

**DEPARTMENT OF TRANSPORTATION****Office of the Secretary****49 CFR Part 10**

[Docket No. DOT-OST-2017-0028]

RIN 2105-AE76

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

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

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** In accordance with the Privacy Act of 1974, the Department of Transportation proposes to add a system of records relating to aviation consumer protection to the list of Department of Transportation Privacy Act Systems of Records that are exempt from one or more provisions of the Privacy Act. The Department is proposing to exempt this system of records, titled Aviation Consumer Complaint Application Online System, to protect records compiled for investigations and inquiries into alleged Federal civil rights and consumer protection misconduct by airlines and air travel companies. This exemption was initially proposed on February 28, 2005 and the Department did not receive any comments on the proposed rule. Nonetheless, given the time that has passed since the original Notice of Proposed Rulemaking, the Department is issuing this Notice of Proposed Rulemaking for comment. The current system of records notice indicates that an exemption applies to this system; however, the Department is updating the system of records notice to specify the basis of the exemption. This rulemaking conforms the Department of Transportation's regulations on Maintenance and Access to Records Pertaining to Individuals to the applicable System of Records Notices (SORNs) to current Department of Transportation practice.

**DATES:** Submit comments on or before April 8, 2019.

**ADDRESSES:** You may file comments identified by the docket number DOT-OST-2017-0028 by any of the following methods:

○ *Federal Rulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.

○ *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.

○ *Hand Delivery or Courier:* West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE, between 9:00 a.m. and 5:00 p.m. ET, Monday through Friday, except Federal holidays.

○ *Fax:* 202-493-2251.

*Instructions:* You must include the agency name and docket number DOT-OST-2017-0028 or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comment. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

*Privacy Act:* Anyone is able to search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.) You may review DOT's system of records notice for dockets in the **Federal Register** notice published on January 17, 2008 (73 FR 3316-3317).

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> or to the street address listed above. Follow the online instructions for accessing the docket.

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

**SUPPLEMENTARY INFORMATION:** The Privacy Act of 1974, 5 U.S.C. 552a, requires that agencies tell the public when they maintain information about a person in a file that may be retrieved to that person's name or some other identifying particular. A group of these files is a "system of records," and the existence of each system must be published in a "system of records notice" (SORN). An Agency wishing to exempt portions of some systems of records from certain provisions of the Privacy Act must notify the public of that exemption in both the SORN and in an exemption rule. This proposed rulemaking clarifies that portions of the Aviation Consumer Complaint Application Online System are not subject to some access and notification provisions of the Privacy Act. Exempting the systems from these requirements is necessary to protect the public's interest in fair and accurate investigations.

In 2005, the DOT established the Aviation Consumer Complaint Application Online System to monitor consumer comments regarding airlines

and air travel companies and to determine the extent to which these entities are in compliance with Federal aviation civil rights and consumer protection regulations. The records contain the inquiries, opinions, and compliments of individuals, as well as complaints of discrimination based on physical handicap, race, religion, etc. Thus, records may contain complaints containing alleged violations of Federal law and regulations, which can lead to civil and criminal investigations by the Department of Transportation. Consequently, the records should be treated as other law enforcement systems as some information needs to remain confidential for these investigative purposes.

This proposed rulemaking would exempt certain records maintained by the Aviation Consumer Complaint Application Online System from the access and notification provisions of the Privacy Act. An exemption from these requirements would be necessary to: Avoid disclosure of aviation compliance inquiry techniques; protect the confidential information of confidential informants and third parties; prevent unwarranted invasions of another individual's privacy; and support DOT's ability to obtain information relevant to resolving an aviation compliance concern. DOT may take administrative or other appropriate action within the scope of its respective legal authority in response to an aviation compliance concern. Thus, an aviation compliance inquiry is comprised of records compiled for law enforcement purposes falling under the subsection (k)(2) exemption (5 U.S.C. 552a(k)(2)) making it applicable to this system of records.

In appropriate circumstances, where compliance with the request would not appear to interfere with or adversely affect the conduct of an aviation compliance inquiry or result in the unauthorized disclosure of confidential information, OST may opt to waive these exemptions. In addition, some information may be available under the Freedom of Information Act, 5 U.S.C. 552 (FOIA). Any request for information from this system under the FOIA would be assessed on a case-by-case basis to determine what, if any, information could be released consistent with section (b)(2) of the Privacy Act, 5 U.S.C. 552a(b)(2).

DOT identifies a system of records that is exempt from one or more provisions of the Privacy Act (pursuant to 5 U.S.C. 552a (k)) both in the SORN published in the **Federal Register** for public comment and in an Appendix to DOT's regulations implementing the Privacy Act (49 CFR part 10, Appendix).

This rule would exempt records in the Aviation Consumer Complaint Application Online System of records from subsection (d) (Access to Records) of the Privacy Act to the extent that records consist of investigatory material compiled for law enforcement purposes in accordance with 5 U.S.C. 552a(k)(2).

### Regulatory Analysis and Notices

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

The DOT has considered the impact of this proposed rulemaking action under Executive Orders 12866 and 13563 (January 18, 2011, "Improving Regulation and Regulatory Review"), and the DOT's regulatory policies and procedures (44 FR 11034; February 26, 1979). The DOT has determined that this action would not constitute a significant regulatory action within the meaning of Executive Order 12866 and within the meaning of DOT regulatory policies and procedures. This rule has not been reviewed by the Office of Management and Budget. There would be no costs associated with this rule.

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

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

#### C. Regulatory Flexibility Act

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

#### C. National Environmental Policy Act

The DOT has analyzed the environmental impacts of this proposed action pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined preliminarily that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on

the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 3.C.5 of DOT Order 5610.1C incorporates by reference the categorical exclusions for all DOT Operating Administrations. This action is covered by the categorical exclusion listed in the Federal Highway

Administration's implementing procedures, "[promulgation of rules, regulations, and directives." 23 CFR 771.117(c)(20). The purpose of this rulemaking is to amend the Appendix to DOT's Privacy Act regulations. The DOT does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

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

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

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

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

#### G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The DOT has determined that this action would not contain a collection of information requirement for the purposes of the PRA.

#### H. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L.

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

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

Penalties, Privacy.

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

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

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

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

■ 2. Amend the Appendix to Part 10 by:

a. In Part II, adding a new subsection H.

#### APPENDIX TO PART 10—EXEMPTIONS

##### Part II. Specific Exemptions

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H. The following systems of records are exempt from subsection (d) (Access to records) of the Privacy Act, 5 U.S.C. 552a, to the extent that they contain investigatory material compiled for law enforcement purposes, in accordance with 5 U.S.C. 552a(k)(2).

I. Aviation Consumer Complaint Application Online System, maintained by the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings in the Office of the Secretary (DOT/OST 102).

This exemption is justified because granting an individual access to investigative records could interfere with the overall law enforcement process by revealing a sensitive investigative technique, or confidential sources or information.

Issued in Washington DC on December 21, 2018.

**Elaine L. Chao,**  
Secretary.

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