The Association of American Railroads and the American Short Line and Regional Railroad Association (jointly, “the railroads”), on behalf of themselves and their member railroads, submit the following comments in response to the May 23, 2019, direct final rule removing the FRA civil penalties schedules and guidelines from the Code of Federal Regulations (“C.F.R.”) and publishing them on the FRA website.¹

The railroads do not object to publication of the civil penalties schedules on the FRA website instead of in the Federal Register. However, there are four related changes that FRA should implement to comply with good agency guidance principles, and to avoid simply shifting the expected administrative costs savings onto the public.²

First, FRA should provide a dedicated URL for the civil penalties schedules, which would let the public know where they can reliably find the schedules. The FRA website is not intuitive to search, so a dedicated URL, as opposed to the seemingly auto-generated URL provided in the final rule, would aid the public in being able to find the official schedules.³

Second, FRA must notify the public of changes to any of the penalties in the schedules. Notification could be given in several ways, including issuing a press release, sending a letter to trade associations and other groups representing the railroads and other regulated entities, or providing a date certain every year for publication of any updates to the schedules. An annual

¹ AAR is a trade association whose membership includes freight railroads that operate 83% of the line-haul mileage, employ 95% of the workers, and account for 97% of the freight revenues of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service. 84 Fed. Reg. 23,730 (May 23, 2019).
² FRA maintains its civil penalties schedules pursuant to the statutory mandate at 49 U.S.C. § 21301.
³ The URL provided in the final rule is: www.fra.dot.gov/Page/P1155.
deadline for any updates to the schedules would provide the public with certainty similar to how the public is able to rely upon regulations published in the annual editions of the C.F.R.

Third and relatedly, FRA needs to provide an opportunity for public feedback on significant proposed changes to the penalties schedules in the future. Not only do DOT and OMB both direct agencies to follow notice and comment procedures for changes to significant agency guidance, FRA has historically provided notice with an opportunity for public comment when the agency has proposed revisions to its civil penalties schedules. FRA should ensure that it has procedures in place to notify the public of any future proposed significant changes to its civil penalties schedules with the opportunity for public feedback.

Finally, FRA should communicate its plan for how the civil penalties schedules are to be maintained on the FRA website in the event of a partial government shutdown. In the past, such shutdowns have resulted in disruption to the maintenance of government websites. The railroads, as well as members of the general public, need to know where, when and how to access the official civil penalties schedules for FRA regulations.

Respectfully Submitted,

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June 28, 2019

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5 See, e.g., Fazzini, Kate. “How the government shutdown is putting national cybersecurity at risk.” CNBC, Jan 14, 2019. (Noting that the government shutdown raised new and alarming concerns as routine website maintenance was essentially furloughed).