

POSTAL SERVICE**39 CFR Parts 265 and 266****Production or Disclosure of Material or Information****AGENCY:** Postal Service™.**ACTION:** Final rule.

SUMMARY: In June 2018, the Postal Service proposed to amend its Freedom of Information Act and Privacy Act regulations. Most of these changes consisted of minor technical corrections. In addition to these technical changes, the Postal Service proposed changes to create a definition of “information of a commercial nature” as it pertains to the Postal Reorganization Act’s provisions concerning disclosure of information under the Freedom of Information Act, add guidance for determining what information qualifies as commercial information under the Act, and provide specific examples. The Postal Service received three sets of comments and addresses them here.

DATES: This rule is effective as of October 24, 2018.

FOR FURTHER INFORMATION CONTACT: Ruth B. Stevenson, Attorney, Federal Compliance, ruth.b.stevenson@usps.gov, 202–268–6627.

SUPPLEMENTARY INFORMATION:**Background**

In June 2018, the Postal Service proposed to amend its Freedom of Information Act (FOIA) and Privacy Act regulations. 83 FR 27933 (June 15, 2018). Most of these changes were minor, intended to improve clarity and make technical corrections. In addition to these technical changes, the Postal Service proposed substantive changes intended to create a definition of “information of a commercial nature” as it pertains to the Postal Reorganization Act’s provisions concerning disclosure of information under the FOIA, add guidance for determining what information qualifies as commercial information under the Act, and provide specific examples. The Postal Service received three sets of comments. The Postal Service has considered these comments and addresses them below.

The Postal Reorganization Act of 1970 (PRA) subjected the newly formed United States Postal Service to certain federal statutes, including the FOIA. See 39 U.S.C. 410(b). The PRA was the result of over two years of congressional deliberation and debate seeking to reestablish the Postal Service as an independent executive organization that would “be run more like a business than

had its predecessor, the Post Office Department.” *Franchise Tax Bd. of Cal. v. U.S. Postal Serv.*, 467 U.S. 512, 520 (1984); see also *Nat’l Ass’n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 822 (1983) (noting that under the Act “Congress sought to ensure that the Postal Service would be managed in a businesslike way”). In recognition of these new mandates and expectations, Congress specifically exempted the Postal Service from disclosing six types of operational information under the FOIA. See 39 U.S.C. 410(c). In particular, Congress exempted “information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed.” 39 U.S.C. 410(c)(2). The original form of the PRA’s final iteration, H.R. 17070, would not have subjected the Postal Service to the FOIA at all. *Id.* However, the Senate conditioned its approval of H.R. 17070 on the inclusion of several significant amendments embodied in S. 3842, including Section 410. S. 3842, 91st Cong. (1970); see also e.g., S. Rep. No. 91–912 (1970); H.R. Rep. No. 91–1363 (1970). This section both subjects the Postal Service to the FOIA and contains certain specific exemptions from disclosure. The House accepted the amendments in S. 3842 with few changes and minimal discussion. See H.R. Rep. No. 91–1363 (1970) and Public Law 91–375 (August 12, 1970). In addition, despite the fact that the inclusion of Section 410 was demanded by the Senate, the Senate record is devoid of specific discussion of this provision and its relationship to the FOIA. These omissions from the congressional record make it difficult to discern, beyond the plain language, how Congress intended the Postal Service to interpret section 410—specifically, what constitutes “information of a commercial nature” under section 410(c)(2).

The Postal Service’s FOIA regulations were originally promulgated in 1975. See U.S. Postal Service, Freedom of Information Act Regulations, 40 FR 7330 (Feb. 19, 1975). Just as Congress did not define commercial information in Section 410, the original **Federal Register** notice concerning 39 CFR 265.14(b)(3) did not define, nor even discuss, commercial information or the proposed exemption of certain categories of records. *Id.* Despite some minor clarifying edits, the regulatory language of § 265.14(b)(3) has remained substantially unchanged since 1975. See 51 FR 26385 (July 23, 1986) (adding two

categories of records without discussion). Several courts have observed the absence of such definition, from either Congress or Postal Service regulations, as they endeavored to define the term themselves. See e.g., *Carlson v. U.S. Postal Serv.*, 504 F.3d 1123, 1128 (9th Cir. 2007) (noting that neither Congress nor Postal Service regulations have defined “information of a commercial nature”); *Nat’l W. Life Ins. Co. v. U.S.*, 512 F. Supp. 454, 459–60 (N.D. Tex. 1980) (stating that there is “no authority as to what constitutes commercial information”); *Carlson v. U.S. Postal Serv.*, No. 13–CV–06017–JSC, 2015 WL 9258072, at *4 (N.D. Cal. Dec. 18, 2015) (stating that “without a statutory or regulatory definition,” the courts have been forced to turn to the dictionary for the common meaning). It was with these criticisms in mind that the Postal Service endeavored to make the proposed changes to its regulations at question here. See proposed § 265.14(b)(3).

Summary of Commenter A’s Comments and Postal Service Responses

Commenter A made several thoughtful comments in response to the proposed rule changes. Chiefly, Commenter A questions the necessity of making any changes at all to § 265.14 under the assumption that “there has been relatively little litigation over the scope of either 39 U.S.C. 410(c)(2) or 39 CFR 265.14(b)(3).” The Postal Service disagrees. The scope of Section 410(c)(2), and more precisely how to define commercial information, has been the subject of numerous court decisions. See e.g., *Wickwire Gavin, P.C. v. U.S. Postal Serv.*, 356 F.3d 588, 594–596 (4th Cir. 2004); *Carlson*, 504 F.3d at 1128; *Nat’l W. Life Ins. Co.*, 512 F. Supp. at 459–60; *Piper & Marbury v. U.S. Postal Serv.*, No. CIV. A. 99–2383JMFCKK, 2001 WL 214217, at *1 (D.D.C. Mar. 6, 2001); *Carlson*, No. 13–CV–06017–JSC, 2015 WL 9258072, at *4. This topic has also been the subject of several other filed complaints that either never, or have not yet, reached judicial decision. Moreover, the scope of section 410(c)(2) is constantly a topic of controversy in the administrative appeal decisions the Postal Service issues under the FOIA. Therefore, the Postal Service believes that the level of controversy surrounding the scope of section 410(c)(2) merits regulatory clarification.

Commenter A next posits that the Postal Service’s proposed definition of “information of a commercial nature” would do more to confuse rather than clarify the scope of section 410(c)(2). The Postal Service proposes to amend

§ 265.14(b)(3) to state “information is of a commercial nature if it relates to commerce, trade, profit, or the Postal Service’s ability to conduct itself in a businesslike manner.” 83 FR 27934, proposed § 265.14(b)(3). The Postal Service’s proposed amendments follow this subsection with six factors to evaluate in determining whether particular information meets this definition. Commenter A, while recognizing that this “is generally consistent with case law,” opines that the definition “is so broad as to be meaningless.” Again, the Postal Service disagrees. The proposed definition is clear, concise, and places new parameters on the scope of section 410(c)(2) where none previously existed. Furthermore, it is considerably narrower than both the current regulatory language of § 265.14(b)(3) and the relatively boundless statutory text of section 410(c)(2). Moreover, the addition of six factors to apply in making a determination of information’s commercial nature provide further clarity to the proposed definition while also providing guidance as to its application in real world circumstances.

In addition to the proposed definition of “information of a commercial nature” and the six evaluation factors, the proposed amendment to § 265.14 also includes a demonstrative, non-exclusive list of 21 examples of specific types of information the Postal Service has determined meets that definition. 83 FR 27934, proposed § 265.14(b)(3)(ii). The remainder of Commenter A’s comments argue that certain of these listed examples would not qualify for withholding, including “Facility-specific volume, revenue, and cost information,” proposed § 265.14(b)(3)(ii)(J), “Country-specific international mail volume and revenue data,” proposed § 265.14(b)(3)(ii)(K), and “Parties to Negotiated Service Agreements,” proposed § 265.14(b)(3)(ii)(O).

Courts have identified several characteristics that tend to weigh either in favor of or against a determination that information is commercial in nature. Some of those characteristics include whether and to what extent the information: Is publicly available, is intrinsically economic or financial, is transactional, involves cost and pricing, would be useful to competitors, or could cause competitive harm if disclosed. See e.g., *Carlson*, 504 F.3d at 1130 (taking note that most of the requested information was already publicly available); *Nat’l W. Life Ins. Co.*, 512 F. Supp. at 459–60 (noting that the information requested was not “intrinsically economic or financial”);

Carlson, No. 13–CV–06017–JSC, 2015 WL 9258072, at *7 (noting the transactional nature of the requested information, its potential utility to competitors, and recognizing that other courts have protected cost and pricing information); *Wickwire Gavin*, 356 F.3d at 595 (rejecting an “implied additional requirement” of competitive harm, but noting that “competitive harm [is] one of many considerations” in determining the commercial nature of information).

Facility-specific and country-specific volume, revenue, and cost information share many of those characteristics. It is non-public, intrinsically economic and financial, and involves cost and pricing. Likewise, the Postal Service does not make the parties to its Negotiated Service Agreements public. The Postal Service uses these agreements to offer customized pricing and classifications to certain mailers to compete for those mailers’ business. Neither of these items would typically be released “under good business practice.” Other businesses, including the Postal Service’s competitors, do not release facility-specific or country-specific volume, revenue and cost information. Customers who hold Negotiated Service Agreements with the Postal Service do not publicly disclose such agreements.

As such, the Postal Service declines making changes to its proposed amendments in response Commenter A’s comments.

Summary of Commenter B’s Comments and Postal Service Responses

Likewise, Commenter B made several thoughtful comments in response to the proposed rule changes. All of Commenter B’s comments relate to proposed § 265.14(b)(3)(ii)(Q) which deems “negotiated terms in leases” commercial information under section 410(c)(2). Commenter B asks that the Postal Service delete this item from the list of examples included at proposed § 265.14(b)(3)(ii). Commenter B’s comments do not contest that negotiated terms in leases qualify as commercial information under section 410(c)(2), rather, it asserts that withholding this information is not “consistent with good business practices for the commercial and business sector.”

The PRA exempted from disclosure under the FOIA “information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed.” 39 U.S.C. 410(c)(2). Section 410(c)(2) creates a two-pronged inquiry; first, whether the information is commercial in nature, and second, whether it would be

publicly disclosed under good business practice. See e.g., *Wickwire Gavin*, 356 F.3d at 594–95; *Carlson* No. 13–cv–06017–JSC, 2015 WL 9258072, at *8. In order to determine whether commercial information would be disclosed under good business practice, courts look to the common practices of other businesses. See *id.* The Postal Service notes that its regulatory changes only encompass the definition of “commercial information.” To the extent that Commenter B asserts that this information is not information that falls within the second prong of this inquiry, the Postal Service submits that such an assertion is outside the scope of this rulemaking. However, to the extent Commenter B’s comments have any bearing on the instant rulemaking, the Postal Service declines to make changes to 39 CFR 265.14(b) that conform to Commenter B’s comments for the reasons discussed below.

First, Commenter B asserts that leasing information should not be exempt from public disclosure because this type of information is “routinely made publicly available in the commercial leasing industry,” citing searchable databases provided by third-party companies. The Postal Service is not aware of any of its competitors publicly releasing the terms of their commercial leases. In fact, it is common practice for parties to a commercial lease to require non-disclosure agreements as part of their lease terms for the very purpose of insuring that terms do not become public. As such, the Postal Service disagrees that this is a routine procedure in keeping with good business practice.

Commenter B next points out that the United States General Services Administration (GSA) provides a searchable database containing information on the terms of its leases. While true, the Postal Service occupies a different position than GSA. GSA is not required to operate in a businesslike manner as its costs are paid through appropriated funds, whereas the Postal Service is self-funded by revenue it generates through operations. Congress enacted section 410(c)(2) in recognition of the Postal Service’s dual role as both a government entity and a business competing in the market. This provision only applies to the Postal Service. Quite simply, GSA does not enjoy these same protections that Congress saw fit to provide the Postal Service. Moreover, section 410(c)(2) references withholding information “under good business practice” with courts looking to the practices of other businesses. GSA is not a business. Thus, GSA’s practices regarding lease terms do not warrant

altering the proposed amendments to 39 CFR 265.14(b).

Commenter B also asserts that the past practice of releasing Postal Service lease information “has benefited both the Postal Service and the lessors of postal buildings.” The Postal Service agrees that such practice has benefited lessors—but to the detriment of the Postal Service’s bargaining position as lessee. It has been the Postal Service’s experience that negotiations in which the lessor has access to extensive Postal Service lease information for other properties result in less-favorable economic terms for the Postal Service. In other words, the Postal Service is disadvantaged when lessors know exactly what rents, concessions, and other terms were accepted by the Postal Service for other properties in the Postal Service’s lease portfolio. The circumstances surrounding the acceptance of less than optimal terms in one lease do not necessarily support the Postal Service’s acceptance of similar terms in other leases. However, lessors can use the knowledge of the former to insist on the same non-beneficial terms in their leases to the detriment of the Postal Service.

Finally, Commenter B posits that without public access to the Postal Service’s negotiated lease terms, insurance underwriters will have a more difficult time accurately estimating risk, causing premiums to increase. Commenter B asserts that this is especially so for “loss of rent coverage.” In theory, an increase in premiums will lead to an increase in rents. The Postal Service will not speculate on what factors impact pricing in insurance markets. However, it should be noted that insurance coverage is the responsibility of the lessor. Moreover, Postal Service leases do not require lessors to carry loss of rent coverage as this coverage solely benefits the lessor—protecting the lessor’s income stream. The commercial real estate market dictates what rents are paid. While a hypothetical increase in insurance rates for lessors may somewhat increase the lessor’s costs, the market will determine whether such an increase in cost can be passed on to tenants. In this case, the Postal Service does not believe that this will cause a significant increase in the rents it pays as determined by relevant commercial real estate market conditions. Regardless, even if such a hypothetical cost increase to the lessor were to trickle into the actual rents paid, the Postal Service estimates that any increase would be far offset by its improved bargaining position as a result of not publicly disclosing its lease information. As such, the Postal Service

declines Commentator B’s invitation to change the proposed amendments.

Summary of the Commenter C’s Comments and Postal Service Responses

Commenter C submitted comments supporting the Postal Service’s proposed changes to 39 CFR 265.14(b). While Commenter C recognizes the importance of the FOIA’s goal of promoting transparency in government, Commenter C also underlines the importance of ensuring that the Postal Service can adequately protect third party sensitive business information. Commenter C notes that the disclosure of such information may allow an unfair advantage to a business’s competitors. Moreover, Commenter C notes that businesses in the private sector would be much more hesitant to conduct business with the Postal Service if they faced uncertainty as to whether the Postal Service could protect their confidential business information from public disclosure.

The Postal Service appreciates and agrees with Commenter C. In order to effectively operate in a competitive commercial environment, the Postal Service must not only protect its own sensitive business information but must also have the ability to give its partners adequate assurances that the Postal Service can maintain the confidentiality of their information. The Postal Service believes that the edits to 39 CFR 265.14(b) achieve a balance between the goals of the FOIA and the Postal Service’s ability to conduct itself in a business-like manner.

List of Subjects

39 CFR Part 265

Administrative practice and procedure, Courts, Freedom of information, Government employees.

39 CFR Part 266

Privacy.

For the reasons stated in the preamble, the Postal Service amends 39 CFR chapter I as follows:

PART 265—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

■ 1. The authority citation for part 265 continues to read as follows:

Authority: 5 U.S.C. 552; 5 U.S.C. App. 3; 39 U.S.C. 401, 403, 410, 1001, 2601; Pub. L. 114–185.

■ 2. Amend § 265.1 by revising paragraph (a)(1) to read as follows:

§ 265.1 General provisions.

(a) * * *

(1) This subpart contains the regulations that implement the Freedom of Information Act (FOIA), 5 U.S.C. 552, insofar as the Act applies to the Postal Service. These rules should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Act Fee Schedule and Guidelines published by the Office of Management and Budget (OMB Guidelines). The Postal Service FOIA Requester’s Guide, an easy-to-read guide for making Postal Service FOIA requests, is available at <http://about.usps.com/who-we-are/foia/welcome.htm>.

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■ 3. Amend § 265.3 by revising paragraphs (d) and (e) to read as follows:

§ 265.3 Procedure for submitting a FOIA request.

* * * * *

(d) *First-party requests.* A requester who is making a request for records about himself must provide verification of identity sufficient to satisfy the component as to his identity prior to release of the record. For Privacy Act-protected records, the requester must further comply with the procedures set forth in 39 CFR 266.5.

(e) *Third-party requests.* Where a FOIA request seeks disclosure of records that pertain to a third party, a requester may receive greater access by submitting a written authorization signed by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual is deceased (e.g., a copy of a death certificate or an obituary). As an exercise of administrative discretion, each component can require a requester to supply a notarized authorization, a declaration, a completed Privacy Waiver as set forth in 39 CFR 266.5(b)(2)(iii), or other additional information if necessary in order to verify that a particular individual has consented to disclosure.

* * * * *

■ 4. Amend § 265.6 by adding paragraph (e)(2) to read as follows:

§ 265.6 Responses to requests.

* * * * *

(e) * * *

(2) Any component invoking an exclusion must maintain an administrative record of the process of invocation and approval of exclusion by OIP.

■ 5. Amend § 265.9 by revising paragraph (c)(3) to read as follows:

§ 265.9 Fees.

* * * * *

(c) * * *

(3) *Review.* Commercial-use requesters shall be charged review fees at the rate of \$21.00 for each half hour by personnel reviewing the records. Review fees shall be assessed in connection with the initial review of the record, *i.e.*, the review conducted by a component to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with a component's re-review of the records in order to consider the use of other exemptions may be assessed as review fees.

* * * * *

■ 6. Amend § 265.14 by revising paragraphs (b) and (d)(1) and (2) to read as follows:

§ 265.14 Rules concerning specific categories of records.

* * * * *

(b) *Information not subject to mandatory public disclosure.* Certain types of information are exempt from mandatory disclosure under exemptions contained in the Freedom of Information Act and in 39 U.S.C. 410(c). The Postal Service will exercise its discretion, in accordance with the policy stated in § 265.1(c), as implemented by instructions issued by the Records Office with the approval of the General Counsel in determining whether the public interest is served by the inspection or copying of records that are:

- (1) Related solely to the internal personnel rules and practices of the Postal Service.
- (2) Trade secrets, or privileged or confidential commercial or financial information, obtained from any person.
- (3) Information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed. Information is of a commercial nature if it relates to commerce, trade, profit, or the Postal Service's ability to conduct itself in a businesslike manner.
 - (i) When assessing whether information is commercial in nature, the Postal Service will consider whether the information:
 - (A) Relates to products or services subject to economic competition, including, but not limited to, "competitive" products or services as defined in 39 U.S.C. 3631, an inbound international service, or an outbound international service for which rates or

- service features are treated as nonpublic;
- (B) Relates to the Postal Service's activities that are analogous to a private business in the marketplace;
- (C) Would be of potential benefit to individuals or entities in economic competition with the Postal Service, its customers, suppliers, affiliates, or business partners or could be used to cause harm to a commercial interest of the Postal Service, its customers, suppliers, affiliates, or business partners;
- (D) Is proprietary or includes conditions or protections on distribution and disclosure, is subject to a nondisclosure agreement, or a third party has otherwise expressed an interest in protecting such information from disclosure;
- (E) Is the result of negotiations, agreements, contracts or business deals between the Postal Service and a business entity; or
- (F) Relates primarily to the Postal Service's governmental functions or its activities as a provider of basic public services.
 - (ii) No one factor is determinative. Rather, each factor should be considered in conjunction with the other factors and the overall character of the particular information. Some examples of commercial information include, but are not limited to:
 - (A) Information related to methods of handling valuable registered mail.
 - (B) Records of money orders except as provided in section 509.3 of the Domestic Mail Manual.
 - (C) Technical information concerning postage meters and prototypes submitted for Postal Service approval prior to leasing to mailers.
 - (D) Quantitative data, whether historical or current, reflecting the number of postage meters or PC postage accounts.
 - (E) Reports of market surveys conducted by or under contract on behalf of the Postal Service.
 - (F) Records indicating carrier or delivery lines of travel.
 - (G) Information which, if publicly disclosed, could materially increase procurement costs.
 - (H) Information which, if publicly disclosed, could compromise testing or examination materials.
 - (I) Service performance data on competitive services.
 - (J) Facility specific volume, revenue, and cost information.
 - (K) Country-specific international mail volume and revenue data.
 - (L) Non-public international volume, revenue and cost data.

- (M) Pricing and negotiated terms in bilateral arrangements with foreign postal operators.
- (N) Information identifying USPS business customers.
- (O) Financial information in or the identities of parties to Negotiated Service Agreements or Package Incentive Agreements.
- (P) Negotiated terms in contracts.
- (Q) Negotiated terms in leases.
- (R) Geolocation data.
- (S) Proprietary algorithms or software created by the Postal Service.
- (T) Sales performance goals, standards, or requirements.
- (U) Technical information or specifications concerning mail processing equipment.

* * * * *

- (d) * * *
 - (1) *Change of address.* The new address of any specific business or organization that has filed a permanent change of address order (by submitting PS Form 3575, a hand written order, or an electronically communicated order) will be furnished to any person upon request. If a domestic violence shelter has filed a letter on official letterhead from a domestic violence coalition stating:
 - (i) That such domestic violence coalition meets the requirements of 42 U.S.C. 10410; and
 - (ii) That the organization filing the change of address is a domestic violence shelter, the new address shall not be released except pursuant to applicable routine uses. The new address of any individual or family that has filed a permanent or temporary change of address order will be furnished only in those circumstances stated at paragraph (d)(5) of this section. Disclosure will be limited to the address of the specifically identified individual about whom the information is requested (not other family members or individuals whose names may also appear on the change of address order). The Postal Service reserves the right not to disclose the address of an individual for the protection of the individual's personal safety. Other information on PS Form 3575 or copies of the form will not be furnished except in those circumstances stated at paragraph (d)(5)(i), (d)(5)(iii), or (d)(5)(iv) of this section.
 - (2) *Name and address of permit holder.* The name and address of the holder of a particular bulk mail permit, permit imprint or similar permit (but not including postage meter licenses), and the name of any person applying for a permit on behalf of a holder will be furnished to any person upon request. For the name and address of a postage

meter license holder, see paragraph (d)(3) of this section. (Lists of permit holders may not be disclosed to members of the public. See paragraph (e)(1) of this section.)

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PART 266—PRIVACY OF INFORMATION

■ 7. The authority citation for part 266 continues to read as follows:

Authority: 5 U.S.C. 552a; 39 U.S.C. 401.

■ 8. Amend § 266.3 by revising paragraphs (a) introductory text, (a)(3), (b)(1) introductory text, (b)(1)(i), (b)(1)(iii), (b)(2) introductory text, (b)(2)(iii), and (b)(2)(xi), and the paragraph (b)(5) heading to read as follows:

§ 266.3 Collection and disclosure of information about individuals.

(a) This section governs the collection of information about individuals, as defined in the Privacy Act of 1974, throughout the United States Postal Service and across its operations;

* * * * *

(3) The Postal Service will maintain no record describing how an individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.

* * * * *

(b) * * *

(1) *Limitations.* The Postal Service will not disclose information about an individual unless reasonable efforts have been made to assure that the information is accurate, complete, timely and relevant to the extent provided by the Privacy Act and unless:

(i) The individual to whom the record pertains has requested in writing, or with the prior written consent of the individual to whom the record pertains, that the information be disclosed, unless the individual would not be entitled to access to the record under the Postal Reorganization Act, the Privacy Act, or other law;

* * * * *

(iii) The disclosure is in accordance with paragraph (b)(2) of this section.

(2) *Conditions of Disclosure.* Disclosure of personal information maintained in a system of records may be made:

* * * * *

(iii) For a routine use as contained in the system of records notices published in the **Federal Register**;

* * * * *

(xi) Pursuant to the order of a court of competent jurisdiction. A court of competent jurisdiction is defined in Article III of the United States Constitution including, but not limited to any United States District Court, any United States or Federal Court of Appeals, the United States Court of Federal Claims, and the United States Supreme Court. For purposes of this section, state courts are not courts of competent jurisdiction.

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(5) *Employment status.* * * *

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Ruth Stevenson,

Attorney, Federal Compliance.

[FR Doc. 2018–20585 Filed 9–21–18; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2018–0073; EPA–R04–OAR–2018–0187; FRL–9984–20–Region 4]

Air Plan Approval; SC and TN; Regional Haze Plans and Prong 4 (Visibility) for the 2012 PM_{2.5}, 2010 NO₂, 2010 SO₂, and 2008 Ozone NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving the portions of South Carolina’s and Tennessee’s State Implementation Plan (SIP) revisions submitted by these States with letters dated September 5, 2017, and November 22, 2017, respectively, seeking to change reliance from the Clean Air Interstate Rule (CAIR) to the Cross-State Air Pollution Rule (CSAPR) for certain regional haze requirements; converting EPA’s limited approvals/limited disapprovals of South Carolina’s and Tennessee’s regional haze plans to full approvals; removing EPA’s Federal Implementation Plans (FIPs) for South Carolina and Tennessee that replaced reliance on CAIR with reliance on CSAPR to address the deficiencies identified in the limited disapprovals of South Carolina’s and Tennessee’s regional haze plans; and converting the conditional approvals to full approvals for the visibility prongs of South Carolina’s infrastructure SIP submittals for the 2012 Fine Particulate Matter (PM_{2.5}), 2010 Nitrogen Dioxide (NO₂), 2010 Sulfur Dioxide (SO₂), and 2008 8-hour Ozone National Ambient Air Quality Standards (NAAQS) and the

visibility prongs of Tennessee’s infrastructure SIP submittals for the 2012 PM_{2.5}, 2010 NO₂, and 2010 SO₂ NAAQS.

DATES: This rule is effective October 24, 2018.

ADDRESSES: EPA has established dockets for these actions under Docket Identification Nos. EPA–R04–OAR–2018–0073 (SC) and EPA–R04–OAR–2018–0187 (TN). All documents in the dockets are listed on the www.regulations.gov website. Although listed in the index, some information may not be publicly available, *i.e.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office’s official hours of business are Monday through Friday 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Michele Notarianni, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. Ms. Notarianni can be reached by telephone at (404) 562–9031 or via electronic mail at notarianni.michele@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background

South Carolina and Tennessee submitted infrastructure SIPs that relied on having fully-approved regional haze plans to satisfy the visibility transport provision of Clean Air Act section 110(a)(2)(D)(i)(II).¹ The CAA requires

¹ EPA’s 2013 Guidance on Infrastructure SIP Elements under Clean Air Act Sections 110(a)(1) and 110(a)(2) (2013 Guidance) provides that one way a state may demonstrate that its SIP will ensure that emissions from the state will not interfere with measures required to be in other states’ plans to protect visibility (*i.e.*, to satisfy prong 4) is through confirmation in its infrastructure SIP submission