthdate is April 4, 1962.
2. I reside in Newburgh, Indiana.
3. My office address is 8 Industrial Rd., Madisonville, KY 42431.
4. I am the President of the above-captioned Polyweave Packaging, Inc. ("Polyweave"). My responsibilities include, among other duties, management of Polyweave's manufacturing facility at the address above in Madisonville, KY. Polyweave was founded by my father, Neil Werthmann, Sr., and the company began operations in 1980.
5. From at least 2015, I have been in charge of Polyweave's compliance with all federal, state and local regulations applicable to the business, including the U.S. Department of Transportation's ("DOT's") Hazardous Materials Regulations ("HMRs"). I have consistently made every effort to assure our company's full compliance with all regulatory requirements and have always responded promptly to any inquiries or criticisms from representatives of regulatory bodies.
6. In April, 2015, I first became aware that Edward Rastetter, an inspector for DOT's Pipeline and Hazardous Materials Safety Administration ("PHMSA") had concerns with certain aspects of our product, a bag made for other businesses to use in the transportation of hazardous materials. Our interaction with Agent Rastetter is set forth in Part III, ¶¶ 45-61 of the Complaint in the above-captioned action.
7. The factual averments in those paragraphs of the Complaint are true, correct and complete, to the best of my knowledge and recollection.

[Signature of Affiant]
Neil J. Werthmann, Jr.
Polyweave Packaging, Inc.
8 Industrial Rd.
Madisonville, KY 42431

DAN FULKERSON
Resident of Vanderburgh County, IN
Commission Expires: December 3, 2025
Commission # 708142

Signed and sworn to before me, Dan Fulkerson, Notary Public, on this 29th day of April, 2021.
My Commission Expires: 12/3/2025