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Part II

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Federal Railroad Administration

49 CFR Part 242
Conductor Certification; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 242

[Docket No. FRA–2009–0035, Notice No. 1]

RIN 2130–AC08

Conductor Certification

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA proposes to prescribe regulations for certification of conductors, as required by the Rail Safety Improvement Act of 2008. The proposed rule would require railroads to have a formal program for certifying conductors. As part of that program, railroads would be required to have a formal process for training prospective conductors and determining that all persons are competent before permitting them to serve as a conductor. FRA is proposing this regulation to ensure that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents, and to improve railroad safety. Although this NPRM does not propose any specific amendments to the regulation governing locomotive engineer certification, it does highlight areas in that regulation that may require conforming changes.

DATES: Written Comments: Written comments on the proposed rule must be received by January 10, 2011. Comments received after that date will be considered to the extent possible without incurring additional expense or delay. FRA anticipates being able to determine these matters without a public hearing. However, if prior to December 10, 2010, FRA receives a specific request for a public hearing accompanied by a showing that the party is unable to adequately present his or her position by written statement, a hearing will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: You may submit comments identified by the docket number FRA–2009–0035 by any one of the following methods:

- *Fax:* 1–202–493–2251;
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590;
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or
- Electronically through the Federal eRulemaking Portal, *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name, docket name and docket number or Regulatory Identification Number (RIN) for this rulemaking (2130–AC08). Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mark H. McKeon, Special Assistant to the Associate Administrator for Railroad Safety/Chief Safety Officer, U.S. Department of Transportation, Federal Railroad Administration, Mail Stop 25, West Building 3rd Floor West, Room W35–334, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202–493–6350); or John Seguin, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, RCC–10, Mail Stop 10, West Building 3rd Floor, Room W31–217, 1200 New Jersey Avenue, SE., Washington, DC 20590 (*telephone:* 202–493–6045).

SUPPLEMENTARY INFORMATION:

I. Statutory Background

Pursuant to the Rail Safety Improvement Act of 2008 § 402, Public Law 110–432, 122 Stat. 4884, (Oct. 16, 2008) (codified at 49 U.S.C. 20163) (hereinafter "RSIA") Congress required the Secretary of Transportation (Secretary) to prescribe regulations to establish a program requiring the certification of train conductors. The Secretary delegated this authority to the Federal Railroad Administrator. 49 CFR 1.49(oo).

Section 20163(a) of 49 U.S.C. (Section 402 of the RSIA) provides that:

> The Secretary of Transportation shall prescribe regulations to establish a program requiring the certification of train conductors. In prescribing such regulations, the Secretary shall require that train conductors be trained, in accordance with the training standards developed pursuant to section 20162.

Section 20163(b) provides that "[i]n developing the regulations required by subsection (a), the Secretary may consider the requirements of section 20135(b) through (e)." The requirements in 49 U.S.C. 20135 concern the certification of locomotive engineers.

Section 20162(a)(2) of 49 U.S.C. (Section 401 of the RSIA) provides that:

> "(a) IN GENERAL.—The Secretary of Transportation shall, not later than 1 year after the date of enactment of the Rail Safety Improvement Act of 2008, establish—
> * * *
> (2) a requirement that railroad carriers, contractors, and subcontractors develop and submit training and qualification plans to the Secretary for approval, including training programs and information deemed necessary by the Secretary to ensure that all safety-related railroad employees receive appropriate training in a timely manner.
> * * *"

Section 20162(b) of 49 U.S.C. provides that "[t]he Secretary shall review and approve the plans required under subsection (a)(2) utilizing an approval process required for programs to certify the qualification of locomotive engineers pursuant to part 240 of title 49, Code of Federal Regulations."

II. RSAC Overview

In March 1996, FRA established the Railroad Safety Advisory Committee (RSAC), which provides a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency's major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of RSAC members follows:

American Association of Private Railroad Car Owners (AARPCO);
American Association of State Highway & Transportation Officials (AASHTO);
American Chemistry Council;
American Petroleum Institute;
American Public Transportation Association (APTA);
American Short Line and Regional Railroad Association (ASLRRA);
American Train Dispatchers Association (ATDA);
Association of American Railroads (AAR);
Association of Railway Museums (ARM);

Association of State Rail Safety Managers (ASRSM);
Brotherhood of Locomotive Engineers and Trainmen (BLET);
Brotherhood of Maintenance of Way Employes Division (BMWED);
Brotherhood of Railroad Signalmen (BRS);
Chlorine Institute;
Federal Transit Administration (FTA);*
Fertilizer Institute;
High Speed Ground Transportation Association (HSGTA);
Institute of Makers of Explosives;
International Association of Machinists and Aerospace Workers;
International Brotherhood of Electrical Workers (IBEW);
Labor Council for Latin American Advancement (LCLAA);*
League of Railway Industry Women;*
National Association of Railroad Passengers (NARP);
National Association of Railway Business Women;*
National Conference of Firemen & Oilers;
National Railroad Construction and Maintenance Association;
National Railroad Passenger Corporation (Amtrak);
National Transportation Safety Board (NTSB);*
Railway Supply Institute (RSI);
Safe Travel America (STA);
Secretaria de Comunicaciones y Transporte;*
Sheet Metal Workers International Association (SMWIA);
Tourist Railway Association Inc.;
Transport Canada;*
Transport Workers Union of America (TWU);
Transportation Communications International Union/BRC (TCIU/BRC);
Transportation Security Administration (TSA); and
United Transportation Union (UTU).

*Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. The working group may establish one or more task forces or other subgroups to develop facts and options on a particular aspect of a given task. The task force, or other subgroup, reports to the working group. If a working group comes to consensus on recommendations for action, the package is presented to RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, and because the RSAC recommendation constitutes the consensus of some of the industry's leading experts on a given subject, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goals, is soundly supported, and is in accordance with applicable policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on recommendations for action, FRA resolves the issue(s) through traditional rulemaking proceedings or other action.

III. RSAC Conductor Certification Working Group

On December 10, 2008, the RSAC accepted a task (No. 08–07) entitled "Conductor Certification." The purpose of this task was defined as follows: "To develop regulations for certification of railroad conductors, as required by the Rail Safety Improvement Act of 2008 (Act), and to consider any appropriate related amendments to existing regulations." The task called for the RSAC Conductor Certification Working Group (Working Group) to perform the following:

- Review safety data bearing on opportunities for reducing risk associated with the duties performed by freight and passenger conductors.
- Assist FRA in developing regulations responsive to the legislative mandate.
- Consider any revisions to 49 CFR Part 240 appropriate to conform and update the certification programs for locomotive engineers and conductors.

The task also listed issues requiring specific report:

- What requirements for training and experience are appropriate?
- What classifications of conductors should be recognized?
- To what extent do existing requirements and procedures for certification of locomotive engineers provide a model for conductor certification?
- To what extent should unsafe conduct occurring while a locomotive engineer affect certification status as a conductor, and vice versa?
- Starting with the locomotive engineer certification model, what opportunities are available for simplifying appeals from decertification decisions of the railroads?

The Working Group was formed from interested organizations that are members of the RSAC. In addition to FRA, the following organizations contributed members:

AAR, including members from BNSF Railway Company (BNSF), Canadian National Railway (CN), Canadian Pacific Railway (CP), CSX Transportation, Inc. (CSX), Iowa Interstate Railroad, LTD, Kansas City Southern Railway (KCS), Northeast Illinois Regional Commuter Railroad Corporation (METRA), Norfolk Southern Railway Company (NS), and Union Pacific Railroad (UP);

The National Railroad Passenger Corporation (Amtrak);

APTA, including members from Long Island Rail Road (LIRR), Metro-North Railroad (MNCW), Southeastern Pennsylvania Transportation Authority (SEPTA), Southern California Regional Rail Authority (Metrolink), and Transit Solutions Group (TSG);

ASLRRA, including members from Anacostia Rail Holdings (ARH), Genesee & Wyoming Inc. (GNWR), Omnitrax Inc. (Omnitrax), Rio Grande Pacific Corporation (RGP), and WATCO Companies, Inc. (WATCO);

BLET;

National Railroad Construction & Maintenance Association, including members from Herzog Transit Services (Herzog);

NTSB;

TWU; and

UTU.

DOT's John A. Volpe National Transportation Systems Center (Volpe Center) also contributed members to the Working Group.

The Working Group convened 6 times on the following dates and locations:

- July 21–23, 2009 in Washington, DC;
- August 25–27, 2009 in Overland Park, KS;
- September 15–17, 2009 in Colorado Springs, CO;
- October 20–22, 2009 in Arlington, VA;
- November 17–19, 2009 in Scottsdale, AZ; and
- December 16–18, 2009 in Washington, DC.

To aid the Working Group in its development of recommendations for certification of conductors, FRA prepared draft regulatory text, which it distributed prior to the July meeting. The draft text closely followed 49 CFR part 240 which governs the qualification and certification of locomotive engineers.

During each meeting, Working Group members made recommendations regarding changes and additions to the draft text. Following each meeting, FRA

considered all of the recommendations and revised the draft text accordingly. Minutes of each of these meetings are part of the docket in this proceeding and are available for public inspection.

Having worked closely with the RSAC in developing its recommendations, FRA believes that the RSAC has effectively addressed concerns with regard to the certification of conductors. FRA has greatly benefited from the open, informed exchange of information during the meetings. The Working Group reached consensus on all of its recommended regulatory provisions. On March 18, 2010, the Working Group presented its recommendations to the full RSAC for concurrence. All of the members of the full RSAC in attendance at the March meeting accepted the regulatory recommendations submitted by the Working Group. Thus, the Working Group's recommendations became the full RSAC's recommendations to FRA.

As contemplated by the Working Group's task statement, the promulgation of the conductor certification regulation opens up consideration of conforming changes to 49 CFR part 240, "Qualification and certification of locomotive engineers." Such changes could include amending the program submission process, adding 49 CFR 218, subpart F violations as revocable offenses, and handling engineer and conductor petitions for review with a single FRA board. Although FRA intended for the Working Group to consider changes to part 240 during its July–December meetings, the Working Group was unable to undertake that task. Moreover, members of the Working Group felt that it would be more efficient to discuss changes to part 240 after the conductor certification regulation is finalized and comments are received. Therefore, FRA expects the Working Group to continue meeting after publication of this NPRM and to provide recommendations that address both the comments to this NPRM and conforming changes to part 240.

In addition to the conductor certification Working Group, interested parties should also be aware that other RSAC working groups are currently meeting to discuss potential FRA regulations which may impact the conductor certification regulation. The Medical Standards for Safety-Critical Personnel Working Group (RSAC Task No.: 06–03), for example, is developing recommendations for a FRA medical standards regulation. That regulation, if promulgated, could supersede some of the medically-related requirements in the conductor certification regulation. Further, the Training Standards Working Group (RSAC Task No.: 10–01) is developing recommendations for a FRA training regulation. While FRA does not expect that such a training regulation would supersede the training requirements in the conductor certification regulation, FRA does not know at this time what the final training regulation will provide. Some modification of the training requirements in this proposed part (*e.g.,* removal of the task analysis requirement) may be necessary to conform to the final requirements of the training regulation.

IV. Section-by-Section Analysis

Subpart A—General

Subpart A of the proposal contains the general provisions of the rule, including a formal statement of the rule's purpose and scope. The subpart also provides that this proposed rule would not constrain a railroad's ability to prescribe additional or more stringent requirements for its conductors that are not inconsistent with this proposed rule.

Section 242.1 Purpose and Scope

This section, derived from 49 CFR 240.1, provides that the proposed rule prescribes minimum standards for the eligibility, training, testing, certification and monitoring of persons who serve as "conductors." This section indicates that the purpose of the proposed rule is to ensure that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents, and to improve railroad safety.[1]

Despite the fact that a person may have a job classification title other than that of conductor, the conductor certification requirements of this proposed rule would apply to that person if he or she meets the definition of conductor. That definition (and who would be covered by the definition) is discussed in more detail in the section analysis for proposed § 242.7 below.

Section 242.3 Application and Responsibility for Compliance

This section is derived, essentially verbatim, from 49 CFR 240.3. The section provides that the proposed rule would apply to all railroads with two exclusions. The first exclusion addresses several types of operations that occur on tracks that are not part of the general railroad system. This exclusion would encompass operations commonly described as tourist, scenic, or excursion service to the extent that they occur on tracks that are not part of the general railroad system. This exclusion also addresses operations that occur within the confines of industrial installations commonly referred to as "plant railroads" and typified by operations such as those in steel mills that do not go beyond the plant's boundaries and that do not involve the switching of rail cars for entities other than themselves.

The second exclusion covers rapid transit operations in an urban area that are not connected to the general system. It should be noted, however, that some rapid transit type operations, given their links to the general system, are within FRA's jurisdiction and FRA specifically intends to have this proposed rule apply to those rapid transit type operations. This proposed rule is not intended to have any effect on FRA's jurisdiction. Since this proposed rule is intended to apply to the same railroads covered by part 240, one should refer to the preamble discussions of 49 CFR 240.3 in 64 FR 60966, 60974 (Nov. 8, 1999), 63 FR 50626, 50636–50637 (Sept. 22, 1998), and 56 FR 28228, 28240 (June 19, 1991) for a more detailed analysis of the applicability of this proposed rule.

Section 242.5 Effect and Construction

This section addresses several legal issues.[2] Paragraph (a) addresses the relationship of this proposed rule to preexisting legal relationships. Paragraph (b) states that FRA does not intend to alter the authority of a railroad to initiate disciplinary sanctions against its employees by issuance of this proposed rule.

Paragraph (c) of this section addresses the issue of "flowback." The term flowback has been used in the industry to describe a situation where an employee leaves his or her current position to return to a previously held position or craft. An example of flowback occurs when a person who holds the position of a conductor subsequently qualifies for the position of locomotive engineer, and at some later point in time the person finds it necessary or preferable to revert back to a conductor position. The reasons for

[1] Paragraph (a) of this section has been slightly modified from the version voted on by the Working Group and full RSAC. The modification is meant to clarify that only those persons that meet the minimum safety standards in this proposed rule would be permitted to serve as conductors.

[2] This section has been modified from the version of the section voted on by the Working Group and full RSAC, including the removal of paragraphs (a) and (b). Those paragraphs addressed preemption of State law which FRA now believes would be unnecessary because 49 U.S.C. 20106 and other Federal railroad safety statutes sufficiently address the preemptive effect of FRA's regulations. Providing a separate Federal regulatory provision concerning the regulation's preemptive effect would be duplicative and unnecessary.

reverting back to the previous craft may derive from personal choice or a less voluntary nature; *e.g.,* downsizing.

Many collective bargaining agreements address the issue of flowback. As a general matter, FRA does not intend to create or prohibit the right to flowback or take a position on whether flowback is desirable. However, paragraph (c) of this section must be read in conjunction with § 242.213, which limits flowback in certain situations.[3] As described in the section analysis for that section below, a person who holds a conductor and locomotive engineer certificate and who has had his or her locomotive engineer certificate revoked could not work as a conductor during the period of revocation. In addition, a person who holds a conductor and locomotive engineer certificate and who has had his or her conductor certification revoked for certain violations could not work as a locomotive engineer during the period of revocation.

Paragraph (d) of this section addresses employee rights. The intent of the proposed rule is to explicitly preserve any remedy already available to the person and not to create any new entitlements. FRA expects that employees would benefit from this paragraph by referring to it should a railroad use this regulation as an inappropriate explanation for ignoring an employee's rights or remedies. A railroad must consider whether any procedural rights or remedies available to the employee would be inconsistent with this part.

Section 242.7 Definitions

This section contains the definitions that FRA proposes to employ in this rule. Most of the definitions are taken essentially verbatim from 49 CFR part 240 and have been thoroughly analyzed in that rulemaking. Parties seeking a detailed analysis of those definitions should refer to the part 240 rulemaking documents. *See,* 54 FR 50890 (Dec. 11, 1989), 56 FR 28228 (June 19, 1991), 58 FR 18982 (Apr. 9, 1993), 60 FR 53133 (Oct. 12, 1995), 63 FR 50626 (Sept. 22, 1998), 73 FR 80349 (Dec. 31, 2008), and 74 FR 68173 (Dec. 23, 2009). Some of the definitions in this proposed rule, however, are not found in part 240 or have been substantively modified from their use in part 240. Those definitions are analyzed below.

As mentioned above, potential rulemakings involving medical standards and 49 CFR part 219 (Control of Alcohol and Drug Use) may impact many of the definitions in part 240 and proposed part 242. For example, definitions relating to medical standards (*e.g.,* "medical examiner") and drug and alcohol control (*e.g.,* "substance abuse disorder") in parts 240 and 242 may be superseded by definitions provided in those rulemakings. However, until those rulemakings are promulgated, the definitions in parts 240 and 242 will control.

Conductor

Although the RSIA requires FRA to establish a program for the certification of conductors, the Act does not define the term "conductor." Without guidance from the Act, FRA proposes, and RSAC recommended, that the definition of "conductor" be based on the generally understood responsibilities of that position, similar to Part 240's approach to defining locomotive engineer. This proposed rule defines conductor as "the crewmember in charge of a train or yard crew as defined in part 218 of this chapter." Part 218 defines "train or yard crew" as:

> "one or more railroad employees assigned a controlling locomotive, under the charge and control of one crew member; called to perform service covered by Section 2 of the Hours of Service Act; involved with the train or yard movement of railroad rolling equipment they are to work with as an operating crew; reporting and working together as a unit that remains in close contact if more than one employee; and subject to the railroad operating rules and program of operational tests and inspections required in §§ 217.9 and 217.11 of this chapter."

As the use of the singular form of "crewmember" suggests, FRA's proposed definition mandates that only one person could be in charge of the train or yard crew and that person would be deemed the conductor for purposes of this proposed regulation only. Moreover, in some circumstances, a locomotive engineer, including a remote control operator, would be required to be certified as both a locomotive engineer under 49 CFR part 240 and as a conductor under this proposed rule. *See* proposed 49 CFR 242.213(d) and (e). All other train or yard crew members (*e.g.,* assistant conductors, brakemen, hostlers, trainmen, switchmen, utility persons, flagmen, yard helpers, and others who might have different job titles but perform similar duties and are not in charge of a train or yard crew) do not fall within the definition of "conductor" for purposes of this proposed rule.

Ineligible or Ineligibility[4]

The term "ineligible" or "ineligibility," which is not used in part 240, means that a person is legally disqualified from serving as a certified conductor. The term is broadly defined to cover a number of circumstances in which a person may not serve as a certified conductor. Revocation of certification pursuant to § 242.407 and denial of certification pursuant to § 242.401 are two examples in which a person would be ineligible to serve as a conductor. A period of ineligibility may end when a condition or conditions are met—for example, when a person meets the conditions to serve as a conductor following an alcohol or drug violation pursuant to proposed § 242.115.

Job Aid

The term "job aid," which is not used in part 240, is defined as information regarding other than main track physical characteristics that supplements the operating instructions of the territory over which the locomotive or train movement will occur. The terms "main track" and "physical characteristics" are discussed below.

The term "job aid" is broadly defined in this proposed rule. A job aid would consist of information that could be obtained from a variety of sources, including but not limited to, training on the territory pursuant to proposed § 242.119, maps, charts or visual aids of the territory, or a person or persons to contact who are qualified on the territory and who can describe the physical characteristics of the territory. While each railroad would have flexibility in how it conveys the information in a job aid to a conductor, the job aid would, at a minimum have to cover the characteristics of the territory over which the locomotive or train movement will occur including: permanent close clearances, location of permanent derails and switches, assigned radio frequencies in use and special instructions required for movement, if any, and railroad-identified unique operating conditions.

Pursuant to proposed § 242.121(c)(4)(v), each railroad would be required to test conductors and conductor candidates on the use of any job aid that a railroad could provide a conductor. Proposed § 242.301(d) describes the conditions under which a railroad should provide a conductor with a job aid.

[3] The reference to § 242.213 in § 242.5(c) was not considered by the Working Group or the full RSAC, but was added by FRA to clarify this proposed rule's position on flowback.

[4] The definition of this term was not considered by the Working Group or the full RSAC. However, the use of term in part 240 has generated some confusion and, therefore, FRA hopes to avoid any confusion in this proposed rule by defining the term.

Main Track

The term "main track" is defined as a track upon which the operation of trains is governed by one or more of the following methods of operation: timetable; mandatory directive; signal indication; positive train control as defined in 49 CFR part 236; or any form of absolute or manual block system. That definition mirrors the definition of "main track" in 49 CFR part 240, but also includes a reference to positive train control.

Medical Examiner

The term "medical examiner" is defined as a person licensed as a doctor of medicine or doctor of osteopathy. A medical examiner could be a qualified full-time salaried employee of a railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified practitioner designated by the railroad to perform functions in connection with medical evaluations of employees. As used in this proposed rule, the medical examiner would owe a duty to make an honest and fully informed evaluation of the condition of an employee.

The only difference between the definition of medical examiner in this proposed rule and the definition in 49 CFR part 240 is that under part 240, the medical examiner owes "a duty to the railroad." In this proposed rule, however, the words "to the railroad" have been deleted. This change was made to address a concern of some Working Group members that a medical examiner should not owe a duty to just the railroad but rather should owe a duty to both the railroad and the employee being evaluated.

On-the-Job Training

The term "on-the-job training," which is not defined in part 240, means job training that occurs in the work place (*i.e.,* the employee learns the job while doing the job). In this proposed rule, the "on-the-job training" portion of the training program (*see* proposed § 242.119) would be required to be based on a model generally accepted by the educational community, and must consist of three key components: (1) A brief statement describing the tasks and related steps the employee must be able to perform; (2) a statement of the conditions (*i.e.,* tools, equipment, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and (3) a statement of the standards by which proficiency can be measured through a combination of task/step accuracy, completeness, and repetition.

Passenger Conductor

The term "passenger conductor" is defined as a conductor who has also received emergency preparedness (EPREP) training under 49 CFR part 239. Interested parties should note that nothing in this proposed rule requires a conductor for private/non-revenue movements (*e.g.,* business car specials) to have the EPREP training. This position is consistent with 49 CFR 239.3(b).

Physical Characteristics

The term "physical characteristics," which is not defined in part 240, means the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train. "Physical characteristics" include both main track physical characteristics (the term "main track" is analyzed above) and other than main track physical characteristics. Examples of physical characteristics could include permanent close clearances, location of permanent derails and switches, and grade.

Qualified

The term "qualified" is defined as a person who has successfully completed all instruction, training and examination programs required by the employer, and the applicable parts of this chapter and therefore could reasonably be expected to be proficient on all safety related tasks the person is assigned to perform. The definition of "qualified" in this proposed rule differs from its definition in part 240 in that part 240's definition focuses on a person's knowledge whereas the definition in this proposed rule focuses not only on knowledge but also on whether the person could reasonably be expected to be proficient at performing all assigned tasks. The revision to the definition of "qualified" is an attempt to ensure that a railroad's instruction and training program not only provide knowledge of how to perform a task but also the ability to proficiently perform the task.

Qualified Instructor

The term "qualified instructor," which is derived from the definition of "instructor engineer" in part 240, means a person who has demonstrated, pursuant to the railroad's written program, an adequate knowledge of the subjects under instruction and, where applicable, has the necessary operating experience to effectively instruct in the field. A qualified instructor would be required to have the following qualifications:

(1) Is a certified conductor under this part; and

(2) Has been selected as such by a designated railroad officer, in concurrence with the designated employee representative, where present; or

(3) In absence of concurrence provided in paragraph (2) of this definition, has a minimum of 12 months service working as a train service employee.

If a railroad does not have designated employee representation, then a person employed by the railroad need not comply with items (2) or (3) of this definition to be a "qualified instructor."

Items (2) and (3), while not found in part 240's definition of "instructor engineer," are included here to address the concerns of some Working Group members that employees, through their representatives, should have input in the selection of instructors who might be viewed as inexperienced (*i.e.,* a person with less than 12 months service working as a train service employee).

Remote Control Operator

The term "remote control operator" (RCO) means a certified locomotive engineer, as defined in § 240.7 of this chapter, certified by a railroad to operate remote control locomotives pursuant to § 240.107 of this chapter. Although this term is not defined in part 240, FRA intends for the term to have the same meaning in this proposed rule as it does in part 240. FRA defines the term in this proposed rule to avoid any confusion as to who this proposed rule is referring to when it references a remote control operator.

The definition of RCO recommended by the Working Group used the word "trained" instead of "certified." FRA, however, believes the definition in this proposed part should to be consistent with the definition of RCO in 49 CFR 218.93. Thus, FRA replaced the word "trained" with "certified" in this proposed rule to parallel 49 CFR 218.93.

Substance Abuse Disorder

The term "substance abuse disorder" refers to a psychological or physical dependence on alcohol or a drug or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is "active" within the meaning of this proposed rule if the person (1) is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or (2) has failed to successfully complete primary treatment or successfully participate in

aftercare as directed by a Substance Abuse Professional (SAP).

The definition of substance abuse disorder in this proposed rule is the same as the definition in part 240 except in two respects. First, part 240's definition refers to an "EAP Counselor" rather than a SAP. Since SAPs have more stringent credential, knowledge, training, and continuing education requirements than EAPs, SAPs may be better qualified to direct a person's treatment or aftercare. Second, part 240 uses the phrase "is currently using alcohol and other drugs" when describing active substance abuse disorders. The proposed rule would revise that phrase to read "is currently using alcohol or other drugs." FRA is proposing the revision to clarify its intent that a person with an active substance abuse disorder could be using alcohol *or* other drugs.

The proposed definition for "substance abuse disorder" is similar to the language employed to govern disposition of employees referred to an employee assistance program under the "co-worker report" (bypass) provision of the alcohol/drug regulations. It describes the condition of chemical dependency, as determined by an appropriate professional. Reference is made to other disorders involving abuse of alcohol and other drugs (*i.e.,* "another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation") to avoid disputes concerning diagnoses of "underlying" problems. The crux of the definition is that a person making uncontrolled use of alcohol or drugs is not a suitable candidate for the highly sensitive duties entrusted to a conductor. Since chemical dependency typically involves or has the potential for poly-drug abuse, the appropriate long-term therapy is abstinence from alcohol and all other drugs, except those taken under medical supervision.

The proposed definition explains that the disorder would be considered "active" within the meaning of the rule if the person is not currently abstaining from use of alcohol and drugs (except under medical supervision consistent with FRA's alcohol/drug regulations) or has not participated in treatment as required. FRA is aware that many individuals abuse alcohol and drugs, with consequent ill-effects on their health and potential implications for fitness, without fitting within common definitions of chemical dependency. However, degrees of abuse are difficult to define; and significant disagreements prevail with regard to appropriate therapeutic responses. Accordingly, FRA has not required withholding of certification for patterns of abuse that fall short of chemical dependency. At the same time, FRA does not intend to convey that the concept of chemical dependency need meet the most rigid test used in any particular segment of the health care or mental health communities. The critical point here with respect to safety is that conductors not be in the grip of uncontrolled abuse patterns that, if addressed through treatment and permanent abstinence, could be put behind them.

Substance Abuse Professional (SAP)

The term "Substance Abuse Professional" (SAP)[5] means a person who meets the qualifications of a SAP, as provided in 49 CFR Part 40. Pursuant to this proposed rule, the SAP would owe a duty to the railroad to make an honest and fully informed evaluation of the condition and progress of an employee. FRA notes that the duty owed by a SAP does not parallel the duty owed by a "medical examiner" (*see* above) in the proposed rule recommend by the full RSAC. As currently written, a medical examiner would owe a duty to both the railroad and the employee being evaluated while a SAP would owe a duty only to the railroad. FRA welcomes comments as to whether a SAP should owe a duty to both the employee being evaluated and the railroad (*i.e.,* whether the words "to the railroad" should be deleted from the definition of SAP).

Territorial Qualifications

The term "territorial qualifications" means possessing the necessary knowledge concerning a railroad's operating rules and timetable special instructions including familiarity with applicable *main track and other than main track physical characteristics* of the territory over which the locomotive or train movement will occur. Although not defined in part 240, the term is derived from part 240's requirement that, with certain exceptions, a locomotive engineer may not operate a locomotive over a territory unless the engineer is "qualified on the physical characteristics of the territory." *See* 49 CFR 240.231. Pursuant to § 242.301 of this proposed rule, a person could not serve as a conductor unless the person was certified and possessed the necessary territorial qualifications for the applicable territory.

[5] The draft recommended by the Working Group and the full RSAC used the term "Substance Abuse Profession." That was a clerical error on FRA's part and the term has been corrected in this NPRM to read "Substance Abuse Professional."

Section 242.9 Waivers

This section tracks the regulatory language in 49 CFR 240.9 and provides the proposed requirements for a person seeking a waiver of any section of this proposed rule. After review, however, FRA believes this section is unnecessary because 49 CFR part 211 sufficiently addresses the waiver process. FRA welcomes comments as to whether this proposed section should be removed.

Section 242.11 Penalties and Consequences for Noncompliance

This section tracks the regulatory language in 49 CFR 240.11 and provides minimum and maximum civil penalty amounts determined in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410 Stat. 890, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996 Public Law 104–134, April 26, 1996, and the RSIA.

Section 242.13 Information Collection Requirements

This section lists the sections of the proposed rule which contain information collection requirements.

Subpart B—Program and Eligibility Requirements

This subpart contains the basic elements of the conductor certification program required by this proposed rule. Based on the RSIA's requirement for "certification" of conductors and FRA's experience with certification of locomotive engineers, this rulemaking proposes to adopt a certification system (*i.e.,* FRA sets eligibility criteria but leaves it to the railroads to evaluate candidates by those standards) rather than a traditional licensing system (*i.e.,* a government agency sets eligibility criteria and evaluates candidates). As with part 240, this proposed rule affords railroads considerable discretion in the daily administration of their certification programs.

Section 242.101 Certification Program Required

This section proposes to require railroads to have a written program composed of six elements, each of which comports with specific provisions relating to that element.[6] To give the railroads time to put their conductor programs into place and to accommodate the fact that many

[6] FRA deleted paragraphs (a) and (b) of this section from the version considered by the Working Group and full RSAC. FRA believes those paragraphs are superfluous in light of the proposed dates provided in other sections of the NPRM regarding submission and approval of railroad programs.

railroads perform training and certification of locomotive engineers at the beginning of each calendar year, FRA is proposing to make January 1, 2012, the effective date of the final rule. FRA is proposing that date based on FRA's anticipation that the Final Rule will be published in early 2011. The rest of the dates proposed in this rule (*e.g.,* dates by which each railroad must grandfather its eligible conductors in § 242.105) are based on the proposed effective date of January 1, 2012. Interested parties should note that FRA cannot guarantee any of the dates proposed in this NPRM. The dates have been included merely to generate discussion regarding the amount of time needed to implement a conductor certification program once a Final Rule has been published. FRA welcomes comments on the dates proposed in this NPRM.

Section 242.103 Approval of Design of Individual Railroad Programs by FRA

This section proposes to require each railroad to submit its certification program to FRA for approval in accordance with a schedule to be provided in the final rule. The proposed schedule for submissions in paragraph (a) would require Class I railroads, Amtrak, the commuter railroads, and Class II railroads to submit their programs at an earlier date than the Class III railroads or others not classified elsewhere.[7] The format and contents of the submission are discussed at length in appendix B to this proposed rule.

Unlike part 240, this proposed rule would require railroads to serve a copy of their submissions, resubmissions and material modifications on the president of each labor organization that represents the railroad's certified conductors. Within 45 days of the filing of any of those submissions with FRA, any designated representative of certified conductors could submit comments on the railroad's submissions to FRA. Although FRA, and not the commenters, would determine whether a railroad's submission was approved, FRA expects that comments would be useful in determining whether the railroad's program conforms to the criteria set forth in this proposed rule.

This section also proposes to require each railroad to indicate how it intends to acquire future conductors. If a railroad accepts the responsibility for training a previously uncertified person to become a conductor, the railroad must explain its training regimen for such trainees, including provisions for relying on an outside training organization to provide the actual training.

The proposed rule provides 30 days for FRA review and approval of railroad programs. FRA is proceeding in this manner because most railroads have existing programs, including locomotive engineer certification programs, intended to accomplish a similar goal that can be easily modified. The quality of such programs is generally good and the problems that may be encountered would not likely involve basic design flaws and generally would not surface until FRA has had time to observe the actual administration of the program. In screening all submissions FRA should be able to quickly detect any substantial deficiencies. Given the quality of existing programs, FRA sees little value in delaying implementation of the programs for time-consuming agency review. FRA may, of course, disapprove any program during the review cycle or at a later date. FRA will explain any deficiencies in writing. This section proposes to require a timely railroad response to an FRA disapproval action as a railroad will have no more than 30 days to revise and resubmit its program.

Section 242.105 Schedule for Implementation

This section contains the timetable for implementation of the proposed rule. Paragraphs (a) and (b) of this section would require that railroads, in writing, designate as certified conductors all persons authorized by the railroad to perform the duties of a conductor as of the effective date of the final rule, or authorized between the effective date of the final rule and dates specified in paragraph (d) or (f) of this section, and to issue a certificate to each person it designates. The mandatory designation requirement of this section is included to address the concerns of some Working Group members that railroads should not be given the discretion to engage in disparate treatment of its employees (*i.e.,* designate and provide a certificate to some people who are authorized to perform the duties of a conductor as of the effective date of the final rule but not others).

Paragraph (c) of this section would require each railroad to make formal determinations concerning those employees it has "grandfathered" (*i.e.,* designated as conductors) within 36 months of the date for compliance by its class of railroad. Pursuant to that paragraph, a grandfathered conductor could serve as a conductor for up to 36 months from the date of compliance for the railroad (*i.e.,* the date specified in paragraph (d) or (e) of this section). At the end of the 36 months, however, the grandfathered conductor could no longer serve as a conductor unless he or she successfully completed the tests and evaluations provided in subpart B of this proposed rule (*i.e.,* the full certification process).

In order to test and evaluate all of its grandfathered conductors by the end of the 36-month period, a large railroad would likely have to begin that process well in advance of the end of the 36 months. For example, paragraph (c), which is derived from part 240's grandfathering provision, would permit a railroad to test and evaluate one-third of its grandfathered conductors within 12 months of the railroad's date of compliance; another one-third within 24 months of its date of compliance; and the final one-third within 36 months of its date of compliance.

Some of the Working Group members raised concerns about grandfathered conductors who would be eligible to retire within 36 months of the date for compliance by their class of railroad. Specifically, some members did not believe it was an efficient use of resources to perform the full certification process on a grandfathered conductor who was going to retire before the end of the 36-month grandfathering period. To address those concerns, subparagraph (c)(1) provides that a grandfathered conductor, who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or with the terms of the Railroad Retirement Act (45 U.S.C. 231) within 36-months prior to the date they would be required to be tested and evaluated under subpart B of this proposed rule, may request, in writing, that the railroad not perform the full certification process on that grandfathered conductor until 36 months from the date of required testing and evaluation.

Paragraph (c)(2) provides that, upon receipt of that written request, a railroad may wait to perform the full certification process on the person making the request until the end of the 36-month grandfathering period. Thus, paragraphs (c)(1) and (c)(2) would allow grandfathered conductors to serve as conductors for the full 36-month grandfathering period and then retire before being subjected to the full certification process.

While it is in the railroads' interest not to perform the full certification process for a person who is going to retire once the grandfathering period

[7] FRA has made some modifications to paragraph (a) of this section from the version considered by the Working Group and full RSAC. FRA believes those modifications are necessary to ensure a sensible schedule and future implementation of the conductor certification regulation.

expires and thus in their interest to grant as many requests as possible, it may not be feasible to accommodate every request that is made. If, for example, a significant number of grandfathered conductors on a railroad properly request that the railroad wait to recertify them at the end of the grandfathering period, but then do not, in fact, retire by the expiration of the 36-month grandfathering period, the railroad might not be able to certify everyone in time and would risk violating this proposed rule. In recognition of that risk and the need to give the railroads some flexibility to comply with the proposed rule, paragraph (c)(2) also provides that a railroad that grants any request must grant the request of all eligible persons "to every extent possible."

In addition, paragraph (c)(3) provides that a grandfathered conductor who is also subject to recertification under part 240 may not make a request under subparagraph (c)(1) of this section. That provision recognizes that railroads would likely want to have concurrent certification processes for certifying a person who will be both a certified locomotive engineer and a conductor and thus it would not be appropriate, in that instance, for a grandfathered conductor who is already subject to recertification under part 240 to make a request to delay the full conductor certification process.

Paragraphs (d), (e), and (f) provide that after specified dates, no railroad could certify or recertify a person as a conductor and no person could serve as a conductor unless that person had been tested and evaluated in accordance with the procedures provided in subpart B of the proposed rule and issued a certificate.

Section 242.107 Types of Service

This section proposes to create two types of conductor service: Conductor and passenger conductor. As indicated in the definition section of this proposed rule, a "passenger conductor" is a "conductor" who has also received emergency preparedness training under 49 CFR part 239.

Paragraph (c) of this section, derived from 49 CFR 240.107(e), proposes to prohibit a railroad from reclassifying the certification of any type of certified conductor to a different type of conductor certification during the period in which the certification is otherwise valid except when a conductor completes 49 CFR part 239 emergency training and is certified as a passenger conductor. For example, this proposed rule would prohibit a railroad from requiring a passenger conductor to exchange his or her passenger conductor certificate for a conductor certificate during the period in which the passenger conductor certificate is otherwise valid.

While this proposed rule would prohibit the practice of reclassification, it would not prevent the railroads from pursuing other measures to ensure the safe performance of conductor service. For example, the proposed rule would not prevent a railroad from placing restrictions on a certificate pursuant to paragraph (d) of this section. It should be noted, however, that while paragraph (d) would permit a railroad to place restrictions on a certificate, any restrictions would be applied and reviewed in accordance with internal railroad rules, procedures and processes. Proposed part 242 would not govern the issuance or review of restrictions as that would be a matter handled under a railroad's internal discipline system or collective bargaining agreement. *See* § 242.5(a), (b), and (d).

Section 242.109 Determinations Required for Certification and Recertification

This section lists the proposed determinations required for evaluating a candidate's eligibility to be certified or recertified. Since motor vehicle data is required to be sent to the railroad rather than to the candidate, paragraphs (d) and (e) of this section would require a railroad to provide a candidate for certification or recertification an opportunity to review and comment on any record which contains adverse information. This review would avoid the potential for reliance on records that were somehow erroneously associated with a candidate.

Section 242.111 Prior Safety Conduct As Motor Vehicle Operator

This section, derived from 49 CFR 240.111 and 240.115, provides the proposed requirements and procedures that a railroad would have to follow when evaluating a conductor or conductor candidate's prior conduct as a motor vehicle operator. Although some members of the Working Group suggested that information regarding the prior safety conduct as a motor vehicle operator was unnecessary in determining whether a person should be certified as a conductor, FRA believes that the prior safety conduct of a motor vehicle operator is one indicator of that person's drug and/or alcohol use and therefore an important piece of information for a railroad to consider.

Pursuant to this section, each person seeking certification or recertification as a conductor would have to request in writing that the chief of each driver licensing agency that issued him or her a driver's license within the preceding five years provide a copy of the person's driving record to the railroad. Unlike part 240, this proposed rule would not require individuals to also request motor vehicle operator information from the National Driver Registry (NDR). It is FRA's understanding that, based on the NDR statute and regulation (*see* 49 U.S.C. chapter 303 and 23 CFR 1327), railroads are prohibited from running NDR checks or requesting NDR information from individuals seeking employment as certified conductors.[8]

During the Working Group meetings, members of the Working Group raised concerns about conductor candidates who had properly requested motor vehicle operator information but were unable to be certified or recertified as conductors because of a delay or mix-up by a driver licensing agency in sending the required information to the railroad. To address that concern, paragraphs (c) and (d) of this section would require a railroad to certify or recertify a person for 60 days if the person: (1) Requested the required information at least 60 days prior to the date of the decision to certify or recertify; and (2) otherwise meets the eligibility requirements provided in § 242.109 of this proposed rule. If a railroad certifies or recertifies a person for 60 days pursuant to paragraphs (c) or (d) but is unable to obtain and evaluate the required information during those 60 days, the person would be ineligible to perform as a conductor until the information can be evaluated. However, if a person is simply unable to obtain the required information, that person or the certifying or recertifying railroad could petition for a waiver from FRA (*see* 49 CFR part 211). During the pendency of the waiver request, a railroad would have to certify or recertify a person if the person otherwise meets the eligibility requirements of § 242.109 of this proposed rule.

Paragraph (l) of this section would require certified conductors or persons seeking initial certification to notify the employing railroad of motor vehicle incidents described in paragraph (n) of this section within 48 hours of the conviction or completed state action to cancel, revoke, suspend, or deny a

[8] As an alternative to the NDR, some members of the Working Group suggested that motor vehicle operator information could be obtained from the National Crime Information Center (NCIC) run by the Federal Bureau of Investigation. However, FRA does believe the NCIC is an appropriate option since the information provided by the NCIC cannot be limited to just motor vehicle data.

motor vehicle driver's license. The paragraph also provides that, for purposes of conductor certification, a railroad could not have a more restrictive company rule requiring an employee to report a conviction or completed state action to cancel, revoke, or deny a motor vehicle drivers license in less than 48 hours.

The reasoning behind paragraph (l) involves several intertwined objectives. As a matter of fairness, a railroad should not revoke, deny, or otherwise make a person ineligible for certification until that person had received due process from the state agency taking the action against the motor vehicle license. Otherwise, action pursuant to this part might be deemed premature since the American judicial system is based on the concept of a person being innocent until proven guilty. Further, by not requiring reporting until 48 hours after the completed state action, the proposed rule would have the practical effect of ensuring that a required referral to a SAP under paragraph (o) of this section would not occur prematurely. Interested parties should note however, that paragraph (l) would not prevent an eligible person from choosing to voluntarily self-refer pursuant to § 242.115(d)(3). Nor would it prevent the railroad from referring the person to a SAP pursuant to § 240.115 if other information exists that identifies the person as possibly having a substance abuse disorder. Further, the restriction would apply only to actions taken against a person's certificate and would have no effect on a person's right to be employed by that railroad.

As mentioned above, paragraph (o) of this section would require that if such a motor vehicle incident described in paragraph (n) is identified, the railroad would be required to provide the data to its SAP along with "any information concerning the person's railroad service record." Furthermore, the person would have to be referred for evaluation to determine if the person had an active substance abuse disorder. If the person has such a disorder, the person could not be currently certified. Alternatively, even if the person is evaluated as not currently affected by an active substance abuse disorder, the railroad would be required, on recommendation of the SAP, to condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs, or both. The intent of this provision is to use motor vehicle records to expose conductors or conductor candidates who may have active substance abuse disorders and make sure they are referred for evaluation and any necessary treatment before allowing them to perform safety sensitive service.

Section 242.113 Prior Safety Conduct as an Employee of a Different Railroad

This section of the proposed rule, which is derived from 49 CFR 240.113 and 240.205, proposes a process for requesting information regarding the candidate's prior safety conduct, if any, as an employee of a different railroad.

Section 242.115 Substance Abuse Disorders and Alcohol Drug Rules Compliance

This proposed section, which is derived from 49 CFR 240.119 and 240.205, would address two separate dimensions of the alcohol/drug problem in relation to conductors—(1) active substance abuse disorders and (2) specific alcohol/drug regulatory violations. This section and § 242.111 address certain situations in which inquiry must be made into the possibility that the individual has an active substance abuse disorder if the individual is to obtain or retain a certificate. The fact that specific instances are cited in this section would not exclude the general duty of the railroad to take reasonable and proportional action in other appropriate cases. Declining job performance, extreme mood swings, irregular attendance and other indicators may, to the extent not immediately explicable, indicate the need for a SAP evaluation.

Paragraph (a) would require each railroad to address both dimensions of this issue in its program. Paragraphs (b) and (c) would require each railroad to determine that a person initially certifying or a conductor recertifying meets the eligibility requirements of this section. Additionally, each railroad would be required to retain the documents used to make that determination.

Paragraph (d) provides that a person with an active substance abuse disorder could not be currently certified as a conductor. This means that appropriate action would have to be taken with respect to a certificate (whether denial or suspension) whenever the existence of an active substance abuse disorder comes to the official attention of the railroad, with the exception discussed below. Paragraph (d) would also provide a mechanism for an employee to voluntarily self-refer for substance abuse counseling or treatment.

Paragraph (e) would address conduct constituting a violation of § 219.101 or § 219.102 of the alcohol/drug regulations. Section 219.101 prohibits any employee from going or remaining on duty in covered service while using, possessing, or being under the influence of or impaired by alcohol or a controlled substance or with a blood alcohol concentration of .04% or more. This is conduct that specifically and directly threatens safety in a way that is wholly unacceptable, regardless of its genesis and regardless of whether it has occurred previously. In its more extreme forms, such conduct is punishable as a felony under the criminal laws of the United States (18 U.S.C. 341 *et seq.*) and a number of states.

Section 219.102 prohibits use of a controlled substance by a covered employee, at any time, on or off duty, except under the exception for approved medical use. Abuse of marijuana, cocaine, amphetamines, and other controlled substances poses unacceptable risks to safety. However, where on-the-job use, possession, or impairment is not established, as is most often the case where urinalysis is the means of detection (*e.g.,* through a random drug test which can detect drugs remaining in the system for some period after actual use), this violation is marginally less serious than a § 219.101 violation.

Under the alcohol/drug regulations, whenever a violation of § 219.101 or § 219.102 is established based on authorized or mandated chemical testing, the employee must be removed from service and may not return until after a SAP evaluation, any needed treatment, or a negative return-to-duty test, and is subject to follow-up testing (§ 219.104). This structure suggests an absolute minimum for action when a conductor is determined to have violated one of these prohibitions. Considering the need both for general and specific deterrence with respect to future unsafe conduct, additional action should be premised on the severity of the violation and whether the same individual has prior violations.

One key consideration in evaluating this conduct and appropriate responses is the duration of retrospective review. This proposed rule would require railroads to consider conduct that occurred within the period of 60 consecutive months prior to the review. This is the same period proposed in this rule as the maximum period of ineligibility for certification following repeated alcohol/drug violations and is the same period used in part 240.

Use of a 5-year cycle reflects anecdotal experience in the railroad industry indicating that conduct committed as much as 5 years before may tend to predict future alcohol or drug abuse behavior (and recognizes the reality that most individual violations are probably not detected). It also

reflects a certain confidence in the resilience of human nature—*i.e.,* a reasonable expectation that the person who remains in compliance for that period of time will not again be found in violation. Of course, railroads would retain the flexibility to consider prior conduct (including conduct more than 5 years prior) in determining whom they will hire as conductors.

Interested parties should note that conduct violative of the FRA proscriptions against alcohol and drugs need not occur while the person is serving in the capacity of a conductor in order to be considered. For instance, an employee who violated § 219.101 while working as a brakeman and then sought conductor certification six months later (under the provision described below) would not be currently eligible for certification. The same is true under part 240—an employee who violates § 219.101 while working as a brakeman and then seeks locomotive engineer certification six months later would not be eligible for certification at that time. The railroad's responsibility would not be limited to periodic recertification. This proposed rule would prompt a review of certification status for any conduct in violation of § 219.101 or § 219.102.

The proposed rule requires a determination of ineligibility for a period of 9 months for an initial violation of § 219.101. This parallels the 9-month disqualification in § 240.119(c)(4)(iii) and for a refusal to cooperate in post-accident or random testing. FRA does not believe that a conductor should be able to seek the shelter of a collective bargaining agreement or more lenient company policy in the case of a clear on-the-job violation, insofar as Federal eligibility to serve as a conductor is concerned. Specifying a period of ineligibility would serve the interest of deterrence while giving further encouragement to co-workers to deal with the problem before it is detected by management.

In order to preserve and encourage co-worker referrals, the 9-month period would be waived only in the case of a qualifying co-worker report (*see* § 219.405). FRA believes that this distinction in treatment is warranted as a strong inducement to participation because co-worker referral programs help identify troubled employees prior to those employees getting into accidents. A strong inducement to refer a co-worker is a worthy goal if it may contribute to a reduction in accidents and incidents. Although we do not know how many actual co-worker reports may be generated, the intended result would be served if an atmosphere of intolerance for drug abusing behavior is reinforced in the workplace and violators know that they may be turned in by their colleagues if they report for duty impaired.

In the case of a second violation of § 219.101, the conductor would be ineligible for a period of 5 years. Given railroad employment practices and commitment to alcohol/drug compliance, it is likely, of course, that any individual so situated may also be permanently dismissed from employment. However, it is important that the employing railroad also follow through and revoke the certificate under this rule so that the conductor could not go to work for another railroad within the 5-year period using the unexpired certificate issued by the first railroad as the basis for certification. These proposed sanctions mirror the sanctions in § 240.119.

Under this proposed rule, one violation of § 219.102 within the 5-year window would require only temporary suspension and the minimum response described in § 242.115(f) (referral for evaluation, treatment as necessary, negative return-to-duty test, and appropriate follow-up). This parallels the approach in part 240 and reflects FRA's wish not to undercut the therapeutic approach to drug abuse employed by many railroads. This approach would permit first-time positive drug tests to be handled in a non-punitive manner that concentrates on remediation of any underlying substance abuse problem and avoids the adversarial process associated with investigations, grievances and arbitrations under the Railway Labor Act and collective bargaining agreements. A second violation of § 219.102 would subject the employee to a mandatory 2-year period of ineligibility. A third violation within 5 years would lead to a 5-year period of ineligibility. This proposed rule would also address violations of §§ 219.101 and 219.102 in combination. A person violating § 219.101 after a prior § 219.102 violation would be ineligible for 3 years; and the same would be true for the reverse sequence.

Refusals and failures to participate in chemical tests would be treated as if the test were positive. A refusal or failure to provide a breath or body fluid sample for testing under the requirements of 49 CFR part 219 when instructed to do so by a railroad representative shall be treated, for purposes of ineligibility under this section, in the same manner as a violation of: (1) § 219.101, in the case of a refusal or failure to provide a breath sample (49 CFR subpart D), or a blood specimen for mandatory post-accident toxicological testing (49 CFR subpart C)); or (2) § 219.102, in the case of a refusal or failure to provide a urine specimen for testing.

Interested parties should note that if a person, covered by 49 CFR part 219, refuses to provide a breath or a body fluid specimen or specimens when required to by the railroad under a mandatory provision of 49 CFR part 219, then the railroad, apart from any action it would take under proposed part 242, is required to remove that person from covered service and disqualify that person from working in covered service for 9 months. *See,* 49 CFR 219.104 and 219.107; *see also,* 49 CFR § 219 subpart H and 49 CFR 40.191 and 40.261.

Proposed § 242.115(f) would prescribe the conditions under which employees may be certified or recertified after a determination that the certification should be denied, suspended, or revoked, due to a violation of § 219.101 or § 219.102 of the alcohol/drug regulations. These conditions mirror the conditions in § 240.119(d) and closely parallel the return-to-duty provisions of the alcohol/drug rule. Interested parties should note that the proposed regulation would not require compensation of the employee for the time spent in this testing, which is a condition precedent to retention of the certificate; but the issue of compensation would ultimately be resolved by reference to the collective bargaining agreement or other terms and conditions of employment under the Railway Labor Act. Moreover, a railroad that intends to withdraw its conditional certification would have to afford the conductor the hearing procedures provided by § 242.407 if the conductor did not waive his or her right to the hearing.

Proposed paragraph (g) would ensure that a conductor, like any other covered employee, could self-refer for treatment under the alcohol/drug rule (§ 219.403) before being detected in violation of alcohol/drug prohibitions and would be entitled to confidential handling of that referral and subsequent treatment. This means that a railroad would not normally receive notice of any substance abuse disorder identified by the SAP. However, the paragraph would also require that the railroad policy must (rather than may) provide that confidentiality is waived if the conductor fails to participate successfully in treatment as directed by the SAP, to the extent that the railroad must receive notice that the employee has an active substance abuse disorder so that appropriate certificate action can be taken. The effect of this provision is

that the certification status of a conductor who seeks help and cooperates in treatment would not be affected, unless the conductor fails to follow through.

Section 242.117 Vision and Hearing Acuity

This section contains proposed requirements for visual and hearing acuity testing that a railroad must incorporate in its conductor certification program. The proposed visual requirements are the same as those provided in 49 CFR 240.121. The testing procedures and standards for the proposed hearing requirements, however, are more stringent than those contained in 49 CFR 240.121 and were derived from the procedures and standards provided in 49 CFR part 227.

Although some individuals may not be able to meet the threshold acuity levels in this proposed rule, they may be able to compensate in other ways that will permit them to function at an appropriately safe level despite their physical limitations. Paragraph (j) of this section would permit a railroad to have procedures whereby doctors can evaluate such individuals and make discrete determinations about each person's ability to compensate for his or her physical limitations. If the railroad's medical examiner concluded that an individual had compensated for his or her limitations and could safely serve as a conductor on that railroad, the railroad could certify that person under this proposed regulation once the railroad possessed the medical examiner's professional medical opinion to that effect.

Paragraph (k) of this proposed section, would address the issue of how soon after learning of a deterioration of his or her best correctable vision or hearing a certified conductor would have to notify the railroad of the deterioration. FRA is concerned with the safe performance of conductor service, not whether a person can notify a railroad within a set time frame. Thus, FRA proposes, and the RSAC recommended, to require notification "prior to any subsequent performance as a conductor." Certified conductors should note that willful noncompliance with this requirement could result in enforcement action.

As mentioned above it is possible that a regulation recommended by the Medical Standards Working Group and adopted by FRA could supersede the hearing and vision standards and requirements in this proposed rule.

Section 242.119 Training

This section, in compliance with the training requirements of the RSIA, proposes to require railroads to provide initial and periodic training of conductors. That training would be necessary to ensure conductors have the knowledge, skills, and abilities necessary to competently and safely perform all of the safety-related duties mandated by Federal laws, regulations, and orders.

Paragraph (c) of this proposed section would require railroads to document a conductor's knowledge of, and ability to comply with, Federal railroad safety laws and regulations, and railroad rules used to implement them. In addition, that paragraph would require railroads to document that a conductor demonstrated that he or she is qualified on the physical characteristics of the railroad, or its pertinent segments, over which that person will perform service. This section would require railroads to review and modify their training program whenever new safety-related railroad laws, regulations, technologies, procedures, or equipment are introduced into the workplace.

Under this section, railroads would have latitude to design and develop the training and delivery methods they will employ; but paragraphs (d), (e), and (f) provide proposed requirements for railroads that elect to train a previously untrained person to be a conductor. Pursuant to paragraph (d),[9] a railroad that makes this election would be required to perform a *task analysis* in order to ensure completeness when developing training courses for both initial and periodic training courses, and on-the-job training standards for new conductors. Subparagraph (d)(1) of this section would permit a railroad to demonstrate that a task analysis, or portions of a task analysis, was performed for a program developed prior to the effective date of the regulation.

In the context of this proposed rule, a *task analysis* is the analysis of how conductor tasks are accomplished, including a detailed description of both manual and mental activities, durations, frequency, allocation, complexity, environmental conditions, necessary clothing and equipment, and any other unique factors involved in or required for one or more people to perform a given task. A task analysis is typically performed by a group of subject matter experts (SMEs) and a skilled educational specialist. In some cases, SMEs are also skilled as educational specialists. This group of SMEs should develop task lists, then the subtasks and steps. A task does not always have subtasks, but unless it is very simple, it will always have steps. The "natural" progression would be for the employer(s) to develop their learning objectives and on-the-job standards from this list. For purposes of this proposed rule, railroads should review all of the Federal requirements (such as 49 CFR Part 215 Appendix D, 49 CFR Part 218, 49 CFR Part 219 Subpart D, 49 CFR Parts 220, 232, and 241, hazardous materials handling and documentation requirements, *etc.*) when developing their task list in order to ensure the task analysis is complete from an FRA perspective. FRA intends to review the railroad task analyses with its own SMEs.

Paragraphs (g), (h), (i), (j), and (k) of this section contain the proposed requirements with respect to acquiring familiarity with the physical characteristics of a territory. Except for the requirements in paragraphs (j) and (k), the requirements parallel those in part 240. Paragraphs (j) and (k) of this section would require railroads to designate in their programs the time period in which a conductor must be absent from a territory or yard, before requalification on physical characteristics is required and the procedures used to qualify or requalify a person on the physical characteristics.

Paragraphs (l) and (m) would require railroads to perform initial instructional briefings to ensure that each of its conductors have knowledge of the Federal railroad safety laws, regulations, and orders that relate to the safety-related tasks the employees are assigned to perform. The purpose of the proposed instructional briefing requirement is to ensure accountability for both railroads and conductors. For many years, FRA has encountered situations in which railroad employees have been non-compliant with Federal requirements, but FRA was unable to determine whether one of the root causes of the non-compliance was inadequate training. FRA intends to remedy this issue by requiring railroads to perform these instructional briefings. FRA would also expect railroads to provide this information to new employees as part of their formal training program. In paragraph (n) of this section, FRA proposes to permit each railroad to demonstrate that it has met the requirements of paragraphs (l) and (m) through prior training records.

Paragraph (o) would require each railroad to provide for the continuing education of certified conductors to ensure that each conductor maintains the necessary knowledge concerning

[9] Subparagraphs (d)(1) and (d)(2) have been modified somewhat from the language recommended by the RSAC to clarify the scope of what the training plan and curriculum need to cover.

railroad safety and operating rules and compliance with all applicable Federal regulations, including, but not limited to, hazardous materials, passenger train emergency preparedness, brake system safety standards, pre-departure inspection procedures, and passenger equipment safety standards, and physical characteristics of a territory. This proposed paragraph, which is derived from 49 CFR 240.123(b), was included in several drafts reviewed by the Working Group but was not in the draft voted on by the Working Group or full RSAC. FRA has included it in this NPRM because we suspect that it was inadvertently omitted and believe that continuing education is critical for conductors. FRA welcomes comments on this paragraph.

Section 242.121 Knowledge Testing

This section, derived from 49 CFR 240.125 and 240.209, would require railroads to provide for the initial and periodic testing of conductors. That testing would have to effectively examine and measure a conductor's knowledge of five subject areas: Safety and operating rules; timetable instructions; compliance with all applicable Federal regulations; the physical characteristics of the territory on which a person will be or is currently serving as a conductor; and the use of any job aid that a railroad may provide a conductor.

Under this section, railroads would have discretion to design the tests that will be employed; for most railroads that will entail some modification of their existing "book of rules" examination to include new subject areas. This section does not specify things like the number of questions to be asked or the passing score to be obtained. However, it does propose that the test not be conducted with open reference books unless use of such materials is part of a test objective and the test be in written or electronic form. Moreover, since the testing effort selected by the railroad must be submitted to FRA for approval, the exercise of the discretion being afforded railroads by this section would be monitored by FRA. To address a concern of some of the members of the Working Group that persons being tested were unable to obtain clarification of test questions by someone who possessed knowledge of a relevant territory, paragraph (e) of this proposed section would require railroads to provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

Section 242.123 Monitoring Operational Performance

This proposed section, derived from 49 CFR 240.129 and 240.303, contains the proposed requirements for conducting unannounced compliance tests.

Paragraph (b) of this section would require each railroad to have a program to monitor the conduct of its conductors by performing unannounced operating rules compliance tests.

Paragraph (c) provides that each conductor would have to be given at least one unannounced compliance test in each calendar year by a railroad officer who meets the requirements of 49 CFR 217.9(b)(1).

Paragraph (d) provides the operational tests that conductors and passenger conductors would have to be tested on. That paragraph would also allow passenger conductors who do not require compliance with 49 CFR 218 subpart F, except under emergency circumstances, to meet the annual, unannounced test requirement with annual training.

Paragraph (e) of this section would require railroads to indicate the types of actions they will take in the event they find deficiencies with a conductor's performance during an unannounced compliance test. FRA believes it is up to each railroad to decide the appropriate action to take in light of various factors, including collective bargaining agreements. Further, FRA believes that the vast majority of railroads have adequate policies to deal with deficiencies with a conductor's performance and have handled them appropriately for many years.

To avoid restricting the options available to the railroads and employee representatives to develop processes for handling test failures, FRA designed this proposal to be as flexible as possible. There are a variety of actions and approaches that a railroad could take in response to a test failure and FRA does not want to stifle a railroad's ability to adopt an approach that is best for its organization. Some of the actions railroads could consider include: develop and provide formal remedial training for conductors who fail tests or have deficiencies in their performance; automatically download event recorder data, if relevant, upon a test failure or deficient performance in order to preserve evidence of the failure/deficiency; and require two supervisors to accompany a retest. Each railroad could also consider implementing a formal procedure whereby a conductor is given the opportunity to explain, in writing, the factors that he or she believes caused their test failure or performance deficiencies. This explanation may allow a railroad to determine what areas of training to focus on or perhaps discover that the reason for the failure/deficiency was due to something other than a lack of skills. FRA believes there are numerous other approaches that could and should be considered and evaluated by railroads and their employees. FRA realizes that a railroad's list of actions it will take in response to a test failure or deficient performance could be expansive given the various circumstances that could contribute to a test failure or deficient performance.

Paragraphs (b) and (f) of this section recognize that some certified conductors may not be performing a service that requires conductor certification and thus a railroad may not be able to provide those conductors with the annual, unannounced compliance test. For example a certified conductor may be on furlough, in military service, off with an extended illness, or working in another service. Unlike part 240, which requires railroads to seek a waiver from FRA's Safety Board for engineers it is unable to annually test, this proposed section would not require railroads to give an unannounced compliance test to conductors who are not performing service requiring certification. However, when the certified conductor returns to certified service, he or she would have to be tested within 30 days of their return. Moreover, the railroad would have to retain a written record documenting certain dates regarding a conductor's service.

Section 242.125 Certification Determinations Made by Other Railroads

This section, derived from 49 CFR 240.225, provides the proposed requirements that would apply when a certified or previously certified conductor is about to begin service for a different railroad. The section would permit the hiring railroad to rely on determinations made by another railroad concerning a person's certification. However, the section would require a railroad's certification program to address how the railroad will administer the training of previously uncertified conductors with extensive operating experience or previously certified conductors who have had their certification expire. In both these instances, FRA is providing a railroad with the opportunity to shorten the on-the-job training that might be required if a person is treated as having no operational experience. If a railroad's certification program fails to

specify how to train a previously certified engineer hired from another railroad, then the railroad would have to require the newly hired conductor to take the hiring railroad's entire training program.

Section 242.127 Reliance on Qualification Requirements of Other Countries

This section, derived from 49 CFR 240.227, proposes to provide Canadian railroads that operate in the United States and U.S. railroads that conduct joint operations with Canadian railroads the option to rely on the system of conductor certification established by the Canadian Government as long as the conductor is employed by a Canadian railroad.

Subpart C—Administration of the Certification Program

Section 242.201 Time Limitations for Certification

This section, derived from 49 CFR 240.217, contains various time constraints that FRA proposes to preclude railroads from relying on stale information when evaluating a candidate for certification or recertification. Although some members of the Working Group advocating for extending the certification period from 3 years to 5 years, FRA could not discern the safety justification for doing so. FRA has, however, extended the period provided in 49 CFR 240.217(a)(2) upon which a railroad could rely on a visual and hearing acuity examination from 366 days to 450 days. The 450 days corresponds to the requirement in 49 CFR 227.109 that railroads must offer employees included in a hearing conservation program a hearing test at an interval not to exceed 450 days.

Section 242.203 Retaining Information Supporting Determinations

This section, derived from 49 CFR 240.215, contains the proposed record keeping requirements for railroads that certify conductors. While both 49 CFR 240.215 and this section permit railroads to retain records electronically, paragraph (g) of this section proposes more specific requirements regarding the electronic storage system used to retain the records than those found in § 240.215. In that paragraph, FRA proposes minimum standards for electronic record-keeping provisions that a railroad would have to utilize to maintain the records required by this section electronically.

FRA recognizes the growing prevalence of electronic records, and acknowledges the unique challenges that electronic transmission, storage, and retrieval of records can present. FRA also recognizes the need to maintain the integrity and security of records stored electronically. Thus, FRA believes that more specific requirements for electronic storage systems than those found in § 240.215 are needed. Further, to allow for future advances in technology, FRA is proposing electronic record storage provisions in paragraph (g) that are technology-neutral.

Section 242.205 Identification of Certified Persons and Record Keeping

This proposed section, derived from 49 CFR 240.221, would require each railroad to maintain a list of its certified conductors. Although derived from § 240.221, this section also contains some significant differences. Unlike § 240.221(c) which requires the railroad responsible for controlling joint operations territory to maintain a list of all engineers certified to operate in the joint operations, paragraph (b) of this section would require the railroad who employs conductors working in joint operations territory to maintain the list.

With respect to engineers, FRA has found that, under actual industry practices, the controlling railroad seldom qualifies foreign engineers over its trackage. Rather, the controlling railroad usually qualifies the employing railroad's designated supervisor of locomotive engineers (DSLEs) on its territory and allows those DSLEs to qualify their own engineers on the controlling railroad's trackage. Considering that practice, the employing railroad would be better able to maintain the list of conductors it qualifies on the controlling railroad. Additionally, the employing railroad has more of an interest in keeping track of its conductors that are qualified on the controlling railroad. Should an employing railroad order a crew for a train that will operate over the controlling railroad, and the crew is not qualified, the train would have to stop at the controlling railroad. Moreover, it is much easier for the employing railroad to keep the list updated as it qualifies conductors or it removes conductors who have lost qualification because of time limitations. This section also differs from § 240.221 in that this section would make it unlawful for a railroad to knowingly or an individual to willfully make a false entry on the list or to falsify the list. Similar language is found in § 240.215(i) but not in § 240.221.

While both § 240.221 and this section permit railroads to retain records electronically, paragraph (e) of this section proposes more specific requirements regarding the electronic storage system used to retain the records than those found in § 240.215(f) and would not require a railroad to obtain FRA approval to maintain the records electronically. The electronic storage requirements in paragraph (e) of this section track those in § 242.203(g).

Section 242.207 Certificate Components

This proposed section, derived from 49 CFR 240.223, contains the proposed requirements for the certificate that each conductor must carry. To address the privacy concerns of some Working Group members, FRA's proposal for what must be on the certificate slightly differs from the certificate requirements in Part 240. While § 240.223(a)(3) requires locomotive engineer certificates to include "the person's name, date of birth and employee identification number, and either a physical description or photograph of the person," proposed § 242.207(a)(3) would require conductor certificates to include "the person's name, employee identification number, and either the year of birth or photograph of the person." [10]

As currently written, this proposed section would not require a conductor's certificate to include a physical description or photograph of the conductor as is required in part 240. FRA is considering requiring a conductor's certificate to include a physical description or photograph of the conductor. FRA believes that requirement would enable FRA inspectors, railroad officers, and police officers to quickly verify that the person in possession of the certificate is in fact the person listed on the certificate. FRA welcomes comments on that proposal.

While FRA expects that, in the future, § 240.223(a)(3) will be amended to conform to § 242.207(a)(3), FRA notes that pursuant to proposed § 242.213(n), a single certificate issued to a person that is certified as both a conductor and a locomotive engineer would have to comply, for now, with § 242.207 and § 240.223.

Section 242.209 Maintenance of the Certificate

This section, derived from 49 CFR 240.305(b), (c) and (e), proposes to require conductors to: Have their certificates in their possession while on duty as a conductor; display their

[10] FRA has made two clarifying changes to the language of § 242.207(a)(3) that were not considered by the Working Group or the full RSAC: (1) The words "either the" were added between "and" and "year"; and (2) the word "the" was added between "of" and "person."

certificates when requested to do so by FRA representatives, State inspectors authorized under 49 CFR 212, and certain railroad officers; and notify a railroad if he or she is called to serve as a conductor in a service that would cause them to exceed their certificate limits. Although State inspectors authorized under 49 CFR 212 could be considered "FRA representatives," they were mentioned separately in this section to ensure that there would be no dispute regarding their authority.

Section 242.211 Replacement of Certificates

This proposed section, derived from 49 CFR 240.301, would require railroads to have a system for the prompt replacement of certificates when necessary. Unlike § 240.301, which does not address the question of who will bear the cost of a replacement certificate, this section proposes that certificates will be replaced by the railroad at no cost to the conductor. While FRA expected that the railroad would bear the cost for a replacement locomotive engineer certificate under part 240, a few Working Group members indicated that some locomotive engineers had been charged (or asked by a railroad to pay) for replacement certificates. The provision in this proposed part clarifies that the railroad would bear the cost of replacement certificates.

To address the concerns of some Working Group members that a full replacement certificate can take some time to generate and provide to a conductor, paragraph (b) of this section proposes to permit railroads to issue temporary replacement certificates. The paragraph describes what the certificate would have to contain and who could authorize the temporary replacement. The temporary replacement certificate could be delivered electronically (*e.g.,* faxed, e-mailed, etc.) and would be valid for no more than 30 days.

Section 242.213 Multiple Certifications

This proposed section would permit a person to hold certification for multiple types of conductor service and/or certification for both conductor and locomotive engineer service. A railroad would only need to issue one certificate to a person with multiple certifications. However, a certificate issued to a person certified as a conductor and locomotive engineer would not only have to comply with proposed § 242.207 but also with § 240.223. To the extent possible, a railroad that issued multiple certificates to a person would have to coordinate the expiration date of those certificates.

With the exception of a situation in which a conductor is removed from a train for a medical, police, or other such emergency, this section would require that a locomotive engineer, including a RCO, who is operating without an assigned certified conductor to either be: (1) Certified as both a locomotive engineer and a conductor; or (2) accompanied by a certified conductor who will attach to the crew "in a manner similar to that of an independent assignment." Since a lone engineer/RCO would be serving as and performing duties as both locomotive engineer and conductor, FRA believes, and the Working Group and full RSAC voted to recommend, that the engineer/RCO must hold dual certification or be accompanied by a certified conductor. The language concerning how an accompanying conductor would attach to the crew conveys FRA's intent that this proposed regulation be neutral on the issue of crew consist (*i.e.,* how many crewmembers must be on a train).

During the RSAC process, representatives of FRA, the railroads, and labor engaged in extensive discussions regarding the potential effect of proposed 49 CFR 242.213 ("Multiple certifications") on the issue of crew consist. It is FRA's intent that this proposed conductor certification regulation, including section 242.213, be neutral on the crew consist issue. Nothing in the proposed part 242 should be read as FRA's endorsement of any particular crew consist arrangement.

In instances where a person, who is serving as both the conductor and the engineer (*i.e.,* a lone engineer or RCO), is involved in a revocable event, railroads may be faced with determining which certification to revoke. For example, a railroad that finds that a RCO, who is certified both as an engineer and as a conductor but who was not accompanied by a certified conductor, has failed to comply with prohibitions against tampering with a locomotive mounted safety device would have to determine whether to revoke the person's conductor certification pursuant to § 242.403(e)(5) or the person's locomotive engineer certification pursuant to § 240.117(e)(5). To address that situation, FRA is considering adding a provision to this proposed section which would require railroads to make the determination as to which certification to revoke based on the work the person was performing at the time the conduct occurred. This determination would be similar to the determination made under the reporting requirements in this proposed rule (§ 242.215(f)) and under part 225 in which railroads determine whether an accident was caused by poorly performing what is traditionally considered a conductor's job function (*e.g.,* switch handling, derail handling, *etc.*) or whether it was caused by poorly performing what is traditionally considered a locomotive engineer's job function (*e.g.,* operation of the locomotive, braking, *etc.*). FRA welcomes comments on that proposed provision.

This section also addresses the consequences of certification denial or revocation for a conductor who is certified to perform multiple types of conductor service or both conductor and locomotive engineer service. A person who holds a current conductor and/or locomotive engineer certificate from more than one railroad would have to immediately notify the other certifying railroad(s) if he or she is denied engineer or conductor recertification or has his or her conductor or engineer certification revoked by another railroad.

Pursuant to this section, a person certified to perform multiple types of conductor service and who has had any of those certifications revoked would not be permitted to perform any type of conductor service during the period of revocation. Likewise, a person who holds a conductor and locomotive engineer certificate and has his or her engineer certificate revoked would not be permitted to work as a conductor during the period of revocation. Similarly, a person who holds a conductor and engineer certificate and has his or her conductor certification revoked for violation of §§ 242.403(e)(1)–(e)(5) or (e)(12) would not be permitted to work as an engineer during the period of revocation. However, a person who holds a conductor and engineer certificate and has his or her conductor certification revoked for a violation of §§ 242.403(e)(6)–(e)(11) (*i.e.,* violations involving provisions of part 218, subpart F) would be permitted to work as an engineer during the period of revocation. To aid interested parties, FRA has included a table in Appendix E [11] to this proposed rule which explains, in a spreadsheet-style form, when a person certified as both an engineer and conductor would be permitted to work following a certification revocation.

Currently under part 240, an engineer cannot have his or her certificate

[11] Appendix E was not considered by the Working Group or the full RSAC. It was added by FRA to assist interested parties in determining the application of revocable events.

revoked for violations of part 218, subpart F. While part 240 may be amended in the future to include part 218, subpart F violations as revocable events, this proposed rule recognizes that it would be unfair to prohibit a person from working as an engineer for a violation that currently would not result in the revocation of his or her engineer certificate. This section also proposes that, in determining the period in which a person may not work as a locomotive engineer due to a revocation of his or her conductor certification, only violations of §§ 242.403(e)(1)–(e)(5) or (e)(12) may be counted. To assist railroads in determining the correct period, paragraph (h)(1) of this section provides a hypothetical scenario and an explanation of how the period would be calculated.

To avoid treating a person who only holds one certification differently than a person who holds multiple certifications, this section would prohibit a person who has had his or her locomotive engineer certification revoked from obtaining a conductor certificate during the revocation. Likewise, a person who has had his or her conductor certification revoked for violations of §§ 242.403(e)(1)–(e)(5) or (e)(12) would be prohibited from obtaining a locomotive engineer certificate during the period of revocation. With respect to denial of certification or recertification, this section provides that a railroad that denies a person locomotive engineer certification or recertification would not be permitted, solely on the basis of the denial, to deny or revoke that person's conductor certification or recertification and vice versa.

Section 242.215 Railroad Oversight Responsibilities

This section, derived from 49 CFR 240.309, proposes to require Class I (including the National Railroad Passenger Corporation and a railroad providing commuter service) and Class II railroads to conduct an annual review and analysis of its program for responding to detected instances of poor safety conduct by certified conductors. FRA has formulated the information collection requirements of this proposed section to ensure that railroads collect data on conductor safety behavior and feed that information into its operational monitoring efforts, thereby enhancing safety.

This section would require Class I (including the National Railroad Passenger Corporation and a railroad providing commuter service) and II railroads to have an internal auditing plan to keep track of 8 distinct kinds of events that involve poor safety conduct by conductors. For each event, the railroad would have to indicate what response it took to that situation. The railroad would evaluate this information, together with data showing the results of annual operational testing and the causation of FRA reportable train accidents, to determine what additional or different efforts, if any, are needed to improve the safety performance of that railroad's certified conductors. FRA is not proposing to require that a railroad furnish this data or its analysis of the data to FRA. Instead, FRA is proposing to require that the railroad be prepared to submit such information when requested.

For purposes of the reporting requirement in this section, an instance of poor safety conduct involving a person who holds both a conductor and engineer certification would only have to be reported once (*i.e.,* either under 49 CFR 240.309 or this section). The determination as to where to report the instance of poor safety conduct would be based on the work the person was performing at the time the conduct occurred. This determination would be similar to the determination made under part 225 in which railroads determine whether an accident was caused by poorly performing what is traditionally considered a conductor's job function (*e.g.,* switch handling, derail handling, *etc.*) or whether it was caused by poorly performing what is traditionally considered a locomotive engineer's job function (*e.g.,* operation of the locomotive, braking, *etc.*).

Subpart D—Territorial Qualification and Joint Operations

Section 242.301 Requirements for Territorial Qualification

This proposed section, derived from 49 CFR 240.229 and 240.231, explains the requirements for territorial qualification. Paragraph (a) of this section provides that, except for two circumstances,[12] a railroad, including a railroad that employs conductors working in joint operations territory, could not permit or require a person to serve as a conductor unless that railroad determines that the person is a certified conductor and possesses the necessary territorial qualifications.

Paragraph (a) reflects the Working Group and full RSAC recommendation to realign the burden for determining which party is responsible for allowing an unqualified person to operate in joint operations. While part 240 puts the burden on the controlling railroad, this proposed rule puts the burden on the employing railroad. This change is based on the experiences of the Working Group members who believe that an inordinate amount of the liability currently rests with the controlling railroad. The perceived unfairness rests on the fact that it is not always feasible for the controlling railroad to make all of the determinations proposed in § 242.119. The employing railroad may provide the controlling railroad with a long list of hundreds or thousands of locomotive engineers that it deems eligible for joint operations; following up on a long, and ever changing list is made much more difficult since a controlling railroad would not control the personnel files of the conductors on this list.

The proposed realignment would lead to a sharing of the burden among a controlling railroad, an employing railroad and an employing railroad's conductor. Although a controlling railroad would be obligated to make sure the person is qualified, paragraph (a) would require that an employing railroad make these same determinations before calling a person to serve in joint operations. Paragraph (b) of this section would require a conductor to notify a railroad when the person is being asked to exceed his or her territorial qualifications. That paragraph parallels § 242.209(b) of this proposed rule.

Paragraphs (c) and (d) propose requirements for situations where a conductor lacks territorial qualification on main track and other than main track physical characteristics. On main track, the conductor would have to be assisted by a person who is (1) a certified conductor or certified locomotive engineer and (2) meets the territorial qualification requirements for the main track physical characteristics. On other than main track, the conductor, where practicable, would have to be assisted by a person who is a certified conductor and meets the territorial qualification requirements for other than main track physical characteristics. Where not practicable, the conductor would have to be provided with an appropriate, up-to-date job aid. Two points should be made about the other than main track proposal in paragraph (d) of this section. First, the person assisting the conductor could be the locomotive engineer as long as the engineer is also a certified conductor and meets the territorial qualification requirements for the other than main track physical characteristics. Second, FRA does not intend for the

[12] The phrase "[e]xcept as provided in paragraph (c) or (d) of this section" in paragraph (a) was not considered by the Working Group or the full RSAC, but has been added to clarify the section.

proposed requirements of § 242.301(d) to apply to sidings.

Subpart E—Denial and Revocation of Certification

This subpart parallels part 240's approach to adverse decisions concerning certification (*i.e.,* decisions to deny certification or recertification and revoke certification). With respect to denials, the approach of this proposed rule is predicated principally on the theory that decisions to deny certification or recertification would come at the conclusion of a prescribed evaluation process which would be conducted in accordance with the provisions set forth in this subpart. Thus, this proposed rule and part 240 contain specific procedures designed to assure that a person, in jeopardy of being denied certification or recertification, would be given a reasonable opportunity to explore and respond to the negative information that might serve as the basis for being denied certification or recertification.

When considering revocation, this proposed rule contemplates that decisions to revoke certification would only occur for the reasons specified in this subpart. Since revocation decisions by their very nature involve a clear potential for factual disagreement, this subpart is structured to ensure that such decisions would come only after a certified conductor had been afforded an opportunity for an investigatory hearing at which the presiding officer would determine whether there was sufficient evidence to establish that the conductor's conduct warranted revocation of his or her certification.

This subpart also includes the concept of certificate suspension. Certificate suspension would be employed in instances where there is reason to think the certificate should be revoked or made conditional but time is needed to resolve the situation. Certificate suspension would be applicable in instances where a person is awaiting an investigatory hearing to determine whether that person violated certain provisions of FRA's alcohol and drug control rules or engaged in operational misconduct and situations in which the person is being evaluated or treated for an active substance abuse disorder.

While this proposed subpart follows part 240's approach to adverse decisions concerning certification, it does include some modifications to the processes in part 240. Those modifications are discussed below.

Section 242.401 Denial of Certification

This section, derived from 49 CFR 240.219, proposes minimum procedures that must be accorded to a certification candidate before a railroad denies the candidate certification or recertification. Except for two changes, the provisions in this section mirror the provisions in § 240.219 including: Providing a certification candidate with a reasonable opportunity to explain or rebut adverse information; and notifying a candidate of an adverse decision and providing a written explanation of the basis for its decision within 10 days.

This section differs from § 240.219 in two ways. First, this section would require that a written explanation of an adverse decision be "served" on a certification candidate (*see* definition of *service* in § 242.7). Use of the defined term, rather than part 240's more general phrase "mailed or delivered," not only makes this proposed rule internally consistent but would likely help FRA in determining whether a petition seeking review of a denial decision was filed within 120 days of the date the denial was served on the petitioner (*see* § 242.503(c)). Second, paragraph (d) of this section, which is not included in § 240.219, would prohibit a railroad from denying certification based on a failure to comply with § 242.403(e)(1)–(11) if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with those sections. Paragraph (d) parallels the intervening cause exception for revocation in § 242.407(i)(1). FRA welcomes comments on whether the intervening cause exception in paragraph (d) should be modified to include certification and recertification requirements in addition to the revocable events in § 242.403. For example, paragraph (d) could be modified to read as follows: A railroad shall not determine that a person failed to meet the eligibility requirements of this part and shall not deny the person's certification if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with the railroad operating rule or practice or certification or recertification requirement which forms the basis for denying the person certification or recertification.

As a supplement to this proposed section, FRA is considering whether to add two provisions which FRA believes would improve the transparency of the certification denial process and improve FRA's ability to adjudicate petitions seeking review of a railroad's denial decision pursuant to subpart E of this proposed rule. One of the challenges that FRA faces when reviewing denial decisions in the locomotive engineer context is that, unlike revocation decisions which are usually accompanied by a documentary record and transcript generated at a railroad hearing, no such hearing is required for denial decisions and often there is little or no documentary record.

To overcome that challenge, FRA is considering two additional provisions. First, FRA is considering adding the following sentence to paragraph (a) of this section: The railroad shall provide the conductor candidate with any written documents or records, including written statements, which support its pending denial decision. Second, FRA is considering adding the following sentence to paragraph (c) of this section: The basis for a railroad's denial decision shall address any explanation or rebuttal information that the conductor candidate may have provided in writing pursuant to paragraph (a) of this section. FRA welcomes comments on those proposed provisions.

Section 242.403 Criteria for Revoking Certification

This section, derived from 49 CFR 240.117 and 240.305, proposes the circumstances under which a conductor may have his or her certification revoked. In addition, paragraph (b) of this section would make it unlawful to fail to comply with any of the events listed in paragraph (e) of this section (*i.e.,* events which would require a railroad to initiate revocation action). Paragraph (b) would be needed so that FRA could initiate enforcement action. For example, FRA might want to initiate enforcement action in the event that a railroad fails to initiate revocation action or a person is not a certified conductor under this part.

Paragraph (c)(1) of this section proposes that a certified conductor who fails to comply with the events listed in paragraph (e) of this section would have his or her conductor certification revoked. Paragraph (c)(2) proposes that a certified conductor, who is monitoring, piloting, or instructing a conductor, could have his or her certification revoked if he or she fails to take "appropriate action" to prevent a violation of paragraph (e) of this section. As explained in paragraph (c)(2), "appropriate action" does not mean that a supervisor, pilot, or instructor must prevent a violation from occurring at all costs, but rather the duty may be met by warning the conductor or engineer, as appropriate, of a potential or foreseeable violation. The term "appropriate action"

is also used in paragraph (e) of this section as well as 49 CFR 240.117(c)(2).

Paragraph (c)(3) proposes that a person who is a certified conductor but is called by a railroad to perform the duty of a train crew member other than that of conductor or locomotive engineer would not have his or her certification revoked based on actions taken or not taken while performing that duty. For example, a person who is called to be the crew's brakeman and who does not serve as a conductor or locomotive engineer during that tour of duty could not have his or her certification revoked for a violation listed in paragraph (e) of this section. Interested parties should note that the exemption would not apply to violations of § 242.403(e)(12) so that conductors working in other capacities who violate certain alcohol and drug rules would have their certification revoked for the appropriate period pursuant to §§ 242.403 and 242.115.

Paragraph (d) proposes that the time frame for considering operating rule compliance would only apply to conduct described in paragraphs (e)(1) through (e)(11) of this section and not paragraph (e)(12). When alcohol and drug violations are at issue, the window in which prior operating rule misconduct will be evaluated would be dictated by § 242.115 and not limited to the 36 month period prescribed in this paragraph. This proposed rule would require that certification reviews consider alcohol and drug misconduct that occurred within a period of 60 consecutive months prior to the review pursuant to § 242.115(e).

Paragraph (e) proposes 12 kinds of rule infractions that could result in certification revocation. The infractions listed in paragraphs (e)(1)-(e)(5) and (e)(12) derive from the revocable events provided in 49 CFR 240.117(e) but have been modified to account for a conductor's duties. For example, paragraphs (e)(1) and (e)(2) recognize that a conductor does not operate the train and thus those subparagraphs would only require a conductor to take "appropriate action" to prevent an engineer from failing to control a locomotive or train in accordance with a signal or to adhere to speed limitations. As explained in those subparagraphs, "appropriate action" does not mean that a conductor must prevent a violation from occurring at all costs; but rather the duty may be met by warning the engineer of a potential or foreseeable violation. Moreover, paragraph (e)(2) recognizes that a conductor who is not in the operating cab should not be held to held to the same responsibility with respect to monitoring train speed as a conductor who is located in the operating cab.

Interested parties should note that with respect to paragraph (e)(4), a conductor would be considered to have occupied main track or a segment of main track without proper authority or permission if the conductor failed to stop and protect/flag a crossing on main track when required to do so pursuant to a railroad operating rule or practice, including a mandatory directive.

The infractions listed in paragraphs (e)(6)–(e)(11) of this section describe violations of part 218, subpart F which are not listed as revocable events in part 240. For the reasons listed below, FRA proposes, and the RSAC recommended, that violations of part 218, subpart F should be revocable events for conductors. In the future, FRA expects to review whether those violations should also be revocable events for locomotive engineers. Subpart F of part 218 requires that each railroad have in effect certain operating rules concerning shoving or pushing movements, equipment left out to foul a track, switches, and derails.[13] The operating rules identified in part 218, subpart F are not only considered core competencies for conductors but are also designed to address the most frequently caused human factor accidents. Human factors are the leading cause of train accidents, accounting for 38 percent of the total in 2005. Human factors also contribute to employee injuries. Subpart F violations account for approximately 43% of all human factor caused accidents. From 2005–2009, there were approximately 2,227 accidents due to Subpart F violations. Those accidents resulted in approximately 13 fatalities, 363 injured, and $104,855,224 in damages.

In addition to the 12 kinds of revocable events proposed in this NPRM, FRA welcomes comments as to whether a violation of the final rule in 49 CFR part 220 ("Restrictions on Railroad Operating Employees' Use of Cellular Telephones and Other Electronic Devices") should constitute a revocable event for conductors and locomotive engineers. In the NPRM for 49 CFR part 220 (75 FR 27672, 27678 (May 18, 2010)), FRA noted that it was "considering amending 49 CFR part 240 * * * to add violations of this subpart as a basis for revoking a locomotive engineer's certification" and requested comments on the issue. However, since the issue deals with revocation of certification, FRA believes that the issue is more appropriately addressed in the conductor and locomotive engineer rules. Comments regarding whether FRA should use its other enforcement tools (*e.g.,* monetary civil penalty against an individual, disqualification of an individual from performing safety-sensitive service, *etc.*) instead of mandating revocation would be particularly helpful as would comments describing how a railroad would acquire the necessary evidence to revoke a conductor's and/or locomotive engineer's certification for violation of 49 CFR part 220.

Paragraph (e)(13) of this section, which does not have a counterpart in part 240, would prohibit a railroad from denying or revoking an employee's certification based upon additional conditions or operational restrictions imposed pursuant to § 242.107(d). Thus, a railroad could not revoke a conductor's certificate for an alleged violation of a railroad rule or practice that was more stringent than the condition or restrictions required by this proposed part. In the future, FRA expects to review whether a similar provision should also apply to locomotive engineers.

Paragraph (f) of this section proposes that if a single incident contravenes more than one operating rule or practice listed in paragraph (e) of this section, that event would be treated as a single violation. Moreover, paragraph (f) proposes that a conductor may have his or her certification revoked for violations that occur during properly conducted operational compliance tests. However, violations that occur during an improperly conducted operational compliance test would not be considered for revocation purposes.

Section 242.405 Periods of Ineligibility[14]

This proposed section, derived from § 240.117, describes how a railroad would determine the period of ineligibility (*e.g.,* for revocation or denial of certification) that a conductor or conductor candidate would have to undergo. With respect to revocation, this section proposes that once a railroad has determined that a conductor has failed to comply with its safety rule concerning one or more events listed in § 242.403(e), two consequences would occur. First, the railroad would be required to revoke the

[13] For a detailed analysis of part 218, interested parties should review the notice of proposed rulemaking (71 FR 60372 (Oct. 12, 2006)), the final rule (73 FR 8442 (Feb. 13, 2008)), and the response to petitions for reconsideration (73 FR 33888 (June 16, 2008)) issued in that rulemaking.

[14] When considered by the Working Group and full RSAC, the title of this section was "Periods of revocation." FRA has modified that title to describe more clearly what the section would cover.

conductor's certification for a period of time provided in this section. Second, that revocation would initiate a period during which the conductor would be subject to an increasingly more severe response if additional revocable events occur in the next 24 to 36 months.

Except for incidents occurring on other than main track where restricted speed or the operational equivalent is in effect, the standard periods of revocation proposed in this section track the periods provided in part 240: 1 event = revocation for 30 days; 2 events within 24 months of each other = 6 months; 3 events within 36 months of each other = 1 year; and 4 events within 36 months of each other = 3 years. This section notes, however, that violations of § 219.101 (Alcohol & Drugs) could result in different periods of ineligibility and in those cases, the longest period of revocation would control. FRA has included a table in Appendix E to this proposed rule which provides the revocation periods in a spreadsheet-style form. The table should be useful in determining the correct period of revocation.

The period of revocation in both part 240 and this proposed rule is based on a floating window. Hence, under this proposed rule and part 240, if a second offense occurs 25 months after the first offense, the revocation period would be the same as a first offense; however, if a third offense occurs within 36 months of the first offense, the revocation period would be one year. The anomaly will be that a person's certificate could be revoked twice for one month under paragraph (a)(3)(ii) of this section but that the third incident could result in a one year revocation under paragraph (a)(3)(iv) of this section without the benefit of the interim six month revocation period under paragraph (a)(3)(iii).

This section also contains two provisions which would reduce the period of ineligibility if certain criteria are met. The first provision, which is contained in paragraph (a)(3)(i) of this section, proposes that "on other than main track where restricted speed or the operational equivalent thereof is in effect," the periods of revocation for violations of certain provisions of § 242.403(e) shall be reduced by one half provided that another revocable event has not occurred within the previous 12 months. That provision, which does not have an equivalent provision in part 240, recognizes that some violations which occur on other than main track where slower speeds are in effect may pose less of a danger to safety than violations that occur on main track and thus a reduced period of revocation is warranted. The second provision, which may reduce the period of ineligibility if certain criteria are met, is contained in paragraph (c) of this section.[15] That provision, which parallels § 240.117(h), proposes that a person whose conductor certification is denied or revoked would be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of revocation if, among other things, at least one half of the initial period of ineligibility has elapsed.

In certain instances, both proposed provisions may apply to a conductor who has had his or her certification revoked. For example, if a conductor's certification is revoked for a violation of proposed § 242.403(e)(6) which occurred on other than main track where restricted speed is in effect and it is the only revocation that the conductor has ever had, then, under § 242.405(a)(3)(i), the revocation period would be 15 days. Moreover, if the conductor meets the criteria in § 242.405(c), then the conductor would be eligible for reinstatement of his or her certificate in 8 days.[16]

Paragraph (b) of this section proposes that all periods of revocation may consist of training. While that provision is not explicitly stated in part 240, it is certainly not prohibited and is included in this proposed rule to make the rule clear.

Section 242.407 Process for Revoking Certification

This proposed section, derived from 49 CFR 240.307, provides the procedures a railroad would have to follow if it acquires reliable information regarding a conductor's violation of § 242.115(e) or § 242.403(e).

Paragraph (b)(1) of this section provides that upon receipt of reliable information regarding a violation of § 242.403(e), a railroad would have to suspend the person's certificate. Paragraph (b)(2) provides that prior to or upon suspending the person's certificate, the railroad would have to provide either oral or written notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing. If the initial notice was verbal, then the notice would have to be promptly confirmed in writing. The amount of time the railroad has to confirm the notice in writing would depend on whether or not a collective bargaining agreement is applicable. In the absence of such an agreement, a railroad would have 96 hours to provide this important information. Interested parties should note that if a notice of suspension is amended after a hearing is convened and/or does not contain citations to all railroad rules and practices that may apply to a potentially revocable event, the Operating Crew Review Board, if asked to review the revocation decision, might subsequently find that that constituted procedural error pursuant to § 242.505.

Paragraphs (b)(3)–(b)(7) and paragraphs (c), (d), (e), and (f) of this section provide the proposed requirements and procedures for conducting or waiving a railroad hearing regarding the alleged revocable event. Except for paragraph (b)(4), discussed below, those proposed requirements mirror the hearing requirements in part 240.

Although the requirements in paragraph (c) regarding the written decision issued in a railroad hearing track the requirements in part 240, FRA is considering modifying those requirements to ensure that clearer and more detailed decisions are issued. Clearer and more detailed decisions would allow a conductor to understand exactly why his or her certification was revoked and would allow the Operating Crew Review Board to have a more detailed understanding of the case if it is asked to review the revocation decision pursuant to subpart E of this proposed rule. Specifically, FRA is considering requiring the decision to: (1) State whether the railroad official found that a revocable event occurred and the applicable period of revocation with a citation to 49 CFR 242.405 (Periods of revocation); (2) contain an explanation of the factual findings and citations to all applicable railroad rules and practices; (3) not cite a railroad rule or practice that was not cited in the written notice of suspension; and (4) be served on the employee and the employee's representative, if any, with the railroad to retain proof of that service. FRA welcomes comments on those proposals.

Pursuant to paragraph (b)(4) of this section, no later than the convening of a hearing, the railroad convening the hearing would have to provide the person with a copy of the written information and list of witnesses the railroad would present at the hearing. If requested, a recess to the start of the hearing would be granted if the copy of the written information list of witnesses is not provided until just prior to the

[15] Following the Working Group meetings, FRA changed the word "revocation" in the beginning of paragraph (c) to the word "ineligibility" to accurately reflect the scope of that paragraph.

[16] If, as in the example, the revocation calculation results in any fraction of a day (*e.g.,* 7.5 days), then round the number up. Thus, the conductor in the example would be eligible for reinstatement in 8 days.

convening of the hearing. If the information that led to the suspension of a conductor's certificate pursuant to § 242.407(b)(1) was provided through statements of an employee of the convening railroad, the railroad would have to make that employee available for examination during the hearing. Examination may be telephonic where it is impractical to provide the witness at the hearing.

The provisions in paragraph (b)(4) of this section were added to address the concerns of some members of the Working Group that engineers were not being provided with information and/or witnesses necessary to defend themselves at the hearing under part 240. Interested parties should note that even if a railroad conducts a hearing pursuant to the procedures in an applicable collective bargaining agreement pursuant to paragraph (d) of this section, the railroad would still have to comply with the provisions of paragraph (b)(4). It is FRA's understanding that, except for an employee of the convening railroad whose statements led to a suspension under § 242.407(b)(1), a railroad would not, in fact, be required to call to testify every witness that it includes on the list provided pursuant to paragraph (b)(4). If, for example, a railroad believes that it has provided sufficient evidence during a hearing to prove its case and that calling a witness on its list to testify would be unduly repetitive, then the railroad would not be obligated to call that witness. Of course, the opposing party could request that the witness be produced to testify but the hearing officer would have the authority pursuant to § 242.407(c)(6) to determine whether the witness' testimony would be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding. FRA welcomes comments on its understanding of paragraph (b)(4).

Paragraph (g) would require a railroad to revoke an employee's conductor certification if it discovers that another railroad has revoked that person's conductor certification. The hearing requirement in this proposed rule is satisfied when any single railroad holds a revocation hearing.

Paragraph (h) would credit the period of certificate suspension prior to the commencement of a hearing required under this section towards satisfying any applicable revocation period imposed in accordance with the provisions of proposed § 242.405.

Paragraph (i) proposes two specific defenses for railroad supervisors and hearing officers to consider when deciding whether to suspend or revoke a person's certificate due to an alleged revocable event. Pursuant to paragraph (i), either defense would have to be proven by sufficient evidence.

Paragraph (i)(1) of this section proposes that a person's certificate would not be revoked when there is sufficient evidence of an intervening cause that prevented or materially impaired the person's ability to comply. For example, a railroad should consider assertions that a conductor in the operating cab failed to take appropriate action to prevent the engineer from failing to control the locomotive in accordance with a signal indication that requires a complete stop before passing it because of defective equipment. Similar to the defense of defective equipment, the actions of other people could sometimes be an intervening cause. For instance, a dispatcher or a train crew member could relay incorrect information to the conductor who reasonably relied on it in making a prohibited train movement.

Conductors and railroad managers need to note that not all equipment failures or errors caused by others would serve to absolve the person from certification action under this proposed rule. The factual issues of each circumstance would have to be analyzed on a case-by-case basis. For example, a broken speedometer would not be an intervening factor in a violation of § 242.403(e)(3) (failure to perform certain required brake tests).

Paragraph (i)(2) of this section proposes to provide a railroad with the discretion necessary to decide not to revoke a conductor's certification for an event that violates § 242.403(e)(1) through (e)(11) under certain limited circumstances. However, that subparagraph does not permit a railroad to use its discretion to dismiss violations indiscriminately. That is, FRA would only permit railroads to excuse violations when two criteria are met. First, the violation would have to be of a minimal nature; for example, on high speed track at the bottom of a steep grade, the engineer makes clear to the conductor, who is in the cab, that the engineer knows the correct speed limit without the conductor saying anything about speed, but the front of the lead unit in a four unit consist hauling 100 cars enters a speed restriction at 10 miles per hour over speed while the third unit and the balance of the train enters the speed restriction at the proper speed, and maintains that speed for the remainder of the train. If more of the locomotive or train consist enters the speed restriction in violation, a railroad that is willing to consider mitigating circumstances would need to consider whether the violation was truly of a minimal nature.

In contrast, a violation could not be considered of a minimal nature if a conductor fundamentally violated the operating rules. For example, if a conductor failed to perform or have knowledge that a required brake test was performed, even if the train was only traveling a short distance, then the event could not be considered of a minimal nature. In situations where the proposed rule had been fundamentally violated, a railroad would not have the discretion to excuse the violation.

Second, for paragraph (i)(2) to apply, sufficient evidence would have to be presented to prove that the violation did not have either a direct or potential effect on rail safety. That defense would certainly not apply to a violation that actually caused a collision or injury because that would be a direct effect on rail safety. It would also not apply to a violation that, given the factual circumstances surrounding the violation, could have resulted in a collision or injury because that would be a potential effect on rail safety. For instance, an example used to illustrate the term "minimal nature" described a situation involving a train that had the first two locomotives enter a speed restriction too fast, yet the balance of the train was in compliance with the speed restriction; since the train in that example would not be endangering other trains because it had the authority to travel on that track at a particular speed, there would be no direct or potential effect on rail safety caused by that violation.

In contrast, if a train failed to stop short of a banner, which was acting as a signal requiring a complete stop before passing it, during a locomotive engineer efficiency test, that striking of a banner might have no direct effect on rail safety but it has a potential effect since a banner would be simulating a railroad car or another train. Meanwhile, there would be a difference between passing a banner versus making an incidental touching of the banner. If a locomotive or train barely touched a banner so that the locomotive or train did not run over the banner, break the banner, or cause the banner to fall down, that incidental touching could be considered a minimal nature violation that did not have any direct or potential effect on rail safety. This is because such an incidental touching is not likely to cause damage to equipment or injuries to crew members even if the banner were another train. Although it is arguable that if the banner were a person the touching could be fatal, FRA is willing

to allow railroads the discretion to consider this type of scenario in the context of excusing a violation pursuant to paragraph (i)(2); of course, if the banner was in fact a person in the manner described in the example, the railroad would not have the discretion to apply paragraph (i)(2).

Similarly, if a train has received oral and written authority to occupy a segment of main track, the oral authority refers to the correct train number but refers to the wrong locomotive because someone transposed the numbers, the conductor's violation in not catching this error before entering the track without proper authority could be considered of a minimal nature with no direct or potential effect on rail safety. Since the railroad would be aware of the whereabouts of this train, the additional risk to safety of this paperwork mistake may practically be zero. Under the same scenario, where there are no other trains or equipment operating within the designated limits, there may be no potential effect on rail safety as well as no direct effect.

Paragraph (j) of this section proposes to require railroads to keep records of those violations in which they must not or elect not to revoke a conductor's certificate pursuant to paragraph (i) of this section. Paragraph (j)(1) would require railroads to keep records even when they decide not to suspend a conductor's certificate due to a determination pursuant to paragraph (i). Paragraph (j)(2) would require railroads to keep records even when they make their determination prior to the convening of the hearing held pursuant to § 242.407.

Paragraph (k) addresses concerns that problems could arise if FRA disagrees with a railroad's decision not to suspend a conductor's certificate for an alleged misconduct event pursuant to § 242.403(e). As long as a railroad makes a good faith determination after a reasonable inquiry, the railroad should have a defense to civil enforcement for making what the agency believes to be an incorrect determination. However, railroads should note that if they do not conduct a reasonable inquiry or act in good faith, they would be subject to civil penalty enforcement under this proposed rule. In addition, even if a railroad does not take what FRA considers appropriate revocation action, FRA could still take enforcement action against a person responsible for the non-compliance by assessing a civil penalty pursuant to § 242.403 of this proposed rule or issuing an order prohibiting an individual from performing safety-sensitive functions in the rail industry for a specified period pursuant to 49 CFR part 209, subpart D.

Subpart F—Dispute Resolution Procedures

This subpart details the opportunities and procedures for a person to appeal a decision by a railroad to deny certification or recertification or to revoke a conductor's certification. As stated in the RSAC Task Statement, one of the issues requiring specific report from the Working Group was "[s]tarting with the locomotive engineer certification model, what opportunities are available for simplifying appeals from decertification decisions of the railroads?" Since its first meeting in July of 2009, the Working Group devoted a considerable amount of time to researching, discussing and proposing ideas to simplify the appeals process. While the appeals process proposed in this subpart, which received unanimous consent by the Working Group and was recommended by the full RSAC, essentially follows the appeals process in part 240, some important modifications are proposed. Those proposed modifications are discussed below.

Section 242.501 Review Board Established

This section, derived from 49 CFR 240.401, provides that a person who has been denied certification or recertification or has had his or her conductor certification revoked could petition FRA to review the railroad's decision. Pursuant to this section, FRA proposes to delegate initial responsibility for adjudicating such disputes to an Operating Crew Review Board (OCRB). Although creation of the OCRB would require issuance of an internal FRA order, FRA expects that the OCRB would mirror the make-up of the Locomotive Engineer Review Board (LERB), which is currently used by FRA to adjudicate disputes under part 240.[17] As mentioned above, FRA expects that, if and when conforming changes are made to part 240, all references to the LERB in part 240 would be changed to the OCRB and the OCRB would handle both conductor and locomotive engineer disputes.

Section 242.503 Petition Requirements

This section, derived from 49 CFR 240.403, provides the proposed requirements for obtaining FRA review of a railroad's decision to deny certification, deny recertification, or revoke certification. Those requirements contained in paragraphs (a)–(c) include the need to seek review in a timely fashion once the adverse decision is rendered by the railroad. Interested parties should note that the "petitioner" referred to in paragraph (b) of this section is the person who had his or her certificate revoked, not an employee representative who may respond on the petitioner's behalf. If the petitioner is represented by someone, the petitioner is encouraged to also provide the representative's name, mailing address, daytime telephone number, and e-mail address (if available) in the petition.

As currently proposed, paragraph (b)(5) of this section would require a petitioner to supplement his or her petition with "a copy of all written documents in the petitioner's possession or reasonably available to the petitioner that document" the railroad's decision. In an effort to clarify that requirement with respect to petitions seeking review of a railroad decision which is based on a failure to comply with any drug or alcohol related rules or a return-to-service agreement, FRA is considering adding a provision to paragraph (b) of this section which would provide that: "If the petitioner is requesting review of a railroad decision which is based on a failure to comply with any drug or alcohol related rules or a return-to-service agreement, then the petitioner shall supplement his or her petition with all relevant written documents, including the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees. The petitioner should provide written explanation in the petition if written documents that should be reasonably available to the petitioner are not supplied." FRA welcomes comments on that proposed provision.

Paragraph (c) of this section proposes to give the OCRB discretion to grant a request for additional time that is made prior to the expiration of the period originally prescribed. As the OCRB could exercise its discretion under this proposed rule only for "cause shown," a party would have to demonstrate some justification for the Board to grant an extension of time. Similarly, if the deadline in paragraph (c) is completely missed, the movant, under paragraph (c)(2), would have to allege facts constituting "excusable neglect" and the mere assertion of excusable neglect, unsupported by facts, would be insufficient. Excusable neglect would require a demonstration of good faith on

[17] In a modification to the regulatory text considered by the Working Group and the full RSAC, FRA has removed a reference to a minimum number of OCRB members in paragraph (c) of this section. The number of board members will be provided by FRA order.

the part of the party seeking an extension of time and some reasonable basis for noncompliance within the time specified in the rules. Absent a showing along these lines, relief would be denied.

Paragraph (d) of this section explains that a decision by the OCRB to deny a petition for untimeliness or lack of compliance with the requirements of § 242.503 could be appealed directly to the Administrator. Ordinarily, an appeal to the Administrator could occur only after a case has been heard by FRA's hearing officer.

One difference between this proposed section and § 240.403 is the time by which a petition seeking review of a railroad's decision would have to be filed. Part 240 contains different times depending on whether a person is seeking review of a revocation decision (120 days) or a denial decision (180 days). This proposed section, however, provides that a petition seeking review of a revocation or denial decision would have to be filed with FRA within 120 days of the date the decision was served on the petitioner. Another difference between this proposed section and § 240.403 is that, under this section, the OCRB's discretion to consider untimely filed petitions would now be extended to petitions seeking review of a railroad's decision to deny certification or recertification.

Section 242.505 Processing Certification Review Petitions

This proposed section, derived from 49 CFR 240.405, details how petitions for review would be handled by FRA. Upon receipt of the petition, FRA proposes to provide the person written acknowledgement of the filing and provide a copy of the filing to the railroad. The railroad would then have 60 days from its date of receipt to respond, if it desires to comment on the matter. If the railroad commented on the matter, any material would have to be submitted in writing and a copy served on the petitioner and petitioner's representative, if any.[18]

Based on the written record, FRA staff would analyze the railroad decision and make a recommendation to the OCRB. The OCRB would determine whether the denial or revocation of certification was improper under the regulation. As indicated in paragraph (a), it would be FRA's goal to issue OCRB decisions within 180 days from the date FRA has received all the information from the parties. FRA's ability to achieve that goal would depend on the number of petitions filed and agency resources available to handle those petitions in any given period. Further, that goal will depend on whether FRA receives all available evidence. If the petition and/or railroad's response do not contain all available evidence, including but not limited to, the complete hearing transcript with exhibits and color copies of all photographic evidence (if available), then it is FRA's intention that the OCRB will render a decision within 180 days from the date that all available evidence is received.

While the handling of petitions by FRA would be the same under § 240.405 and this proposed section, this section, unlike § 240.405, includes, in paragraphs (f)–(j), the proposed process and standards of review that the OCRB would utilize when considering a petition. Those standards are the same standards used by the LERB to review locomotive engineer petitions.[19] The standards were added to this proposed rule to address a concern of some members of the Working Group that railroads and petitioners would not know what standard of review the OCRB would use in considering petitions.

Like the LERB, the OCRB would only determine whether a railroad's decision was based on an incorrect determination. If a railroad conducted hearing was so unfair that it caused a petitioner substantial harm, the OCRB could grant the petition; however, the OCRB's review would not be intended to correct all procedural wrongs committed by the railroad. Also like the LERB, the decision-making power of the OCRB would be limited to approving the railroad decision, overturning the railroad decision, or returning the case to the railroad for additional fact finding. The OCRB would not be empowered to mitigate the consequences of a railroad decision, if that decision was valid under this proposed regulation. The OCRB would only be empowered to make determinations concerning qualifications under this regulation. The contractual consequences, if any, of those determinations would have to be resolved under dispute resolution mechanisms that do not directly involve FRA. For example, FRA could not order a railroad to alter its seniority rosters or make an award of back pay to accommodate a finding that a railroad wrongfully denied certification.

Interested parties should note that promulgation of this proposed rule, as currently written, would necessarily require the OCRB and LERB to determine whether a railroad revoked the correct certificate of a person who holds both an engineer and conductor certification. For example, in a case in which a railroad found that a person who holds both a conductor and engineer certification violated a railroad rule involving a failure to comply with the provisions of 49 CFR 218.99 (*i.e.,* a part 218, subpart F violation) but revoked that person's engineer certification, the OCRB, if petitioned, would have to find that the revocation decision was improper because, currently, an engineer cannot have his or her part 240 certification revoked for violations of part 218, subpart F.

Paragraph (l) of this section would require the OCRB's written decision to be served on the petitioner, including the petitioner's representative, if any, and the railroad. That paragraph has been modified from the paragraph considered by the Working Group and the full RSAC to require that the decision be served on the parties, not just provided to them. Moreover, the modified paragraph does not contain a requirement that every decision include findings of fact which may not be appropriate or relevant to some decisions.

Section 242.507 Request for a Hearing

This section, which parallels 49 CFR 240.407, provides that a party who has been adversely affected by an OCRB decision would have the opportunity to request an administrative proceeding as prescribed in proposed § 242.509. In addition, this section details the proposed requirements for requesting such a proceeding.

Paragraph (c) of this section provides that a party who fails to request an administrative hearing in a timely fashion would lose the right to further administrative review since the OCRB's decision would constitute final agency action.

As noted in paragraph (e) of this section, FRA would not schedule hearings or set an agenda for the proceeding. FRA would merely arrange for the appointment of a presiding officer and it would be the presiding officer's duty to schedule a hearing for the earliest practicable date.

[18] The proposed rule considered by the Working Group and full RSAC would have required the railroad to "provide" a copy of the information to the petitioner. To clarify the obligation of the railroad, FRA has changed the word "provide" to "serve" and added that petitioner's representative, if any, also be served.

[19] FRA has made some modifications to paragraphs (f)–(j) from the draft recommended by the Working Group and full RSAC. The modifications are necessary to clarify the authority of the OCRB and the standards of review the OCRB would utilize.

Section 242.509 Hearings

This section, which parallels 49 CFR 240.409, describes the proposed authority of the presiding officer to conduct an administrative hearing and the procedures by which the administrative hearing would be governed. Like § 240.409, the proceeding provided by this section would afford an aggrieved party a *de novo* hearing at which the relevant facts would be adduced and the correct application of this proposed part would be applied.

In instances when the issues are purely legal, or when only limited factual matters are necessary to determine issues, paragraph (c) of this section proposes that the presiding officer could determine the issues following an evidentiary hearing only on the disputed factual issues, if any. The presiding officer could therefore grant full or partial summary judgment.

Paragraph (d) of this section proposes that the presiding officer may authorize discovery. It also proposes to authorize the presiding officer to sanction willful noncompliance with permissible discovery requests. Paragraph (e) would require that documents in the nature of pleadings be signed. This signature would constitute a certification of factual and legal good faith. Paragraph (f) proposes a requirement for service and for certificates of service. The presiding officer's authority to address noncompliance with a law or directive is expressed in paragraph (g). This provision is intended to ensure that the presiding officer would have the authority to control the proceeding so that an efficient and fair hearing would result.

Paragraph (h) states the right of each party to appear and be represented. Paragraph (i) would protect witnesses by ensuring their right of representation and their right to have their representative question them. Paragraph (j) would allow any party to request consolidation or separation of hearings of two or more petitions when to do so would be appropriate under established jurisprudential standards. This option is intended to allow more efficient determination of petitions in cases where a joint hearing would be advantageous.

Under paragraph (k), the presiding officer could, with certain exceptions, extend periods for action required in the proceedings, provided substantial prejudice would not result to a party. The proposed authority to deny a request for extension submitted after the expiration of the period involved shows the preference for use of this authority as a tool to alleviate unforeseen or unnecessary burdens, and not as a remedy for inexcusable neglect.

Paragraph (l) would establish a motion as the appropriate method for requesting action by the presiding officer. That paragraph would also provide the form of motions and the response period for written motions.

Paragraph (m) would provide rules for the mode of hearing and record maintenance, including requirements for sworn testimony, verbatim record (including oral testimony and argument), and inclusion of evidence or substitutes therefor in the record. Paragraph (n) would direct the presiding officer to employ specific rules of evidence as guidelines for the introduction of evidence and permits the presiding officer to determine what evidence may be received. Further, paragraph (o) proposes additional powers the presiding officer may exercise during the proceedings.

Paragraph (p) would provide that the petitioner before the OCRB, the railroad that took the certification action at issue, and the FRA are mandatory parties to the administrative proceeding. Paragraph (q) would require the party requesting the hearing to carry the burden of proof. The actions of the conductor and the railroad would be at issue in the hearing—not the actions of the OCRB. Thus, it is appropriate that the conductor and the railroad fill the roles of petitioner and respondent for the hearing. In addition, the burden each party would have if they were the hearing petitioner is articulated in paragraph (q).

Paragraph (r) would provide that FRA would be a mandatory party in the proceeding. In all proceedings, FRA would initially be considered a respondent. If, based on evidence acquired after the filing of a petition for hearing, FRA were to conclude that the public interest in safety was more closely aligned with the position of the petitioner than the respondent, FRA could request that the hearing officer exercise his or her inherent authority to realign parties for good cause shown. However, FRA anticipates that such a situation would occur rarely, if ever. Since FRA could realign itself, FRA wants to caution future parties that FRA represents the interests of the government; hence, parties and their representatives would have to be careful to avoid ethical dilemmas that might arise due to FRA's ability to realign itself.

Paragraphs (s)–(u) would provide the providing officer with authority to close the record and issue a decision.

Section 242.511 Appeals

This section, derived from 49 CFR 240.411, proposes to permit any party aggrieved by the presiding officer's decision to file an appeal with the FRA Administrator. Paragraph (a) proposes that if no appeal is timely filed, the presiding officer's decision would constitute final agency action.

Paragraphs (b)–(f) would allow for a reply to the appeal and described the Administrator's authority to conduct the proceedings. Interested parties should note that the phrase "except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted" in paragraph (e) of this section is included in this proposed rule so that parties would understand that a remand, or other intermediate decision, would not constitute final agency action. The inclusion of this phrase is made in deference to those parties that are not represented by an attorney or who might otherwise be confused as to whether any action taken by the Administrator should be considered final agency action.

Appendices

FRA proposes to include at least four appendices to this rule. In the final rule, Appendix A will contain a penalty schedule similar to that FRA has issued for all of its existing rules. Because such penalty schedules are statements of policy, notice and comment are not required prior to their issuance. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless interested parties are welcome to submit their views on what penalties may be appropriate.

Proposed Appendix B provides both the organizational requirements and a narrative description of the submission required under §§ 242.101 and 242.103. FRA is not proposing to require that railroad submissions be made on a Federally mandated form. Instead, FRA is prescribing only minimal constraints on the organization and manner of presenting information. FRA would require that the submission be divided into six sections. FRA would require that each section deal with a different subject matter and that the railroad identify the appropriate person to be contacted in the event FRA needs to discuss some aspect of the railroad's program. While proposed Appendix B is derived from Appendix B to part 240, one major difference is that proposed Appendix B proposes to require that, pursuant to § 242.103, a railroad must serve a copy of its submission on the president of each labor organization that

represents the railroad's employees subject to part 242.

Interested parties should note that FRA is considering the possibility of requiring each railroad to provide its submission electronically. Such a requirement would likely allow FRA to review submissions more efficiently and eliminate the need to store hardcopies of the numerous submissions. FRA welcomes comments on this consideration.

Proposed Appendix C, derived from Appendix C to part 240, provides a narrative discussion of the procedures that a person seeking certification or recertification would have to follow to furnish a railroad with information concerning his or her motor vehicle driving record.

Proposed Appendix D, derived from Appendix F to part 240, provides a narrative discussion of the procedures that a railroad would be required to employ in administering the vision and hearing requirements of § 242.117. The main issue addressed in this proposed Appendix is the acceptable test methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry.

Subsequent to the July–December Working Group meetings, FRA was notified that an additional color vision test (Richmond—HRR (4th edition)) could be added to the list of acceptable tests contained in Appendix F to part 240 and that some of the listed tests are no longer in print. While updating the list would appear to fall within the purview of the medical standards working group, FRA would welcome comments on which vision color tests should be included both in Appendix F to part 240 and in Appendix C to this proposed rule.

Proposed Appendix E provides a table describing the application of revocable events. The table lists: The revocation periods; whether a person would be eligible for a reduction of the revocation period; and whether a person who is certified as both a conductor and an engineer could work in either position following a certification revocation.

V. Regulatory Impact and Notices

1. Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule has been evaluated in accordance with existing policies and procedures, and determined to be non-significant under both Executive Order 12866 and DOT policies and procedures. *See* 44 FR 11034 (February 26, 1979). FRA has prepared and placed in Docket No. FRA–2009–0035 a regulatory evaluation addressing the economic impact of this proposed rule. Document inspection and copying facilities are available at the DOT Central Docket Management Facility located in Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590. Docket material is also available for inspection electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at the Office of Chief Counsel, RCC–10, Mail Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; please refer to Docket No. FRA–2009–0035.

As part of the regulatory impact analysis, FRA has assessed quantitative measurements of the cost streams expected to result from the adoption of this proposed rule. For the twenty-year period analyzed, the estimated quantified cost that would be imposed on industry totals $83.5 million with a present value (PV, 7%) of $42.2 million. In addition, FRA would incur administrative costs totaling about $15.2 million, with a PV of $7.6 million. Although there are numerous costs or burdens in this proposed rule, the requirements that are expected to impose the largest burdens relate to the initial and periodic training, knowledge testing, and operational testing. In addition, the dispute resolution process associated with the denial and revocation of conductor certification would be a new requirement that would impose burdens on the railroad industry and FRA.

As part of the regulatory impact analysis, FRA has explained what the likely benefits for this proposed rule would be, and provided numerical assessments of the potential value of such benefits. The proposed rulemaking is expected to improve railroad safety by ensuring that all trains have certified and trained conductors. Thus, in general, the proposed rule should decrease train accidents and incidents and associated casualties and damages. FRA also anticipates that this proposed regulation will decrease switching operation casualties and human factor-caused train crew injuries. FRA believes the value of the anticipated safety benefits will meet or exceed the cost of implementing the proposed rule.

The table below presents the cost associated with implementation of the proposed rule.

Costs for Proposed Rule				
[Note dollars are discounted (7 %)]				
Subpart B: Program and Eligibility Requirements				
Development of Programs				$884,676
Prior Conduct of Employee				$2,571,461
Vision and Hearing Acuity				$495,929
Training				$13,849,944
Knowledge Testing				$3,755,303
Operational Tests				$3,911,774
Miscellaneous Subpart B costs				$370,025
Subpart C: Administration of the Certificate Program				
Certificates				$1,010,397
Sections 242.203 - 242.213				$2,135,625
Railroad Oversight Responsibilities				$699,711
Subpart D: Territorial Qualifications & Joint Operations				
Section 242.301				$8,345,170
Subpart E: Denial and Revocation of Certification				
Sections 242.401 & 242.407				$1,971,943
Subpart F: Dispute Resolution Procedures				
Petitions to FRA Review Board				$1,813,783
Requests for Administrative Hearings				$321,000
Appeals to FRA Administrator				$48,000
Total Non-Government Cost				**$42,184,739**
Government Costs: Subpart F				
Sections 242.501-511				$7,572,000

2. Regulatory Flexibility Act and Executive Order 13272; Initial Regulatory Flexibility Assessment

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and Executive Order 13272 require a review of proposed and final rules to assess their impacts on small entities. An agency must prepare an initial regulatory flexibility analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA is publishing this IRFA to aid the public in commenting on the potential small business impacts of the requirements in this NPRM. FRA invites all interested parties to submit data and information regarding the potential economic impact that would result from adoption of the proposals in this NPRM. FRA will consider all comments received in the public comment process when making a determination.

Based on information currently available, FRA estimates that about 8 percent of the total railroad cost associated with implementing the proposed rule would be borne by small entities. Based on very conservative assumptions, FRA estimates that the cost for this proposed regulation could be as high as $83.5 million for the railroad industry. In addition, also based on conservative assumptions, FRA would incur costs that could total as much as $15.2 million. FRA also estimates that small railroads comprise over 90 percent of the number of entities impacted directly by this proposed regulation. Small railroads generally have fewer conductors and operate over smaller territories allowing them to meet the proposed requirements at lower overall cost as well as lower cost per conductor. Thus, although a substantial number of small entities would likely be impacted, the economic impact on them would likely not be significant. This IRFA is not intended to be a stand-alone document. In order to get a better understanding of the total costs for the railroad industry, which forms the base for the estimates in this IRFA, or more cost detail on any specific requirement, please see the Regulatory Impact Analysis (RIA) that FRA has placed in the docket for this rulemaking.

In accordance with the Regulatory Flexibility Act, an IRFA must contain:

(1) A description of the reasons why action by the agency is being considered;

(2) A succinct statement of the objectives of, and the legal basis for, the proposed rule;

(3) A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule; and

(6) A description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. 5 U.S.C. 603(b), (c).

1. Reasons for Considering Agency Action

The purpose of this rulemaking is to enhance the safety of railroad operations by ensuring that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents, and to improve railroad safety.

2. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

FRA's proposed regulation for conductor certification is intended, *inter alia,* to ensure that only those persons who meet minimum Federal safety standards serve as train conductors, and it accomplishes this by establishing Federal requirements for railroads to have conductor certification programs. These programs must meet or exceed FRA's minimum standards for the eligibility, training, testing, certification, and monitoring of persons who serve as conductors. Included in the eligibility determination for new or recertifying conductors are vision and hearing acuity tests. In addition, a railroad must consider prior conduct as a motor vehicle operator; substance abuse, alcohol, and drug rules compliance; and prior safety conduct at a different railroad, if applicable. FRA's proposed regulation would also prescribe minimum standards for the revocation of certification and the dispute resolution procedures for appealing certification denial or revocation.

As discussed in Section IV of the Supplementary Information portion to the preamble, the proposed rule would require railroads to have a formal program for certifying conductors. FRA is proposing this regulation to ensure that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents, and to improve railroad safety. FRA is also issuing this proposed rule to promulgate minimum training and certification standards for train conductors as mandated by RSIA Section 402, Public Law 110–432 (October 16, 2008) (codified at 9 U.S.C. 20157).

3. A Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply

The "universe" of the entities to be considered generally includes only those small entities that are reasonably expected to be directly regulated by this action. For this proposed rulemaking there is one type of small entity that is potentially affected by this rulemaking: Small railroads.

FRA estimates that approximately 5 contractors will be developing conductor certification programs and contracting conductors to railroads. The cost associated with certifying conductors is a cost that these contractors will pass on to the railroads contracting their services.

"Small entity" is defined in 5 U.S.C. 601 as having the same meaning as "small business concern" under Section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) includes nonprofit enterprises that are independently owned and operated, and are not dominant in their field of operations within the definition of "small entities." Additionally, 5 U.S.C. 601(5) defines "small entities" as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

The U.S. Small Business Administration (SBA) stipulates "size standards" for small entities. It provides that the largest a for-profit railroad business firm may be (and still classify as a "small entity") is 1,500 employees for "line-haul operating" railroads, and 500 employees for "shortline operating" railroads.[20]

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to the authority provided to it by SBA, FRA has published a final policy, which formally establishes small entities as railroads that meet the line haulage revenue requirements of a Class III railroad.[21] Currently, the revenue requirements are $20 million or less in annual operating revenue, adjusted annually for inflation. The $20 million limit (adjusted annually for inflation) is based on the Surface Transportation Board's threshold of a Class III railroad carrier, which is adjusted by applying the railroad revenue deflator adjustment.[22] The same dollar limit on revenues is established to determine whether a railroad shipper or contractor is a small entity. Governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000 are also considered small entities under FRA's policy. FRA is proposing to use this definition for this rulemaking. Any comments received pertinent to its use will be addressed in the final rule.

Small Railroads:

There are approximately 682 railroads meeting the definition of "small entity" as described above. FRA estimates that approximately 627 of these small entities would be impacted by this proposed rule. FRA estimates that approximately 55 of the 682 small railroads would not be impacted because they would be exempt from the proposed rule. Note, however, that approximately 125 of the small railroads that would be impacted are subsidiaries of large shortline holding companies with the expertise and resources comparable to larger railroads. Many small railroads that would be impacted by this rulemaking are members of the American Shortline and Regional Railroad Association (ASLRRA), which actively participated in the development of this regulatory proposal. It is very likely that the ASLRRA will develop a generic conductor certification program for their members to use. FRA would assist with this effort.

Small railroads would be required to have written programs for certifying conductors in accordance with the proposed regulation. Given the nature of how most small railroads operate and the fact that they operate fewer types and numbers of trains than larger railroads this proposed regulation should be less burdensome. Thus, given the more limited territory, equipment types, number of conductors and/or the commodities transported by small railroads relative to Class II and Class I railroads, implementing and maintaining a program for the certification of conductors would be significantly less burdensome for small railroads both overall and on a per conductor basis. While FRA does

[20] "Table of Size Standards," U.S. Small Business Administration, January 31, 1996, Title 13 CFR Part 121. *See also* NAICS Codes 482111 and 482112.

[21] *See* 68 FR 24891 (May 9, 2003).

[22] For further information on the calculation of the specific dollar limit, *please see* 49 CFR part 1201.

recognize that some small railroads do not currently have formal conductor training and certification programs, FRA believes that most small railroads currently have informal programs with the necessary elements of a formal program. FRA requests information regarding the number and type of Class III railroads that do not have formal conductor training and certification programs as well as the number of conductors employed by such railroads.

In general, the proposed rule would likely burden all small railroads that are not exempt from its scope or application. However, it would not significantly burden many, if any, of these entities. More details on the cost burdens for small railroads are provided below. FRA invites commenters to submit information that might assist us in assessing the cost impacts on small railroads of the proposals during the comment process of the NPRM.

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The impact of this rulemaking would come from its numerous proposed requirements. However, many of the estimated burdens are for small paperwork burdens or for processes and procedures that would not impact small railroads and their conductors as frequently or significantly as Class I and II railroads and the conductors they employ. As discussed above, in general the burdens on small railroads should be lower per train mile than those on Class I and II railroads both for overall programs and per conductor.

Small railroads employ less than 10 percent of the employees in the railroad industry. In fact the percentage of employees is probably closer to 7 or 8 percent. Thus, since most of the requirements in this proposed regulation are assessed per conductor, the burden for each railroad would be driven mainly by the number of conductors it employs. In general, small railroads have fewer conductors and would not train or certify as many conductors as the large railroads. Small railroads would also not need to certify any conductors for remote control locomotives (RCL) purposes, since they do not use RCLs. In addition, the size of the territory and level of joint operations is likely to be less for smaller railroads making the burden per conductor lower.

This proposed regulation has many requirements which are organized by subparts. There are numerous burdens from this proposed regulation that are noted in the RIA for railroads. This IRFA will discuss a majority of these burdens and their pertinence to small railroads below.

FRA's RIA estimates the total burden for this proposed rule to be $83.5 million (non-discounted) for the first 20 years of the rule. As detailed in the assessments below, FRA estimates that $6.7 million of this burden would be borne by small railroads.

(a) *Subpart A—General:*

The requirements in Subpart A do not impose any direct burdens on small railroads.

(b) *Subpart B—Program and Eligibility Requirements:*

This subpart of the proposed rule contains the basic elements of the proposed conductor certification program that would impose the majority of the new burden for creating and implementing such programs. The ASLRRA has indicated that it plans to develop a generic program and template to facilitate compliance with this federal regulation and FRA would gladly collaborate in this effort. FRA anticipates that almost all of the small railroads in need of a program will take the shortline generic plan and tailor it for their operations. As more fully discussed in the RIA, FRA estimates that these programs can be developed at an average cost of $700 per small railroad.[23] FRA estimates, that in total, small railroads will be burdened with approximately $473,000 to develop conductor certification programs. FRA estimates that it would cost the entire railroad industry about $918,000 to develop programs.

The proposed requirements for a training program and periodic training for recertification, *i.e.,* Section 242.119, are among the most significant costs for the entire railroad industry imposed by this proposal. Railroads generally already have formal or informal training programs and many offer some degree of periodic training. FRA estimates that further developing the training programs and providing the periodic training would cost the railroad industry approximately $28 million (not discounted) over the 20-year analysis in FRA's RIA. Based on experience and discussions at RSAC working group meetings, FRA knows that most small railroads are currently providing training to their conductors and that most of that training is on-the-job training. FRA estimates that more formalized training will have to be added to the training programs for small railroads. FRA estimates that the small railroads will incur almost $2.5 million of this cost, making the per railroad average approximately $4,000.

Proposed Section 242.121 requires railroads provide initial and periodic testing of conductors. That testing would have to effectively examine and measure a conductor's knowledge of five subject areas: Safety and operating rules; timetable instructions; compliance with all applicable Federal regulations; the physical characteristics of the territory on which a person will be or is currently serving as a conductor; and the use of any job aid that a railroad may provide a conductor. FRA's RIA has estimated that this would cost the industry $7.4 million (not discounted) over the 20-year analysis for the entire industry. Since small railroads represent approximately 7 to 8 percent of the employees in the railroad industry, FRA estimates that small railroads will incur approximately $554,000 of this cost.

Proposed Section 242.123 requires railroads to conduct unannounced compliance tests and inspections. The proposed rule would require each railroad to have a program to monitor the conduct of its conductors by performing unannounced operating rules compliance tests. FRA's RIA has estimated that this would cost the industry $7.7 million (not discounted) over the 20-year analysis. Since small railroads represent approximately 7 to 8 percent of the employees in the railroad industry, FRA estimates that small railroads will incur approximately $577,000 of this cost.

Other proposed requirements in this subpart that would impact small railroads include: Prior safety conduct as a motor vehicle operator, Section 242.111; substance abuse disorders and alcohol drug rules compliance, Section 242.115; vision and hearing acuity testing, Section 242.117; and certification determinations made by other railroads, Section 242.125.

The total (non-discounted) cost for this subpart is $50.6 million. FRA estimates the estimated cost for small railroads is about $4.6 million (not discounted) over the first twenty-years.

(c) *Subpart C—Administration of the Certificate Program:*

This subpart of the proposed rule covers the requirements for administering a certification program. Most of the requirements in this subpart are basic requirements necessary for having the certificate program, except the proposed requirements in Section 242.215. That section proposes to

[23] Calculation: (1 small RR) * [(1 exec hours) * ($125) + (2 admin hours) * ($21) + (12 RR staff hours) * ($42.05) + (0.5 Senior RR staff hours) * ($75)] = $709.

require only Class I, Class II and all passenger railroads to conduct an annual review and analysis of their programs. Thus, small railroads will incur no burden from that proposed requirement.

The total (non-discounted) cost for this Subpart C is $7.4 million. However, FRA estimates that less 6 percent of this will be borne by small railroads given that they would not be subject to the annual review and analysis requirements. Thus, the estimated cost for small railroads is about $448,000 (non-discounted) over the first twenty-years.

(d) *Subpart D—Territorial Qualification and Joint Operations:*

This subpart of the proposed rule covers the requirements for territorial qualification and joint operations. FRA estimates that approximately 320 railroads operate over joint territory. FRA further estimates that approximately 2 percent of all of the conductors industry-wide will be qualified for joint territory. However, the primary burden from this subpart is related to the qualification of new conductors. In general, small railroads do not have as high a turnover rate for employees and therefore should not have as many new conductors each year. The total (non-discounted) cost for this subpart is $17.1 million. Since small railroads represent approximately 7 to 8 percent of the employees in the railroad industry, FRA estimates that the cost for small railroads is about $1,281,000 over the first twenty-years.

(e) *Subpart E—Denial and Revocation of Certification:*

This subpart of the proposed rule covers the denial and revocation of conductor certifications. The estimated burdens in this subpart are related to the paperwork involved in the denial of certification, which often occurs when hearing, vision or knowledge tests are failed. The majority of the burdens for this subpart are associated with the process for revocation (Section 242.407). The total (non-discounted) cost for this subpart is $4.1 million. Since small railroads represent approximately 7 to 8 percent of the employees in the railroad industry, FRA estimates the cost for small railroads is about $303,000 (not discounted) over the first twenty-years.

(f) *Subpart F—Dispute Resolution Procedures:*

This subpart of the proposed rule primarily deals with the dispute resolution procedures, and the procedures for a person to appeal a decision by a railroad to deny certification or recertification or to revoke a conductor's certification. The estimated burdens in this subpart are related to appeals to FRA's Review Board, requests for administrative hearings, and appeals to FRA's Administrator. Based on past experience with locomotive engineer appeals, administrative hearings, *etc.,* FRA does not anticipate many of the cases related to this subpart to be from employees of small railroads. The total (non-discounted) cost for this subpart is $19.4 million. However, most of the costs for the requirements in this section are for government resources. FRA estimates that the non-government share of this Subpart's cost is $4.4 million. FRA estimates that less than 2 percent of the non-government cost will be borne by small railroads. Thus, the estimated cost for small railroads is about $88,000 (non-discounted) over the first twenty-years.

5. An Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

FRA is not aware of any relevant federal rules that may duplicate, overlap, or conflict with the proposed rule. Some of the requirements proposed in this NPRM are identical or very similar to the requirements in 49 CFR Part 240 for the certification of locomotive engineers, however actions taken to comply with requirements in Part 240 that are identical or very similar to those in Part 242 could be used to fulfill the requirements in Part 242, or vice versa, without incurring any additional burden.

6. A Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

FRA formed an RSAC working group to develop recommendations for conductor certification regulations in December 2008. The RSAC Working Group met for six, multi-day meetings over a period of several months. After a series of detailed discussions, the RSAC Working Group achieved consensus on a draft proposed rule in January 2010. The full RSAC approved and recommended its consensus on March 18, 2010.

In Section 242.3 of the proposed regulation there is an exclusion for operations that occur on track that is not part of the general railroad system, which generally encompasses operations commonly described as tourist, scenic or excursion service to the extent that they occur on track that is not part of the general railroad system. FRA estimates that this would exclude approximately 55 small and very small railroads from the requirements of this proposed regulation.

FRA's proposal would minimize the impact to small railroads by delaying the implementation of the recertification process for the Class III railroads by 12 months. Thus, small railroads will have more time to implement most of the requirements of this proposed regulation than Class I and Class II freight railroads and passenger railroads.

FRA is not aware of any significant alternatives to the proposed rule that would accomplish the stated objectives of RSIA that would minimize the economic impact of the proposed rule on small entities.

The process by which this proposed rule was developed provided outreach to small entities. As noted above in this IRFA, this rule was developed in consultation with industry representatives via RSAC, which includes small railroad representatives. The RSAC Conductor Certification Working Group came to consensus on a majority of this proposed regulation in January 2010 and the Full RSAC approved the draft proposed rule in March 2010. Small railroad representatives participated in all meetings of the Working Group and raised issues of concern to small railroads. If requested, FRA may hold a public hearing. After the comment period for this NPRM closes, FRA expects to reconvene the Working Group to review the comments to the docket. At that meeting FRA expects that comments will be reviewed and considered by the Working Group, including any raised concerning impacts on small entities and this IRFA.

3. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements are duly designated, and the estimated time to fulfill each requirement is as follows:

CFR Section/Subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
242.9—Waivers—Petitions	677 railroads	10 petitions	3 hours	30
242.101/103—Certification Program: Written Program for Certifying Conductors.	677 railroads	678 programs	160 hrs./581 hrs./ 15.5 hrs.	16,799
Approval of Design of Programs				
—Certification Programs for New RRs	6 railroads	6 new prog	15.5 hours	93
—Conductor Certification Submission Copies to Rail Labor Organizations.	677 railroads	200 copies	15 minutes	50
—Affirmative Statements that Copies of Submissions Sent to RLOs.	677 railroads	200 statements	15 minutes	50
—Certified Comments on Submissions	677 railroads	35 comments	4 hours	140
—Certification Programs Disapproved by FRA and then Revised.	677 railroads	10 programs	4 hours	40
—Revised Certification Programs Still Not Conforming and then Resubmitted.	677 railroads	3 programs	2 hours	6
—Certification Programs Materially Modified After Initial FRA Approval.	677 railroads	50 programs	2 hours	100
—Materially Modified Programs Disapproved by FRA & Then Revised.	677 railroads	3 programs	2 hours	6
—Revised programs Disapproved and Then Resubmitted.	677 railroads	1 program	2 hours	2
242.105—Implementation Schedule				
—Designation of Certified Conductors (Class I Railroads).	677 railroads	48,600 designations	5 minutes	4,050
—Issued Certificates (⅓ each year)	677 railroads	16,200 certif	1 hour	16,200
—Designation of Certified Conductors (Class II and III Railroads).	677 railroads	5,400 design	5 minutes	450
—Issued Certificates (⅓ each year)	677 railroads	1,800 certif	1 hour	1,800
—Requests for Delayed Certification	677 railroads	5,000 request	30 minutes	2,500
—Testing/Evaluation to Certify Persons	677 railroads	1,000 tests	560 hours	560,000
—Testing/Evaluation to Certify Conductors (Class III).	627 railroads	100 tests	400 hours	40,000
242.107—Types of Service				
—Reclassification to Diff. Type of Cert.	677 railroads	25 conductor Tests/Evaluations.	8 hours	200
242.109—Opportunity by RRs for Certification Candidates to Review and Comment on Prior Safety Record.	677 Railroads	50 comments	1 hour	50
242.111—Prior Safety Conduct As Motor Vehicle Operator				
—Eligibility Determinations	677 Railroads	1,100 dtrmin	10 minutes	183
—Initial Certification for 60 Days	677 Railroads	75 certific	10 minutes	13
—Recertification for 60 Days	677 Railroads	125 recertif	10 minutes	21
—Driver Info. Not Provided and Request for Waiver by Persons/RR.	677 Railroads	25 requests	2 hours	50
—Request to Obtain Driver's License Information From Licensing Agency.	54,000 Conductors/Persons	18,000 req	15 minutes	4,500
—Requests for Additional Information From Licensing Agency.	54,000 Conductors/Persons	25 requests	10 minutes	4
—Notification to RR by Persons of Never Having a License.	54,000 Conductors/Persons	2 notification	10 minutes	.33
—Report of Motor Vehicle Incidents	54,000 Conductors	200 reports	10 minutes	33
—Evaluation of Driving Record	54,000 Conductors	18,000 eval	10 minutes	3,000
—SAP Referral by RR After Report of Driving Drug/Alcohol Incident.	677 Railroads	180 referrals	5 minutes	15
—SAP Request and Supply by Persons of Prior Counseling or Treatment.	677 Railroads	5 requests/Records	30 minutes	3
—Conditional Certifications Recommended by SAP.	677 Railroads	50 certificat	4 hours	200
242.113—Prior Safety Conduct As Employee of a Different Railroad.	54,000 conductors	360 requests/360 records	15 minutes + 30 minutes.	270
242.115—Substance Abuse Disorders and Alcohol Drug Rules Compliance				
—Meeting Section's Eligibility Reqmnt	54,000 conductors	18,000 determinations	2 minutes	600
—Written Documents from SAP Person Not Affected by a Disorder.	677 railroads	400 docs	30 minutes	200
—Self-Referral by Conductors for Substance Abuse Counseling.	54,000 conductors	10 self-referrals	10 minutes	2
—Certification Reviews for Occurrence/ Documentation of Prior Alcohol/Drug Conduct by Persons/Conductors.	677 railroads	18,000 reviews	10 minutes	3,000

CFR Section/Subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Written Determination That Most Recent Incident Has Occurred.	677 railroads	150 determin	60 minutes	150
—Notification to Person That Recertification Has Been Denied.	677 railroads	150 notific	10 minutes	25
—Persons/Conductors Waiving Investigation.	54,000 conductors	100 waivers	10 minutes	17
242.117— Vision and Hearing Acuity				
—Determination Vision Standards Met	677 railroads	18,000 deter	20 minutes	6,000
—Determination Hearing Stds. Met	677 railroads	18,000 deter	20 minutes	6,000
—Medical Examiner Certificate That Person Has Been Examined/Passed test.	677 railroads	18,000 certif	2 hours	36,000
—Document Standards Met with Conditions.	677 railroads	50 document	30 minutes	25
—Document Standards Not Met	677 railroads	25 document	30 minutes	13
—Notation Person Needs Corrective Device (Glasses/Hearing Aid).	677 railroads	10,000 notes	10 minutes	1,667
—Request for Further Medical Evaluation for New Determination.	677 railroads	100 requests + 100 Evals	60 minutes + 2 hours.	300
—Request for Second Retest and Another Medical Evaluation.	677 railroads	25 requests + 25 Evals	60 minutes + 2 hours.	75
—Copies of Part 242 Provided to RR Medical Examiners.	677 railroads	677 copies	60 minutes	677
—Consultations by Medical Examiners with Railroad Officer and Issue of Conditional Certification.	677 railroads	100 consults + 100 certif	2 hours + 10 minutes.	217
—Notification by Certified Conductor of Deterioration of Vision/Hearing.	677 railroads	10 notific	10 minutes	2
242.119—Training				
—Completion of Training Program	677 railroads	678 Programs	37 hours/70 hrs/3 hrs.	3,801
—Completion of Training Program by Conductors/Persons + Documents.	54,000 Conductors	18,000 Docs/18,000 Cond	1 hour/560 hours	10,098,000
—Training Task Analysis for RRs Training Persons Previously Untrained.	677 railroads	677 analyses	12 hours/20 hrs./20 min.	829
—Modification of Training Program Due to New Laws/Regulations.	677 railroads	30 programs	4 hours	120
—Consultation with Supervisory Employee During Written Test.	677 railroads	1,000 consult	15 minutes	250
—Familiarization Training Upon Transfer of RR Ownership.	677 railroads	10 trained Conductors	8 hours	80
—Instructional Briefings on Federal RR Safety Laws/Regulations.	677 railroads	54,000 briefs	8 hours	432,000
—Records of Instructional Briefings	677 railroads	54,000 record	10 minutes	9,000
—Continuing Education of Conductors	677 railroads	18,000 cont. trained cond	8 hours	144,000
242.121—Knowledge Testing				
—Determining Eligibility	677 railroads	18,000 deter	30 minutes	9,000
—Retests/Re-Examinations	677 railroads	500 Retests	8 hours	4,000
242.123—Monitoring Operational Performance				
—Unannounced Compliance Tests and Records.	677 railroads	18,000 tests + 18,000 recd	2 hours + 10 minutes.	39,000
—Return to Service That Requires Unannounced Compliance Test/Record.	677 railroads	1,000 tests + 1,000 records	2 hours + 10 minutes.	2,167
242.125/127—Certificate Determination by Other Railroads/Other Country				
—Determination Made by RR Relying on Another RR's Certification.	677 railroads	100 determin	8.5 hours	850
—Determination by Another Country	677 railroads	200 determin	1 hour	200
242.203—Retaining Information Supporting Determination—Records.	677 railroads	18,000 recds	5 minutes	1,500
—Amended Electronic Records	677 railroads	20 records	60 minutes	20
242.205—List of Certified Conductors Working in Joint Territory.	677 railroads	625 lists	60 minutes	625
242.209— Maintenance of Certificates				
—Request to Display Certificate	677 railroads	2,000 request/displays	2 minutes	67
—Notification That Request to Serve Exceeds Certification.	677 railroads	1,000 notif	10 minutes	167
242.211—Replacement of Certificates	677 railroads	500 certific	5 minutes	42
242.213—Multiple Certificates				
—Notification to Engineer That No Conductor Is On Train.	677 railroads	5 notification	10 minutes	1

CFR Section/Subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Notification of Denial of Certification by Individuals Holding Multiple Certifications.	677 railroads	10 notific	10 minutes	2
242.215—RR Oversight Responsibility				
—RR Review and Analysis of Administration of Certification Program.	677 railroads	44 reviews/Analyses	40 hours/1 hour	1,760
—Report of Findings by RR to FRA	677 railroads	36 reports	4 hours	144
242.301—Determinations—Territorial Qualification and Joint Operations.	320 railroads	1,080 Deter	15 minutes	270
—Notification by Persons Who Do Not Meet Territorial Qualification.	320 railroads	500 Notific	10 minutes	83
242.401—Notification to Candidate of Information That Forms Basis for Denying Certification and Candidate Response.	677 railroads	40 notific. + 30 responses	60 minutes/60 minutes.	70
—Written Notification of Denial of Certification.	677 railroads	40 notific.	60 minutes	40
242.403/405—Criteria for Revoking Certification; Periods of Ineligibility				
—Review of Compliance Conduct	677 railroads	950 reviews	10 minutes	158
—Written Determination That the Most Recent Incident Has Occurred.	677 railroads	950 determin	60 minutes	950
242.407—Process for Revoking Certification				
—Revocation for Violations of Section 242.115(e).	677 railroads	950 Revoked Certificates	8 hours	7,600
—Immediate Suspension of Certificate	677 railroads	950 suspend Certificate	1 hour	950
—Determinations Based on RR Hearing Record.	677 railroads	950 determin	1 hour	950
—Hearing Record	677 railroads	950 records	30 minutes	475
—Written Decisions by RR Official	677 railroads	950 decisions	1 hour	950
—Written Waiver of Right to Hearing	54,000 Conductors	425 waivers	10 minutes	71
—Revocation of Certification Based on Information That Another Railroad Has Done So.	677 railroads	15 revoked Certifications	10 minutes	3
—Placing Relevant Information in Record Prior to Suspending Certification/Convening Hearing.	677 railroads	100 updated records	1 hour	100

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: Whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202–493–6292, or Ms. Nakia Jackson at 202–493–6073.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Nakia Jackson, Federal Railroad Administration, 1200 New Jersey Avenue, SE., 3rd Floor, Washington, DC 20590. Comments may also be submitted via e-mail to Mr. Brogan or Ms. Jackson at the following address: *robert.brogan@dot.gov; nakia.jackson@dot.gov.*

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

4. Federalism Implications

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects 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." Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds

necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. This proposed rule would not have a substantial effect on the States or their political subdivisions; it would not impose any compliance costs; and it would not affect the relationships between the Federal government and the States or their political subdivisions, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

However, this proposed rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the "essentially local safety or security hazard" exception to section 20106.

In sum, FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

5. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards.

This proposed rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

6. Environmental Impact

FRA has evaluated this rule in accordance with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this proposed rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. *See* 64 FR 28547 (May 26, 1999).

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this proposed rule is not a major Federal action significantly affecting the quality of the human environment.

7. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $140,800,000 or more in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and tribal governments and the private sector. The proposed rule will not result in the expenditure, in the aggregate, of $140,800,000 or more in any one year, and thus preparation of such a statement is not required.

8. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28355 (May 22, 2001). Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this NPRM in accordance with Executive Order 13211. FRA has determined that this NPRM is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this NPRM is not a "significant energy action" within the meaning of Executive Order 13211.

9. Privacy Act

FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any agency docket 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 complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://www.regulations.gov/search/footer/privacyanduse.jsp.*

List of Subjects in 49 CFR Part 242

Administrative practice and procedure, Conductor, Penalties, Railroad employees, Railroad operating procedures, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

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

1. Add a new part 242 to read as follows:

PART 242—QUALIFICATION AND CERTIFICATION OF CONDUCTORS

Subpart A—General

Sec.
242.1 Purpose and scope.
242.3 Application and responsibility for compliance.
242.5 Effect and construction.
242.7 Definitions.
242.9 Waivers.
242.11 Penalties and consequences for noncompliance.
242.13 Information collection requirements.

Subpart B—Program and Eligibility Requirements

242.101 Certification program required.
242.103 Approval of design of individual railroad programs by FRA.
242.105 Schedule for implementation.
242.107 Types of service.
242.109 Determinations required for certification and recertification.
242.111 Prior safety conduct as motor vehicle operator.
242.113 Prior safety conduct as an employee of a different railroad.
242.115 Substance abuse disorders and alcohol drug rules compliance.
242.117 Vision and hearing acuity.
242.119 Training.
242.121 Knowledge testing.
242.123 Monitoring operational performance.
242.125 Certification determinations made by other railroads.
242.127 Reliance on qualification requirements of other countries.

Subpart C—Administration of the Certification Program

242.201 Time limitations for certification.
242.203 Retaining information supporting determinations.
242.205 Identification of certified persons and record keeping.
242.207 Certificate components.
242.209 Maintenance of the certificate.
242.211 Replacement of certificates.
242.213 Multiple certifications.
242.215 Railroad oversight responsibilities.

Subpart D—Territorial Qualification and Joint Operations

242.301 Requirements for territorial qualification.

Subpart E—Denial and Revocation of Certification

242.401 Denial of certification.
242.403 Criteria for revoking certification.
242.405 Periods of ineligibility.
242.407 Process for revoking certification.

Subpart F—Dispute Resolution Procedures

242.501 Review board established.
242.503 Petition requirements.
242.505 Processing certification review petitions.
242.507 Request for a hearing.
242.509 Hearings.
242.511 Appeals.
APPENDIX A TO PART 242—SCHEDULE OF CIVIL PENALTIES
APPENDIX B TO PART 242—PROCEDURES FOR SUBMISSION AND APPROVAL OF CONDUCTOR CERTIFICATION PROGRAMS
APPENDIX C TO PART 242—PROCEDURES FOR OBTAINING AND EVALUATING MOTOR VEHICLE DRIVING RECORD DATA
APPENDIX D TO PART 242—MEDICAL STANDARDS GUIDELINES
APPENDIX E TO PART 242—APPLICATION OF REVOCABLE EVENTS

Authority: 49 U.S.C. 20103, 20107, 20135, 20138, 20162, 20163, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

Subpart A—General

§ 242.1 Purpose and scope.

(a) The purpose of this part is to ensure that only those persons who meet minimum Federal safety standards serve as conductors, to reduce the rate and number of accidents and incidents and to improve railroad safety.

(b) This part prescribes minimum Federal safety standards for the eligibility, training, testing, certification and monitoring of all conductors to whom it applies. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements consistent with this part.

(c) The conductor certification requirements prescribed in this part apply to any person who meets the definition of conductor contained in § 242.7, regardless of the fact that the person may have a job classification title other than that of conductor.

§ 242.3 Application and responsibility for compliance.

(a) This part applies to all railroads, except:

(1) A railroad that operates only on track inside an installation that is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(b) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, including a contractor for a railroad, who performs any function covered by this part, must perform that function in accordance with this part.

§ 242.5 Effect and construction.

(a) FRA does not intend, by use of the term conductor in this part, to alter the terms, conditions, or interpretation of existing collective bargaining agreements that employ other job classification titles when identifying a person who is the crew member in charge of a movement that requires a locomotive engineer.

(b) FRA does not intend by issuance of these regulations to alter the authority of a railroad to initiate disciplinary sanctions against its employees, including managers and supervisors, in the normal and customary manner, including those contained in its collective bargaining agreements.

(c) Except as provided in § 242.213, nothing in this part shall be construed to create or prohibit an eligibility or entitlement to employment in other service for the railroad as a result of denial, suspension, or revocation of certification under this part.

(d) Nothing in this part shall be deemed to abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to removal from service or other adverse action taken as a consequence of this part.

§ 242.7 Definitions.

As used in this part—

Administrator means the Administrator of the FRA or the Administrator's delegate.

Alcohol means ethyl alcohol (ethanol) and includes use or possession of any beverage, mixture, or preparation containing ethyl alcohol.

Conductor means the crewmember in charge of a "train or yard crew" as defined in part 218 of this chapter. *See also* the definition of "passenger conductor" in this section.

Controlled substance has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR parts 1301–1316).

Drug means any substance (other than alcohol) that has known mind or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

Dual purpose vehicle means a piece of on-track equipment that is capable of moving railroad rolling stock and may also function as roadway maintenance equipment.

File, filed and *filing* mean submission of a document under this part on the date when the Docket Clerk receives it, or if sent by mail, the date mailing was completed.

FRA means the Federal Railroad Administration.

FRA representative means the FRA Associate Administrator for Railroad

Safety/Chief Safety Officer and the Associate Administrator's delegate, including any safety inspector employed by the Federal Railroad Administration and any qualified state railroad safety inspector acting under part 212 of this chapter.

Ineligible or *ineligibility* means that a person is legally disqualified from serving as a certified conductor. The term covers a number of circumstances in which a person may not serve as a certified conductor. Revocation of certification pursuant to § 242.407 and denial of certification pursuant to § 242.401 are two examples in which a person would be ineligible to serve as a conductor. A period of ineligibility may end when a condition or conditions are met. For example, when a person meets the conditions to serve as a conductor following a alcohol or drug violation pursuant to § 242.115.

Job aid means information regarding *other than main track physical characteristics* that supplements the operating instructions of the territory over which the locomotive or train movement will occur. *See* definitions of "main track" and "physical characteristics" in this section. A *job aid* may consist of training on the territory pursuant to § 242.119, maps, charts or visual aids of the territory, or a person or persons to contact who are qualified on the territory and who can describe the physical characteristics of the territory. At a minimum, a *job aid* must cover characteristics of a territory including: Permanent close clearances, location of permanent derails and switches, assigned radio frequencies in use and special instructions required for movement, if any, and railroad-identified unique operating conditions.

Joint operations means rail operations conducted by more than one railroad on the same track regardless of whether such operations are the result of—

(1) Contractual arrangement between the railroads,

(2) Order of a governmental agency or a court of law, or

(3) Any other legally binding directive.

Knowingly means having actual knowledge of the facts giving rise to the violation or that a reasonable person acting in the circumstances, exercising due care, would have had such knowledge.

Locomotive means a piece of on-track equipment (other than specialized roadway maintenance equipment or a dual purpose vehicle operating in accordance with § 240.104(a)(2) of this chapter):

(1) With one or more propelling motors designed for moving other equipment;

(2) With one or more propelling motors designed to carry freight or passenger traffic or both; or

(3) Without propelling motors but with one or more control stands.

Locomotive engineer means any person who moves a locomotive or group of locomotives regardless of whether they are coupled to other rolling equipment except:

(1) A person who moves a locomotive or group of locomotives within the confines of a locomotive repair or servicing area as provided for in §§ 218.5 and 218.29(a)(1) of this chapter; or

(2) A person who moves a locomotive or group of locomotives for distances of less than 100 feet and this incidental movement of a locomotive or locomotives is for inspection or maintenance purposes.

Locomotive engineer certificate means a certificate issued pursuant to part 240 of this chapter.

Main track means a track upon which the operation of trains is governed by one or more of the following methods of operation: Timetable; mandatory directive; signal indication; positive train control as defined in part 236 of this chapter; or any form of absolute or manual block system.

Medical examiner means a person licensed as a doctor of medicine or doctor of osteopathy. A medical examiner can be a qualified full-time salaried employee of a railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified practitioner designated by the railroad to perform functions in connection with medical evaluations of employees. As used in this rule, the medical examiner owes a duty to make an honest and fully informed evaluation of the condition of an employee.

On-the-job training means job training that occurs in the work place (*i.e.,* the employee learns the job while doing the job). In the context of this part, the *on-the-job training* portion of the training program must be based on a model generally accepted by the educational community, and must consist of the following three key components:

(1) A brief statement describing the tasks and related steps the employee must be able to perform;

(2) A statement of the conditions (*i.e.,* tools, equipment, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and

(3) A statement of the standards by which proficiency can be measured through a combination of task/step accuracy, completeness, and repetition.

Passenger conductor means a conductor who has also received emergency preparedness training under part 239 of this chapter. *See also* the definition of "conductor" in this section.

Person means an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

Physical characteristics means the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train. *Physical characteristics* includes both *main track physical characteristics* (see definition of "main track" in this section) and other than main track physical characteristics.

Qualified means a person who has successfully completed all instruction, training and examination programs required by the employer, and the applicable parts of this chapter and that the person therefore may reasonably be expected to be proficient on all safety related tasks the person is assigned to perform.

Qualified instructor means a person who has demonstrated, pursuant to the railroad's written program, an adequate knowledge of the subjects under instruction and, where applicable, has the necessary operating experience to effectively instruct in the field, and has the following qualifications:

(1) Is a certified conductor under this part; and

(2) Has been selected as such by a designated railroad officer, in concurrence with the designated employee representative, where present; or

(3) In absence of concurrence provided in paragraph (2) of this definition, has a minimum of 12 months service working as a train service employee. If a railroad does not have designated employee representation, then a person employed by the railroad need not comply with paragraphs (2) or (3) of this definition to be a *qualified instructor.*

Railroad means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways and any entity providing such transportation, including:

(1) Commuter or other short-haul railroad passenger service in a

metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Railroad officer means any supervisory employee of a railroad.

Railroad rolling stock is on-track equipment that is either a freight car (as defined in § 215.5 of this chapter) or a passenger car (as defined in § 238.5 of this chapter).

Remote control operator (RCO) means a certified locomotive engineer, as defined in § 240.7 of this chapter, certified by a railroad to operate remote control locomotives pursuant to § 240.107 of this chapter.

Roadway maintenance equipment is on-track equipment powered by any means of energy other than hand power which is used in conjunction with maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems.

Serve or *service,* in the context of serving documents, has the meaning given in Rule 5 of the Federal Rules of Civil Procedure as amended. Similarly, the computation of time provisions in Rule 6 of the Federal Rules of Civil Procedure as amended are also applicable in this part. *See also* the definition of "filing" in this section.

Specialized roadway maintenance equipment is roadway maintenance equipment that does not have the capability to move railroad rolling stock. Any alteration of such equipment that enables it to move railroad rolling stock will require that the equipment be treated as a dual purpose vehicle.

Substance abuse disorder refers to a psychological or physical dependence on alcohol or a drug, or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is "active" within the meaning of this part if the person is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or has failed to successfully complete primary treatment or successfully participate in aftercare as directed by a SAP.

Substance Abuse Professional (SAP) means a person who meets the qualifications of a substance abuse professional, as provided in part 40 of this title. As used in this rule, the SAP owes a duty to the railroad to make an honest and fully informed evaluation of the condition and progress of an employee.

Territorial qualifications means possessing the necessary knowledge concerning a railroad's operating rules and timetable special instructions including familiarity with applicable *main track and other than main track physical characteristics* of the territory over which the locomotive or train movement will occur.

§ 242.9 Waivers.

(a) A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for a waiver under this section must be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions the Administrator deems necessary.

§ 242.11 Penalties and consequences for noncompliance.

(a) A person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $650 and not more than $25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $100,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. *See* Appendix A to this part for a statement of agency civil penalty policy.

(b) A person who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from all safety-sensitive service in accordance with part 209 of this chapter.

(c) A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

(d) In addition to the enforcement methods referred to in paragraphs (a), (b), and (c) of this section, FRA may also address violations of this part by use of the emergency order, compliance order, and/or injunctive provisions of the Federal rail safety laws.

§ 242.13 Information collection requirements.

(a) The information collection requirements of this Part were reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and are assigned OMB control number _____.

(b) The information collection requirements are found in the following sections: (TO BE INSERTED IN FINAL RULE).

Subpart B—Program and Eligibility Requirements

§ 242.101 Certification program required.

(a) After the pertinent date specified in § 242.105(d) or (e), each railroad shall have a certification program approved in accordance with § 242.103 that includes:

(1) A designation of the types of service that it determines will be used in compliance with the criteria established in § 242.107;

(2) A procedure for evaluating prior safety conduct that complies with the criteria established in § 242.109;

(3) A procedure for evaluating visual and hearing acuity that complies with the criteria established in § 242.117;

(4) A procedure for training that complies with the criteria established in § 242.119;

(5) A procedure for knowledge testing that complies with the criteria established in § 242.121; and

(6) A procedure for monitoring operational performance that complies with the criteria established in § 242.123.

(b) Reserved.

§ 242.103 Approval of design of individual railroad programs by FRA.

(a) Each railroad shall submit its written certification program and request for approval in accordance with the procedures contained in appendix B of this part according to the following schedule:

(1) A Class I railroad (including the National Railroad Passenger Corporation), Class II railroad, or railroad providing commuter service shall submit a program no later than March 30, 2012; and

(2) A Class III railroad (including a switching and terminal or other railroad

not otherwise classified) shall submit a program no later than July 30, 2012.

(b) A railroad commencing operations after the pertinent date specified in paragraph (a) of this section shall submit its written certification program and request for approval in accordance with the procedures contained in appendix B to this part at least 60 days prior to commencing operations.

(c) Each railroad shall:

(1) Simultaneous with its filing with the FRA, serve a copy of the submission filed pursuant to paragraph (a) or (b) of this section, a resubmission filed pursuant to paragraph (h) of this section, or a material modification filed pursuant to paragraph (i) of this section on the president of each labor organization that represents the railroad's employees subject to this part; and

(2) Include in their submission filed pursuant to paragraph (a) or (b) of this section, a resubmission filed pursuant to paragraph (h) of this section, or a material modification filed pursuant to paragraph (i) of this section a statement affirming that the railroad has served a copy on the president of each labor organization that represents the railroad's employees subject to this part, together with a list of the names and addresses of persons served.

(d) Not later than 45 days from the date of filing a submission pursuant to paragraph (a) or (b) of this section, a resubmission pursuant to paragraph (h) of this section, or a material modification pursuant to paragraph (i) of this section, any designated representative of railroad employees subject to this part may comment on the submission, resubmission, or material modification:

(1) Each comment shall set forth specifically the basis upon which it is made, and contain a concise statement of the interest of the commenter in the proceeding;

(2) Each comment shall be submitted to the Associate Administrator for Railroad Safety/Chief Safety Officer, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590; and

(3) The commenter shall certify that a copy of the comment was served on the railroad.

(e) The submission required by paragraph (a) or (b) of this section shall state the railroad's election either:

(1) To accept responsibility for the training of conductors and thereby obtain authority for that railroad to initially certify a person as a conductor in an appropriate type of service; or

(2) To recertify only conductors previously certified by other railroads.

(f) A railroad that elects to accept responsibility for the training of conductors shall state in its submission whether it will conduct the training program or employ a training program conducted by some other entity on its behalf but adopted and ratified by that railroad.

(g) A railroad's program is considered approved and may be implemented 30 days after the required filing date (or the actual filing date) unless the Administrator notifies the railroad in writing that the program does not conform to the criteria set forth in this part.

(1) If the Administrator determines that the program does not conform, the Administrator will inform the railroad of the specific deficiencies.

(2) If the Administrator informs the railroad of deficiencies more than 30 days after the initial filing date, the original program may remain in effect until 30 days after approval of the revised program is received.

(h) A railroad shall resubmit its program within 30 days after the date of such notice of deficiencies. A failure to resubmit the program with the necessary revisions will be considered a failure to implement a program under this part.

(1) The Administrator will inform the railroad in writing whether its revised program conforms to this part.

(2) If the program does not conform, the railroad shall resubmit its program.

(i) A railroad that intends to materially modify its program after receiving initial FRA approval shall submit a description of how it intends to modify the program in conformity with the specific requirements of this part at least 60 days prior to implementing such a change.

(1) A modification is material if it would affect the program's conformance with this part.

(2) The modification submission shall contain a description that conforms to the pertinent portion of the procedures contained in appendix B of this part.

(3) The modification submission will be handled in accordance with the procedures of paragraphs (g) and (h) of this section as though it were a new program.

§ 242.105 Schedule for implementation.

(a) By March 1, 2012, each railroad shall:

(1) In writing, designate as certified conductors all persons authorized by the railroad to perform the duties of a conductor as of January 1, 2012; and

(2) Issue a certificate that complies with § 242.207 to each person that it designates.

(b) After March 1, 2012, each railroad shall:

(1) In writing, designate as a certified conductor any person who has been authorized by the railroad to perform the duties of a conductor between January 1, 2012 and the pertinent date in paragraph (d) or (e) of this section; and

(2) Issue a certificate that complies with § 242.207 to each person that it designates.

(c) No railroad shall permit or require a person, designated as a certified conductor under the provisions of paragraph (a) or (b) of this section, to perform service as a certified conductor for more than a 36-month period beginning on the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of paragraph (d) or (e) of this section unless that person has been certified in accordance with procedures that comply with subpart B of this part.

(1) Except as provided in paragraph (c)(3) of this section, a person who has been designated as a certified conductor under the provisions of paragraph (a) or (b) of this section and who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or in accordance with the terms of the Railroad Retirement Act (45 U.S.C. 231) within 36 months from the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of paragraph (d) or (e) of this section, may request, in writing, that a railroad not recertify that person, pursuant to subpart B of this part, until 36 months from the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of paragraph (d) or (e) of this section.

(2) Upon receipt of a written request pursuant to paragraph (c)(1) of this section, a railroad may wait to recertify the person making the request until the end of the 36-month period described in paragraph (c) of this section. If a railroad grants any request, it must grant the request of all eligible persons to every extent possible.

(3) A person who is subject to recertification under part 240 of this chapter may not make a request pursuant to paragraph (c)(1) of this section.

(d) After June 1, 2012, no Class I railroad (including the National Railroad Passenger Corporation), Class II railroad, or railroad providing commuter service shall initially certify or recertify a person as a conductor

unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part and issued a certificate that complies with § 242.207.

(e) After September 1, 2012, no Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall initially certify or recertify a person as a conductor unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part and issued a certificate that complies with § 242.207.

(f) After the applicable dates specified in paragraphs (d) and (e) of this section, no person shall serve as a conductor in any type of service and no railroad shall require or permit any person to serve as a conductor in any type of service unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part and issued a certificate that complies with § 242.207.

§ 242.107 Types of service.

(a) Each railroad's program shall state which of the two types of service (conductor and passenger conductor), provided for in paragraph (b) of this section, that it will cover.

(b) A railroad may issue certificates for either of the following types of service:

(1) Conductor; and

(2) Passenger conductor.

(c) A railroad shall not reclassify the certification of any type of certified conductor to a different type of conductor certification during the period in which the certification is otherwise valid except when a conductor completes the emergency training identified in part 239 of this chapter and is certified as a passenger conductor.

(d) Each railroad is authorized to impose additional conditions or operational restrictions on the service a conductor may perform beyond those identified in this section provided those conditions or restrictions are not inconsistent with this part.

§ 242.109 Determinations required for certification and recertification.

(a) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor, shall, in accordance with its FRA-approved program, determine in writing that:

(1) The individual meets the eligibility requirements of §§ 242.111, 242.113, 242.115 and 242.403; and

(2) The individual meets the vision and hearing acuity standards of § 242.117 ("Vision and hearing acuity");

(3) The individual has the necessary knowledge, as demonstrated by successfully completing a test that meets the requirements of § 242.121 ("Knowledge testing"); and

(4) Where a person has not previously been certified, that the person has completed a training program that meets the requirements of § 242.119 ("Training").

(b) When evaluating a person's railroad employment record, a railroad shall not consider information concerning prior railroad safety conduct that:

(1) Occurred prior to the effective date of this rule; or

(2) Occurred at a time other than that specifically provided for in §§ 242.111, 242.115 or 242.403.

(c) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file documents pertinent to those determinations.

(d) A railroad's program shall provide a candidate for certification or recertification a reasonable opportunity to review and comment in writing on any record which contains information concerning the person's prior safety conduct, including information pertinent to determinations required under § 242.115, if the railroad believes the record contains information that could be sufficient to render the person ineligible for certification under this subpart.

(e) The opportunity for comment shall be afforded to the person prior to the railroad's rendering its eligibility decision based on that information. Any responsive comment furnished shall be retained by the railroad in accordance with § 242.203.

(f) The program shall include a method for a person to advise the railroad that he or she has never been a railroad employee or obtained a license to drive a motor vehicle. Nothing in this section shall be construed as imposing a duty or requirement that a person have prior railroad employment experience or obtain a motor vehicle driver's license in order to become a certified conductor.

(g) Nothing in this section, §§ 242.111 or 242.113 shall be construed to prevent persons subject to this part from entering into an agreement that results in a railroad's obtaining the information needed for compliance with this subpart in a different manner than that prescribed in §§ 242.111 or 242.113.

§ 242.111 Prior safety conduct as motor vehicle operator.

(a) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) Except as provided in paragraphs (c), (d), (e) and (f) of this section, after the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person meets the eligibility requirements of this section involving prior conduct as a motor vehicle operator.

(c) A railroad shall initially certify a person as a conductor for 60 days if the person:

(1) Requested the information required by paragraph (h) of this section at least 60 days prior to the date of the decision to certify that person; and

(2) Otherwise meets the eligibility requirements provided in § 242.109.

(d) A railroad shall recertify a person as a conductor for 60 days from the expiration date of that person's certification if the person:

(1) Requested the information required by paragraph (h) of this section at least 60 days prior to the date of the decision to recertify that person; and

(2) Otherwise meets the eligibility requirements provided in § 242.109.

(e) Except as provided in paragraph (f) of this section, if a railroad who certified or recertified a person pursuant to paragraph (c) or (d) of this section does not obtain and evaluate the information required pursuant to paragraph (h) within 60 days of the pertinent dates identified in paragraph (c) or (d) of this section, that person will be ineligible to perform as a conductor until the information can be evaluated.

(f) If a person requests the information required pursuant to paragraph (h) of this section but is unable to obtain it, that person or the railroad certifying or recertifying that person may petition for a waiver of the requirements of paragraph (b) of this section in accordance with the provisions of part 211 of this chapter. A railroad shall certify or recertify a person during the pendency of the waiver request if the person otherwise meets the eligibility requirements provided in § 242.109.

(g) *Individual's duty.* Except for persons designated as conductors under § 242.105 (a) or (b) or for persons

covered by § 242.109(f), each person seeking certification or recertification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

(1) Take the actions required by paragraphs (h) through (j) of this section to make information concerning his or her driving record available to the railroad that is considering such certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State, Federal, or foreign law to make information concerning his or her driving record available to that railroad.

(h) Each person seeking certification or recertification under this part shall request, in writing, that the chief of each driver licensing agency identified in paragraph (i) of this section provide a copy of that agency's available information concerning his or her driving record to the railroad that is considering such certification or recertification.

(i) Each person shall request the information required under paragraph (h) of this section from:

(1) The chief of the driver licensing agency of any jurisdiction, including a state or foreign country, which last issued that person a driver's license; and

(2) The chief of the driver licensing agency of any other jurisdiction, including states or foreign countries, that issued or reissued the person a driver's license within the preceding five years.

(j) If advised by the railroad that a driver licensing agency has informed the railroad that additional information concerning that person's driving history may exist in the files of a state agency or foreign country not previously contacted in accordance with this section, such person shall:

(1) Request in writing that the chief of the driver licensing agency which compiled the information provide a copy of the available information to the prospective certifying railroad; and

(2) Take any additional action required by State, Federal, or foreign law to obtain that additional information.

(k) Any person who has never obtained a motor vehicle driving license is not required to comply with the provisions of paragraph (h) of this section but shall notify the railroad of that fact in accordance with procedures of the railroad that comply with § 242.109(f).

(l) Each certified conductor or person seeking initial certification shall report motor vehicle incidents described in paragraphs (n)(1) and (2) of this section to the employing railroad within 48 hours of being convicted for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle drivers license for, such violations. For purposes of this paragraph and paragraph (n) of this section, "state action" means action of the jurisdiction that has issued the motor vehicle driver's license, including a foreign country. For the purposes of conductor certification, no railroad shall require reporting earlier than 48 hours after the conviction, or completed state action to cancel, revoke, or deny a motor vehicle drivers license.

(m) *Evaluation of record.* When evaluating a person's motor vehicle driving record, a railroad shall not consider information concerning motor vehicle driving incidents that occurred:

(1) Prior to the effective date of this rule;

(2) More than 36 months before the month in which the railroad is making its certification decision; or

(3) At a time other than that specifically provided for in §§ 242.111, 242.115, or 242.403.

(n) A railroad shall only consider information concerning the following types of motor vehicle incidents:

(1) A conviction for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle drivers license for, operating a motor vehicle while under the influence of or impaired by alcohol or a controlled substance; or

(2) A conviction for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle driver's license for, refusal to undergo such testing as is required by State or foreign law when a law enforcement official seeks to determine whether a person is operating a vehicle while under the influence of alcohol or a controlled substance.

(o) If such an incident is identified:

(1) The railroad shall provide the data to the railroad's SAP, together with any information concerning the person's railroad service record, and shall refer the person for evaluation to determine if the person has an active substance abuse disorder;

(2) The person shall cooperate in the evaluation and shall provide any requested records of prior counseling or treatment for review exclusively by the SAP in the context of such evaluation; and

(3) If the person is evaluated as not currently affected by an active substance abuse disorder, the subject data shall not be considered further with respect to certification. However, the railroad shall, on recommendation of the SAP, condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs deemed necessary by the SAP consistent with the technical standards specified in § 242.115(f)(3).

(4) If the person is evaluated as currently affected by an active substance abuse disorder, the provisions of § 242.115(d) will apply.

§ 242.113 Prior safety conduct as an employee of a different railroad.

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person meets the eligibility requirements of this section.

(c) Except for persons designated as conductors under § 242.105(a) or (b) or for persons covered by § 242.109(f), each person seeking certification or recertification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

(1) Request, in writing, that the chief operating officer or other appropriate person of the former employing railroad provide a copy of that railroad's available information concerning his or her service record pertaining to compliance or non-compliance with §§ 242.111, 242.115 and 242.403 to the railroad that is considering such certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State or Federal law to make information concerning his or her service record available to that railroad.

§ 242.115 Substance abuse disorders and alcohol drug rules compliance.

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person meets the eligibility requirements of this section.

(c) In order to make the determination required under paragraph (d) of this section, a railroad shall have on file documents pertinent to that determination, including a written document from its SAP which states his or her professional opinion that the person has been evaluated as not currently affected by a substance abuse disorder or that the person has been evaluated as affected by an active substance abuse disorder.

(d) *Fitness requirement.*

(1) A person who has an active substance abuse disorder shall be denied certification or recertification as a conductor.

(2) Except as provided in paragraph (g) of this section, a certified conductor who is determined to have an active substance abuse disorder shall be ineligible to hold certification. Consistent with other provisions of this part, certification may be reinstated as provided in paragraph (f) of this section.

(3) In the case of a current employee of the railroad evaluated as having an active substance abuse disorder (including a person identified under the procedures of § 242.111), the employee may, if otherwise eligible, voluntarily self-refer for substance abuse counseling or treatment under the policy required by § 219.403 of this chapter; and the railroad shall then treat the substance abuse evaluation as confidential except with respect to ineligibility for certification.

(e) *Prior alcohol/drug conduct; Federal rule compliance.*

(1) In determining whether a person may be or remain certified as a conductor, a railroad shall consider conduct described in paragraph (e)(2) of this section that occurred within a period of 60 consecutive months prior to the review. A review of certification shall be initiated promptly upon the occurrence and documentation of any incident of conduct described in this paragraph.

(2) A railroad shall consider any violation of §§ 219.101 or 219.102 of this chapter and any refusal or failure to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative.

(3) A period of ineligibility described in this section shall begin:

(i) For a person not currently certified, on the date of the railroad's written determination that the most recent incident has occurred; or

(ii) For a person currently certified, on the date of the railroad's notification to the person that recertification has been denied or certification has been revoked; and

(4) The period of ineligibility described in this section shall be determined in accordance with the following standards:

(i) In the case of a single violation of § 219.102 of this chapter, the person shall be ineligible to hold a certificate during evaluation and any required primary treatment as described in paragraph (f) of this section. In the case of two violations of § 219.102 of this chapter, the person shall be ineligible to hold a certificate for a period of two years. In the case of more than two such violations, the person shall be ineligible to hold a certificate for a period of five years.

(ii) In the case of one violation of § 219.102 of this chapter and one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of three years.

(iii) In the case of one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of 9 months (unless identification of the violation was through a qualifying "co-worker report" as described in § 219.405 of this chapter and the conductor waives investigation, in which case the certificate shall be deemed suspended during evaluation and any required primary treatment as described in paragraph (f)). In the case of two or more violations of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of five years.

(iv) A refusal or failure to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative shall be treated, for purposes of ineligibility under this paragraph, in the same manner as a violation of:

(A) Section 219.102 of this chapter, in the case of a refusal or failure to provide a urine specimen for testing; or

(B) Section 219.101 of this chapter, in the case of a refusal or failure to provide a breath sample (part 219, subpart D), or a blood specimen for mandatory post-accident toxicological testing (part 219, subpart C)).

(f) *Future eligibility to hold certificate following alcohol/drug violation.* The following requirements apply to a person who has been denied certification or who has had certification suspended or revoked as a result of conduct described in paragraph (e) of this section:

(1) The person shall not be eligible for grant or reinstatement of the certificate unless and until the person has:

(i) Been evaluated by a SAP to determine if the person currently has an active substance abuse disorder;

(ii) Successfully completed any program of counseling or treatment determined to be necessary by the SAP prior to return to service; and

(iii) Presented a urine sample for testing under subpart H of part 219 of this chapter that tested negative for controlled substances assayed and has tested negative for alcohol.

(2) A conductor placed in service or returned to service under the above-stated conditions shall continue in any program of counseling or treatment deemed necessary by the SAP and shall be subject to a reasonable program of follow-up alcohol and drug testing without prior notice for a period of not more than 60 months following return to service. Follow-up tests shall include not fewer than 6 alcohol tests and 6 drug tests during the first 12 months following return to service.

(3) Return-to-service and follow-up alcohol and drug tests shall be performed consistent with the requirements of subpart H of part 219 of this chapter.

(4) This paragraph does not create an entitlement to utilize the services of a railroad SAP, to be afforded leave from employment for counseling or treatment, or to employment as a conductor. Nor does it restrict any discretion available to the railroad to take disciplinary action based on conduct described herein.

(g) *Confidentiality protected.* Nothing in this part shall affect the responsibility of the railroad under § 219.403 of this chapter ("Voluntary referral policy") to treat voluntary referrals for substance abuse counseling and treatment as confidential; and the certification status of a conductor who is successfully assisted under the procedures of that section shall not be adversely affected. However, the railroad shall include in its voluntary referral policy required to be issued pursuant to § 219.403 of this chapter a provision that, at least with respect to a certified conductor or a candidate for certification, the policy of confidentiality is waived (to the extent that the railroad shall receive from the SAP official notice of the substance abuse disorder and shall suspend or revoke the certification, as appropriate) if the person at any time refuses to cooperate in a recommended course of counseling or treatment.

§ 242.117 Vision and hearing acuity.

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any class of service, shall determine that the person meets the standards for visual acuity and hearing acuity prescribed in this section.

(c) In order to make the determination required under paragraph (b) of this section, a railroad shall have on file either:

(1) A medical examiner's certificate that the individual has been medically examined and meets these acuity standards; or

(2) A written document from its medical examiner documenting his or her professional opinion that the person does not meet one or both acuity standards and stating the basis for his or her determination that:

(i) The person can nevertheless be certified under certain conditions; or

(ii) The person's acuity is such that he or she cannot safely perform as a conductor even with conditions attached.

(d) Any examination required for compliance with this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant such that:

(1) A licensed optometrist or a technician responsible to that person may perform the portion of the examination that pertains to visual acuity; and

(2) A licensed or certified audiologist or a technician responsible to that person may perform the portion of the examination that pertains to hearing acuity.

(e) If the examination required under this section discloses that the person needs corrective lenses or a hearing aid, or both, either to meet the threshold acuity levels established in this section or to meet a lower threshold determined by the railroad's medical examiner to be sufficient to perform as a conductor, that fact shall be noted on the certificate issued in accordance with the provisions of this part.

(f) Any person with such a certificate notation shall use the relevant corrective device(s) while performing as a conductor unless the railroad's medical examiner subsequently determines in writing that the person can safely perform without using the device.

(g) *Fitness requirement*. In order to be currently certified as a conductor, except as permitted by paragraph (j) of this section, a person's vision and hearing shall meet or exceed the standards prescribed in this section and Appendix D to this part. It is recommended that each test conducted pursuant to this section should be performed according to any directions supplied by the manufacturer of such test and any American National Standards Institute (ANSI) standards that are applicable.

(h) Except as provided in paragraph (j) of this section, each person shall have visual acuity that meets or exceeds the following thresholds:

(1) For distant viewing, either:

(i) Distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses; or

(ii) Distant visual acuity separately corrected to at least 20/40 (Snellen) with corrective lenses and distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses;

(2) A field of vision of at least 70 degrees in the horizontal meridian in each eye; and

(3) The ability to recognize and distinguish between the colors of railroad signals as demonstrated by successfully completing one of the tests in Appendix E to this part.

(i) Except as provided in paragraph (j) of this section, each person shall have a hearing test or audiogram that shows the person's hearing acuity meets or exceeds the following thresholds: the person does not have an average hearing loss in the better ear greater than 40 decibels with or without use of a hearing aid, at 500 Hz, 1,000 Hz, and 2,000 Hz. The hearing test or audiogram shall meet the requirements of one of the following:

(1) As required in 29 CFR 1910.95(h) (OSHA);

(2) As required in § 227.111 of this chapter; or

(3) Conducted using an audiometer that meets the specifications of and are maintained and used in accordance with ANSI S3.6–2004 "Specifications for Audiometers."

(j) A person not meeting the thresholds in paragraphs (h) and (i) of this section shall, upon request, be subject to further medical evaluation by a railroad's medical examiner to determine that person's ability to safely perform as a conductor. In accordance with the guidance prescribed in Appendix D to this part, a person is entitled to one retest without making any showing and to another retest if the person provides evidence substantiating that circumstances have changed since the last test to the extent that the person could now safely perform as a conductor. The railroad shall provide its medical examiner with a copy of this part, including all appendices. If, after consultation with a railroad officer, the medical examiner concludes that, despite not meeting the threshold(s) in paragraphs (h) and (i) of this section, the person has the ability to safely perform as a conductor, the person may be certified as a conductor and such certification conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(k) As a condition of maintaining certification, each certified conductor shall notify his or her employing railroad's medical department or, if no such department exists, an appropriate railroad official if the person's best correctable vision or hearing has deteriorated to the extent that the person no longer meets one or more of the prescribed vision or hearing standards or requirements of this section. This notification is required prior to any subsequent performance as a conductor.

§ 242.119 Training.

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to the initial issuance of a certificate to any person as a conductor, shall determine that the person has, in accordance with the requirements of this section, the knowledge to safely perform as a conductor in each type of service that the person will be permitted to perform.

(c) In making this determination, a railroad shall have written documentation showing that:

(1) The person completed a training program that complies with paragraph (d) of this section;

(2) The person demonstrated his or her knowledge by achieving a passing grade under the testing and evaluation procedures of that training program; and

(3) The person demonstrated that he or she is qualified on the physical

characteristics of the railroad, or its pertinent segments, over which that person will perform service.

(d) A railroad that elects to train a previously untrained person to be a conductor shall develop an initial training program which, at a minimum, includes the following:

(1) Perform a task analysis or otherwise demonstrate that a task analysis has been performed to identify safety-related tasks and steps that must be performed proficiently. The demonstration of a task analysis for an existing program (*i.e.,* a program implemented prior to the effective date of this part) can be based on the production of an existing program with defined standards of sufficient detail to indicate that an effective task analysis was performed. When new safety-related railroad laws, regulations, orders, technologies, procedures, or equipment are introduced into the workplace, the railroad must review its training program and modify its training plan accordingly.

(2) Determine how training must be structured, developed, and delivered, including on-the-job training and any combination of classroom, simulator, computer-based, or other formally structured training designed to impart the knowledge, skills, and abilities identified as necessary to perform each task. The curriculum shall include knowledge of, and ability to comply with, Federal railroad safety laws, regulations, and orders, as well as any railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. This training shall document a person's knowledge of, and ability to comply with, Federal railroad safety laws, regulations, and orders, as well as railroad rules and procedures.

(e) Prior to a previously untrained person being certified as a conductor, a railroad shall require the person to:

(1) Successfully complete the formal initial training program developed pursuant to paragraph (d) of this section and any associated examinations covering the skills and knowledge the person will need to possess in order to perform the tasks necessary to be a conductor; and

(2) Demonstrate, to the satisfaction of the railroad with input from a qualified instructor, on-the-job proficiency by successfully completing the tasks necessary to be a conductor. However, a person may perform such tasks under the direct onsite supervision of a person, who has the necessary operating experience, as part of the on-the-job training process prior to completing such training and passing the field evaluation; and

(3) Demonstrate knowledge of the physical characteristics of any assigned territory by successfully completing a test created by a person qualified on the physical characteristics of the territory.

(f) If a railroad uses a written test for purposes of paragraph (e)(3) of this section, the railroad must provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

(g) A person may acquire familiarity with the physical characteristics of a territory through the following methods:

(1) The methods used by a railroad for familiarizing its conductors with new territory while starting up a new railroad;

(2) The methods used by a railroad for starting operations over newly acquired rail lines; or

(3) The methods used by a railroad for reopening of a long unused route.

(h) The methods listed in paragraph (g) of this section shall be described in the railroad's conductor qualification program required under this part and submitted according to the procedures described in Appendix B to this part.

(i) If ownership of a railroad is being transferred from one company to another, the conductor(s) of the acquiring company may receive familiarization training from the selling company prior to the acquiring railroad commencing operation.

(j) A railroad shall designate in its program required by this section the time period in which a conductor must be absent from a territory or yard, before requalification on physical characteristics is required.

(k) A railroad's program shall include the procedures used to qualify or requalify a person on the physical characteristics.

(l) Except as provided by paragraph (n) of this section, each railroad shall, no later than (DATE 365 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER), perform initial instructional briefings to ensure that each of its conductors have knowledge of the Federal railroad safety laws that relate to the safety-related tasks the employees are assigned to perform.

(m) Initial instructional briefings required by this section must:

(1) Be delivered in a manner conducive to ensure learning transfer;

(2) Include in the briefing a written or electronic check-off list containing the title and section or subpart of each applicable railroad safety law, including, but limited to, regulations and orders, that the conductor must comply with; and

(3) Require each conductor to complete an identical check-off list during the instructional briefing, and to sign or electronically validate the list at the conclusion of the briefing.

(n) Any railroad that has previously informed, briefed, or instructed any of its existing conductors on the relevant Federal railroad safety laws may choose not to perform the initial instructional briefing required by paragraph (l) of this section, as long as the railroad has retained a record containing the following information concerning each such person:

(1) The name of the person;

(2) The name or a description of the training during which this information was delivered;

(3) The date the training was completed; and

(4) The name of the railroad officer certifying the record(s).

(o) A railroad shall provide for the continuing education of certified conductors to ensure that each conductor maintains the necessary knowledge concerning railroad safety and operating rules and compliance with all applicable Federal regulations, including, but not limited to, hazardous materials, passenger train emergency preparedness, brake system safety standards, pre-departure inspection procedures, and passenger equipment safety standards, and physical characteristics of a territory.

§ 242.121 Knowledge testing.

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) After the pertinent date specified in § 242.105(d) or (e), each railroad, prior to initially certifying or recertifying any person as a conductor for any type of service, shall determine that the person has, in accordance with the requirements of this section, demonstrated sufficient knowledge of the railroad's rules and practices for the safe movement of trains.

(c) In order to make the knowledge determination required by paragraph (b) of this section, a railroad shall have procedures for testing a person being evaluated for certification as a conductor that shall be:

(1) Designed to examine a person's knowledge of the railroad's operating rules and practices for the safe movement of trains;

(2) Objective in nature;

(3) Administered in written or electronic form;

(4) Cover the following subjects:

(i) Safety and operating rules;

(ii) Timetable instructions;

(iii) Compliance with all applicable Federal regulations;

(iv) Physical characteristics of the territory on which a person will be or is currently serving as a conductor; and

(v) Use of any job aid that a railroad may provide a conductor;

(5) Sufficient to accurately measure the person's knowledge of the covered subjects; and

(6) Conducted without open reference books or other materials except to the degree the person is being tested on his or her ability to use such reference books or materials.

(d) The conduct of the test shall be documented in writing and the documentation shall contain sufficient information to identify the relevant facts relied on for evaluation purposes.

(e) For purposes of paragraph (c) of this section, the railroad must provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

(f) The documentation shall indicate whether the person passed or failed the test.

(g) If a person fails to pass the test, no railroad shall permit or require that person to function as a conductor prior to that person's achieving a passing score during a reexamination of his or her knowledge.

§ 242.123 Monitoring operational performance.

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) Each railroad shall have a program to monitor the conduct of its certified conductors by performing unannounced operating rules compliance tests. The program shall include procedures to address the testing of certified conductors who are not given an unannounced compliance test in a calendar year pursuant to paragraph (f) of this section. At a minimum, the procedures shall include the following:

(1) A requirement that an unannounced compliance test must be conducted within 30 days of a return to conductor service; and

(2) The railroad must retain a written record indicating the date that the conductor stopped performing service that requires certification pursuant to this part, the date that the conductor returned to performing service that requires certification pursuant to this part, and the date that the unannounced compliance test was performed.

(c) Except as provided in paragraph (f) of this section, each conductor shall be given at least one unannounced compliance test in each calendar year by a railroad officer who meets the requirements of § 217.9(b)(1) of this chapter.

(d) The unannounced test program shall:

(1) Test those persons certified as a conductor pursuant to § 242.107(b)(1) for compliance with one or more operational tests in accordance with the provisions of § 217.9 of this chapter; and one or more provisions of §§ 218.99 through 218.109 of this chapter; and

(2) Test those persons certified as a passenger conductor pursuant to § 242.107(b)(2) for compliance with one or more operational tests in accordance with the provisions of § 217.9 of this chapter.

(i) For persons certified as passenger conductors pursuant to § 242.107(b)(2) who do not require compliance with part 218, subpart F of this chapter except under emergency circumstances, the requirement for an annual, unannounced test may be satisfied by annual training.

(ii) [Reserved]

(e) Each railroad's program shall indicate the action the railroad will take in the event that it finds deficiencies with a conductor's performance during an unannounced compliance test administered in accordance with this section.

(f) A certified conductor who is not performing a service that requires certification pursuant to this part need not be given an unannounced compliance test. However, when the certified conductor returns to a service that requires certification pursuant to this part, that certified conductor must be tested pursuant to this section within 30 days of his or her return.

§ 242.125 Certification determinations made by other railroads.

(a) A railroad that is considering certification of a person as a conductor may rely on determinations made by another railroad concerning that person's certification. The railroad's certification program shall address how the railroad will administer the training of previously uncertified conductors with extensive operating experience or previously certified conductors who have had their certification expire. If a railroad's certification program fails to specify how it will train a previously certified conductor hired from another railroad, then the railroad shall require the newly hired conductor to take the hiring railroad's entire training program.

(b) A railroad relying on another railroad's certification shall determine that:

(1) The prior certification is still valid in accordance with the provisions of §§ 242.201 and 242.407;

(2) The prior certification was for the same type of service as the certification being issued under this section;

(3) The person has received training on the physical characteristics of the new territory in accordance with § 242.119; and

(4) The person has demonstrated the necessary knowledge concerning the railroad's operating rules in accordance with § 242.121.

§ 242.127 Reliance on qualification requirements of other countries.

(a) A Canadian railroad that is required to comply with this regulation or a railroad that conducts joint operations with a Canadian railroad may certify that a person is eligible to be a conductor provided it determines that:

(1) The person is employed by the Canadian railroad; and

(2) The person meets or exceeds the qualifications standards issued by Transport Canada for such service.

Subpart C—Administration of the Certification Program

§ 242.201 Time limitations for certification.

(a) After the pertinent date in § 242.105(d) or (e), a railroad shall not certify or recertify a person as a conductor in any type of service, if the railroad is making:

(1) A determination concerning eligibility under §§ 242.111, 242.113, 242.115 and 242.403 and the eligibility data being relied on was furnished more than 366 days before the date of the railroad's certification decision;

(2) A determination concerning visual and hearing acuity and the medical examination being relied on was conducted more than 450 days before the date of the railroad's certification decision;

(3) A determination concerning demonstrated knowledge and the

knowledge examination being relied on was conducted more than 366 days before the date of the railroad's certification decision; or

(4) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than 24 months before the date of the railroad's recertification decision if the railroad administers a knowledge testing program pursuant to § 242.121 at intervals that do not exceed 24 months.

(b) The time limitations of paragraph (a) of this section do not apply to a railroad that is making a certification decision in reliance on determinations made by another railroad in accordance with paragraph (c)(3) of this section, § 242.125, or § 242.127.

(c) No railroad shall:

(1) Permit or require a person, designated under § 242.105(a) or (b), to perform service as a certified conductor for more than the 36-month period beginning on the pertinent date for compliance with the mandatory procedures for testing and evaluation set forth in the applicable provisions of § 242.105(d) or (e) unless that person has been determined to be eligible in accordance with procedures that comply with subpart B of this part.

(2) Certify a person as a conductor for an interval of more than 36 months; or

(3) Rely on a certification issued by another railroad that is more than 36 months old.

(d) Except as provided for in § 242.105 concerning initial implementation of the program, a railroad shall issue each person designated as a certified conductor a certificate that complies with § 242.207 no later than 30 days from the date of its decision to certify or recertify that person.

§ 242.203 Retaining information supporting determinations.

(a) After the pertinent date in § 242.105(d) or (e), a railroad that issues, denies, or revokes a certificate after making the determinations required under § 242.109 shall maintain a record for each certified conductor or applicant for certification that contains the information the railroad relied on in making the determinations.

(b) A railroad shall retain the following information:

(1) Relevant data from the railroad's records concerning the person's prior safety conduct;

(2) Relevant data furnished by another railroad;

(3) Relevant data furnished by a governmental agency concerning the person's motor vehicle driving record;

(4) Relevant data furnished by the person seeking certification concerning his or her eligibility;

(5) The relevant test results data concerning hearing and vision acuity;

(6) If applicable, the relevant data concerning the professional opinion of the railroad's medical examiner on the adequacy of the person's hearing or vision acuity;

(7) Relevant data from the railroad's records concerning the person's success or failure of the passage of knowledge test(s) under § 242.121;

(8) A sample copy of the written knowledge test or tests administered; and

(9) The relevant data from the railroad's records concerning the person's success or failure on unannounced operating rules compliance tests the railroad performed to monitor the conductor's performance in accordance with § 242.123.

(c) If a railroad is relying on successful completion of an approved training program conducted by another entity, the relying railroad shall maintain a record for each certified conductor that contains the relevant data furnished by the training entity concerning the person's demonstration of knowledge and relied on by the railroad in making its determinations.

(d) If a railroad is relying on a certification decision initially made by another railroad, the relying railroad shall maintain a record for each certified conductor that contains the relevant data furnished by the other railroad which it relied on in making its determinations.

(e) All records required under this section shall be retained for a period of six years from the date of the certification, recertification, denial or revocation decision and shall be made available to FRA representatives upon request during normal business hours.

(f) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on the record(s) required by this section; or

(2) Otherwise falsify such records through material misstatement, omission, or mutilation.

(g) Nothing in this section precludes a railroad from maintaining the information required to be retained under this section in an electronic format provided that:

(1) The railroad maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or individual records;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) A record cannot be deleted or altered by any individual after the record is certified by the employee who created the record;

(3) Any amendment to a record is either:

(i) Electronically stored apart from the record that it amends; or

(ii) Electronically attached to the record as information without changing the original record;

(4) Each amendment to a record uniquely identifies the person making the amendment;

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information in usable format when requested to furnish data by FRA representatives; and

(6) Information retrieved from the system can be easily produced in a printed format which can be readily provided to FRA representatives in a timely manner and authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by FRA representatives.

§ 242.205 Identification of certified persons and record keeping.

(a) After March 1, 2012, a railroad shall maintain a list identifying each person designated as a certified conductor. That list shall indicate the types of service the railroad determines each person is authorized to perform and date of the railroad's certification decision.

(b) If a railroad employs conductors working in joint operations territory, the list shall include person(s) determined by that railroad to be certified as conductor(s) and possessing the necessary territorial qualifications for the applicable territory in accordance with § 242.301.

(c) The list required by paragraphs (a) and (b) of this section shall:

(1) Be updated at least annually;

(2) Be available at the divisional or regional headquarters of the railroad; and

(3) Be available for inspection or copying by FRA during regular business hours.

(d) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on the list required by this section; or

(2) Otherwise falsify such list through material misstatement, omission, or mutilation.

(e) Nothing in this section precludes a railroad from maintaining the list required by this section in an electronic format provided that:

(1) The railroad maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or the list;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) An entry on the list cannot be deleted or altered by any individual after the entry is certified by the employee who created the entry;

(3) Any amendment to the list is either:

(i) Electronically stored apart from the entry on the list that it amends; or

(ii) Electronically attached to the entry on the list as information without changing the original entry;

(4) Each amendment to the list uniquely identifies the person making the amendment;

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information in usable format when requested to furnish data by FRA representatives; and

(6) Information retrieved from the system can be easily produced in a printed format which can be readily provided to FRA representatives in a timely manner and authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by FRA representatives.

§ 242.207 Certificate components.

(a) At a minimum, each certificate issued in compliance with this part shall:

(1) Identify the railroad or parent company that is issuing it;

(2) Indicate that the railroad, acting in conformity with this part, has determined that the person to whom it is being issued has been determined to be eligible to perform as a conductor or as a passenger conductor;

(3) Identify the person to whom it is being issued (including the person's name, employee identification number, and either the year of birth or photograph of the person);

(4) Identify any conditions or limitations, including the type of service or conditions to ameliorate vision or hearing acuity deficiencies, that restrict the person's operational authority;

(5) Show the effective date of each certification held;

(6) Be signed by an individual designated in accordance with paragraph (b) of this section; and

(7) Be of sufficiently small size to permit being carried in an ordinary pocket wallet.

(b) Each railroad shall designate in writing any person that it authorizes to sign the certificates described in this section. The designation shall identify such persons by name or job title.

(c) Nothing in paragraph (a) of this section shall prohibit any railroad from including additional information on the certificate or supplementing the certificate through other documents.

(d) It shall be unlawful for any railroad to knowingly or any individual to willfully:

(1) Make, cause to be made, or participate in the making of a false entry on that certificate; or

(2) Otherwise falsify that certificate through material misstatement, omission, or mutilation.

§ 242.209 Maintenance of the certificate.

(a) Each conductor who has received a certificate required under this part shall:

(1) Have that certificate in his or her possession while on duty as a conductor; and

(2) Display that certificate upon the receipt of a request to do so from:

(i) A representative of the Federal Railroad Administration,

(ii) A State inspector authorized under part 212 of this chapter,

(iii) An officer of the issuing railroad, or

(iv) An officer of another railroad when serving as a conductor in joint operations territory.

(b) Any conductor who is notified or called to serve as a conductor and such service would cause the conductor to exceed certificate limitations, set forth in accordance with subpart B of this part, shall immediately notify the railroad that he or she is not authorized to perform that anticipated service and it shall be unlawful for the railroad to require such service.

(c) Nothing in this section shall be deemed to alter a certified conductor's duty to comply with other provisions of this chapter concerning railroad safety.

§ 242.211 Replacement of certificates.

(a) A railroad shall have a system for the prompt replacement of lost, stolen or mutilated certificates at no cost to conductors. That system shall be reasonably accessible to certified conductors in need of a replacement certificate or temporary replacement certificate.

(b) At a minimum, a temporary replacement certificate must identify the person to whom it is being issued (including the person's name, identification number and year of birth); indicate the date of issuance; and be authorized by a designated supervisor. Temporary replacement certificates may be delivered electronically and are valid for a period no greater than 30 days.

§ 242.213 Multiple certifications.

(a) A person may hold certification for multiple types of conductor service.

(b) A person may hold both conductor and locomotive engineer certification.

(c) A railroad that issues multiple certificates to a person, shall, to the extent possible, coordinate the expiration date of those certificates.

(d) Except as provided in paragraph (e) of this section, a locomotive engineer, including a remote control operator, who is operating a locomotive without an assigned certified conductor must either be (i) certified as both a locomotive engineer under part 240 of this chapter and as a conductor under this part or (ii) accompanied by a person certified as a conductor under this part but who will be attached to the crew in a manner similar to that of an independent assignment.

(e) *Passenger Railroad Operations.* If the conductor is removed from a train for a medical, police or other such emergency after the train departs from an initial terminal, the train may proceed to the first location where the conductor can be replaced without incurring undue delay without the locomotive engineer being a certified conductor. However, an assistant conductor or brakeman must be on the train and the locomotive engineer must be informed that there is no certified conductor on the train prior to any movement.

(f) During the duration of any certification interval, a person who holds a current conductor and/or locomotive engineer certificate from more than one railroad shall immediately notify the other certifying railroad(s) if he or she is denied conductor or locomotive engineer recertification under § 242.401 or

§ 240.219 of this chapter or has his or her conductor or locomotive engineer certification revoked under § 242.407 or § 240.307 of this chapter by another railroad.

(g) A person who is certified to perform multiple types of conductor service and who has had any of those certifications revoked under § 242.407 may not perform any type of conductor service during the period of revocation.

(h) A person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked under § 242.407 for a violation of § 242.403(e)(1) through (e)(5) or (e)(12) may not work as a locomotive engineer during the period of revocation. However, a person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked under § 242.407 for a violation of § 242.403(e)(6) through (e)(11) may work as a locomotive engineer during the period of revocation.

(1) For purposes of determining the period for which a person may not work as a certified locomotive engineer due to a revocation of his or her conductor certification, only violations of § 242.403(e)(1) through (e)(5) or (e)(12) will be counted. Thus, a person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked three times in less than 36 months for two violations of § 242.403(e)(6) and one violation of § 242.403(e)(1) would have his or her conductor certificate revoked for 1 year, but would not be permitted to work as a locomotive engineer for one month (*i.e.,* the period of revocation for one violation of § 242.403(e)(1)).

(i) A person who holds a current conductor and locomotive engineer certificate and who has had his or her locomotive engineer certification revoked under § 240.307 of this chapter may not work as a conductor during the period of revocation.

(j) A person who has had his or her locomotive engineer certification revoked under § 240.307 of this chapter may not obtain a conductor certificate pursuant to this part during the period of revocation.

(k) A person who had his or her conductor certification revoked under § 242.407 for violations of § 242.403(e)(1) through (e)(5) or (e)(12) may not obtain a locomotive engineer certificate pursuant to part 240 of this chapter during the period of revocation.

(l) A railroad that denies a person conductor certification or recertification under § 242.401 shall not, solely on the basis of that denial, deny or revoke that person's locomotive engineer certification or recertification.

(m) A railroad that denies a person locomotive engineer certification or recertification under § 240.219 of this chapter shall not, solely on the basis of that denial, deny or revoke that person's conductor certification or recertification.

(n) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified to perform multiple types of conductor service or is certified as a conductor and a locomotive engineer. The certificate must comply with § 240.223 of this chapter and § 242.207.

§ 242.215 Railroad oversight responsibilities.

(a) No later than March 31 of each year (beginning in calendar year (TO BE INSERTED IN FINAL RULE)), each Class I railroad (including the National Railroad Passenger Corporation and a railroad providing commuter service) and each Class II railroad shall conduct a formal annual review and analysis concerning the administration of its program for responding to detected instances of poor safety conduct by certified conductors during the prior calendar year.

(b) Each review and analysis shall involve:

(1) The number and nature of the instances of detected poor safety conduct including the nature of the remedial action taken in response thereto;

(2) The number and nature of FRA reported train accidents attributed to poor safety performance by conductors;

(3) The number and type of operational monitoring test failures recorded by railroad officers who meet the requirements of § 217.9(b)(1) of this chapter; and

(4) If the railroad conducts joint operations with another railroad, the number of conductors employed by the other railroad(s) which: were involved in events described in this paragraph and were determined to be certified and to have possessed the necessary territorial qualifications for joint operations purposes by the controlling railroad.

(c) Based on that review and analysis, each railroad shall determine what action(s) it will take to improve the safety of railroad operations to reduce or eliminate future incidents of that nature.

(d) If requested in writing by FRA, the railroad shall provide a report of the findings and conclusions reached during such annual review and analysis effort.

(e) For reporting purposes, information about the nature of detected poor safety conduct shall be capable of segregation for study and evaluation purposes into the following categories:

(1) Incidents involving noncompliance with part 218 of this chapter;

(2) Incidents involving noncompliance with part 219 of this chapter;

(3) Incidents involving noncompliance with the procedures for the safe use of train or engine brakes when the procedures are required for compliance with the Class I, Class IA, Class II, Class III, or transfer train brake test provisions of part 232 of this chapter or when the procedures are required for compliance with the Class 1, Class 1A, Class II, or running brake test provisions of part 238 of this chapter;

(4) Incidents involving noncompliance with the railroad's operating rules involving operation of a locomotive or train to operate at a speed that exceeds the maximum authorized limit;

(5) Incidents involving noncompliance with the railroad's operating rules resulting in operation of a locomotive or train past any signal, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it;

(6) Incidents involving noncompliance with the provisions of restricted speed, and the operational equivalent thereof, that must be reported under the provisions of part 225 of this chapter;

(7) Incidents involving occupying main track or a segment of main track without proper authority or permission; and

(8) Incidents involving the failure to comply with prohibitions against tampering with locomotive mounted safety devices, or knowingly operating or permitting to be operated a train with an unauthorized or disabled safety device in the controlling locomotive.

(f) For reporting purposes, an instance of poor safety conduct involving a person who holds both conductor certification pursuant to this part and locomotive engineer certification pursuant to part 240 of this chapter need only be reported once (either under 49 CFR 240.309 of this chapter or this section). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred.

(g) For reporting purposes each category of detected poor safety conduct identified in paragraph (b) of this

section shall be capable of being annotated to reflect the following:

(1) The nature of the remedial action taken and the number of events subdivided so as to reflect which of the following actions was selected:

(i) Imposition of informal discipline;

(ii) Imposition of formal discipline;

(iii) Provision of informal training; or

(iv) Provision of formal training; and

(2) If the nature of the remedial action taken was formal discipline, the number of events further subdivided so as to reflect which of the following punishments was imposed by the hearing officer:

(i) The person was withheld from service;

(ii) The person was dismissed from employment or

(iii) The person was issued demerits. If more than one form of punishment was imposed only that punishment deemed the most severe shall be shown.

(h) For reporting purposes each category of detected poor safety conduct identified in paragraph (b) of this section which resulted in the imposition of formal or informal discipline shall be annotated to reflect the following:

(1) The number of instances in which the railroad's internal appeals process reduced the punishment initially imposed at the conclusion of its hearing; and

(2) The number of instances in which the punishment imposed by the railroad was reduced by any of the following entities: The National Railroad Adjustment Board, a Public Law Board, a Special Board of Adjustment or other body for the resolution of disputes duly constituted under the provisions of the Railway Labor Act.

(i) For reporting purposes, each category of detected poor safety conduct identified in paragraph (b) of this section shall be capable of being annotated to reflect the following:

(1) The total number of incidents in that category;

(2) The number of incidents within that total which reflect incidents requiring an FRA accident/incident report; and

(3) The number of incidents within that total which were detected as a result of a scheduled operational monitoring effort.

(ii) [Reserved]

Subpart D—Territorial Qualification and Joint Operations

§ 242.301 Requirements for territorial qualification.

(a) Except as provided in paragraph (c) or (d) of this section, a railroad, including a railroad that employs conductors working in joint operations territory, shall not permit or require a person to serve as a conductor unless that railroad determines that the person is certified as a conductor and possesses the necessary territorial qualifications for the applicable territory pursuant to § 242.119.

(b) Each person who is called to serve as a conductor shall:

(1) Meet the territorial qualification requirements on the segment of track upon which he or she will serve as a conductor; and

(2) Immediately notify the railroad upon which he or she is employed if he or she does not meet the required territorial qualifications.

(c) If a conductor lacks territorial qualification on main track physical characteristics required by paragraph (a) of this section, he or she shall be assisted by a person who is a certified conductor or certified locomotive engineer and meets the territorial qualification requirements for the main track physical characteristics.

(d) If a conductor lacks territorial qualification on other than main track physical characteristics required by paragraph (a) of this section, where practicable, he or she shall be assisted by a person who is a certified conductor and meets the territorial qualification requirements for other than main track physical characteristics. Where not practicable, the conductor should be provided an appropriate up-to-date job aid.

Subpart E—Denial and Revocation of Certification

§ 242.401 Denial of certification.

(a) A railroad shall notify a candidate for certification or recertification of information known to the railroad that forms the basis for denying the person certification and provide the person a reasonable opportunity to explain or rebut that adverse information in writing prior to denying certification.

(b) This section does not require further opportunity to comment if the railroad's denial is based solely on factors addressed by §§ 242.111, 242.115, or 242.403 and the opportunity to comment afforded by § 242.109 has been provided.

(c) If a railroad denies a person certification or recertification, it shall notify the person of the adverse decision and explain, in writing, the basis for its denial decision. The document explaining the basis for the denial shall be served on the person within 10 days after the railroad's decision and shall give the date of the decision.

(d) A railroad shall not determine that a person failed to meet the eligibility requirements of this part and shall not deny the person's certification if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with the railroad operating rule or practice which constitutes a violation under § 242.403(e)(1) through (e)(11) of this part.

§ 242.403 Criteria for revoking certification.

(a) Each railroad shall adopt and comply with a program which meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) It shall be unlawful to fail to comply with any of the railroad rules and practices described in paragraph (e) of this section.

(c)(1) A certified conductor who has demonstrated a failure to comply with railroad rules and practices described in paragraph (e) of this section shall have his or her certification revoked.

(2) A certified conductor who is monitoring, piloting, or instructing a conductor and fails to take appropriate action to prevent a violation of paragraph (e) of this section shall have his or her certification revoked. Appropriate action does not mean that a supervisor, pilot, or instructor must prevent a violation from occurring at all costs; the duty may be met by warning the conductor or the engineer, as appropriate, of a potential or foreseeable violation.

(3) A certified conductor who is called by a railroad to perform the duty of a train crew member other than that of conductor or locomotive engineer shall not have his or her certification revoked based on actions taken or not taken while performing that duty.

(d) *Limitations on consideration of prior operating rule compliance data.* In determining whether a person may be or remain certified as a conductor, a railroad shall consider as operating rule compliance data only conduct described in paragraphs (e)(1) through (e)(11) of this section that occurred within a period of 36 consecutive months prior to the determination. A review of an existing certification shall be initiated promptly upon the occurrence and documentation of any conduct described in this section.

(e) A railroad shall only consider violations of its operating rules and practices that involve:

(1) Failure to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from failing to control a locomotive or train in accordance with a signal indication, excluding a hand or a radio signal indication or a switch, that requires a complete stop before passing it, when the conductor is located in the operating cab, or otherwise has knowledge of the signal indication. Appropriate action does not mean that a conductor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation.

(2) Failure to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from failing to adhere to limitations concerning train speed:

(i) When the conductor is located in the operating cab and the speed at which the train was operated exceeds the maximum authorized limit by at least 10 miles per hour. Where restricted speed is in effect, railroads shall consider only those violations of the conditional clause of restricted speed rules (*i.e.,* the clause that requires stopping within one half of the locomotive engineer's range of vision), or the operational equivalent thereof, which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter. Appropriate action does not mean that a conductor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation.

(ii) When not in the operating cab, the conductor is deemed to have taken appropriate action when in compliance with all applicable Railroad Operating Rules and Special Instructions.

(3) Failure to perform or have knowledge that a required brake test was performed pursuant to the Class I, Class IA, Class II, Class III, or transfer train brake test provisions of part 232 of this chapter or the Class 1, Class 1A, Class II, or running brake test provisions of part 238 of this chapter.

(4) Occupying main track or a segment of main track without proper authority or permission.

(5) Failure to comply with prohibitions against tampering with locomotive mounted safety devices; knowingly fail to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from failing to comply with prohibitions against tampering with locomotive mounted safety devices; or knowingly fail to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from operating or permitting to be operated a train with an unauthorized disabled safety device in the controlling locomotive. (*See* 49 CFR part 218, subpart D and appendix C to part 218);

(6) Failure to comply with the provisions of § 218.99 of this chapter (Shoving or pushing movements). Railroads shall only consider those violations of § 218.99 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(7) Failure to comply with the provisions of § 218.101 of this chapter (Leaving rolling and on-track maintenance-of-way equipment in the clear). Railroads shall only consider those violations of § 218.101 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(8) Failure to comply with the provisions of § 218.103 of this chapter (Hand-operated switches, including crossover switches). Railroads shall only consider those violations of § 218.103 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(9) Failure to comply with the provisions of § 218.105 of this chapter (Additional operational requirements for hand-operated main track switches). Railroads shall only consider those violations of § 218.105 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(10) Failure to comply with the provisions of § 218.107 of this chapter (Additional operational requirements for hand-operated crossover switches). Railroads shall only consider those violations of § 218.107 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(11) Failure to comply with the provisions of § 218.109 of this chapter (Hand-operated fixed derails). Railroads shall only consider those violations of § 218.109 of this chapter which cause reportable accidents or incidents under part 225 of this chapter, except for accidents and incidents that are classified as "covered data" under § 225.5 of this chapter.

(12) Failure to comply with § 219.101 of this chapter; however such incidents shall be considered as a violation only for the purposes of § 242.405(a)(2) and (3).

(13) A railroad shall not be permitted to deny or revoke an employee's certification based upon additional conditions or operational restrictions imposed pursuant to § 242.107(d).

(f)(1) If in any single incident the person's conduct contravened more than one operating rule or practice, that event shall be treated as a single violation for the purposes of this section.

(2) A violation of one or more operating rules or practices described in paragraphs (e)(1) through (e)(11) of this section that occurs during a properly conducted operational compliance test subject to the provisions of this chapter shall be counted in determining the periods of ineligibility described in § 242.405.

(3) An operational test that is not conducted in compliance with this part, a railroad's operating rules, or a railroad's program under § 217.9 of this chapter, will not be considered a legitimate test of operational skill or knowledge, and will not be considered for certification, recertification or revocation purposes.

§ 242.405 Periods of ineligibility.

(a) A period of ineligibility described in this paragraph shall:

(1) Begin, for a person not currently certified, on the date of the railroad's written determination that the most recent incident has occurred; or

(2) Begin, for a person currently certified, on the date of the railroad's notification to the person that recertification has been denied or certification has been revoked; and

(3) Be determined according to the following standards:

(i) On other than main track where restricted speed or the operational equivalent thereof is in effect, the period of revocation for a violation of § 242.403(e)(6) through (e)(8), (e)(10), or (e)(11) shall be reduced by one half provided that another revocable event has not occurred within the previous 12 months.

(ii) In the case of a single incident involving violation of one or more of the operating rules or practices described in § 242.403(e)(1) through (e)(11), the person shall have his or her certificate

revoked for a period of 30 calendar days.

(iii) In the case of two separate incidents involving a violation of one or more of the operating rules or practices described in § 242.403(e)(1) through (e)(11), that occurred within 24 months of each other, the person shall have his or her certificate revoked for a period of six months.

(iv) In the case of three separate incidents involving violations of one or more of the operating rules or practices, described in § 242.403(e)(1) through (e)(12), that occurred within 36 months of each other, the person shall have his or her certificate revoked for a period of one year.

(v) In the case of four separate incidents involving violations of one or more of the operating rules or practices, described in § 242.403(e)(1) through (e)(12), that occurred within 36 months of each other, the person shall have his or her certificate revoked for a period of three years.

(vi) Where, based on the occurrence of violations described in § 242.403(e)(12), different periods of ineligibility may result under the provisions of this section and § 242.115, the longest period of revocation shall control.

(b) Any or all periods of revocation provided in paragraph (a) of this section may consist of training.

(c) *Reduction in period of ineligibility*. A person whose certification is denied or revoked shall be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of ineligibility only if:

(1) The denial or revocation of certification in accordance with the provisions of paragraph (a)(3) of this section is for a period of one year or less;

(2) Certification is denied or revoked for reasons other than noncompliance with § 219.101 of this chapter;

(3) The person is evaluated by a railroad officer and determined to have received adequate remedial training;

(4) The person successfully completes any mandatory program of training or retraining, if that is determined to be necessary by the railroad prior to return to service; and

(5) At least one half the pertinent period of ineligibility specified in paragraph (a)(3) of this section has elapsed.

§ 242.407 Process for revoking certification.

(a) Except as provided for in § 242.115(g), a railroad that certifies or recertifies a person as a conductor and, during the period that certification is valid, acquires reliable information regarding violation(s) of § 242.403(e) or § 242.115(e) of this chapter shall revoke the person's conductor certificate.

(b) Pending a revocation determination under this section, the railroad shall:

(1) Upon receipt of reliable information regarding violation(s) of § 242.403(e) or § 242.115(e) of this chapter, immediately suspend the person's certificate;

(2) Prior to or upon suspending the person's certificate, provide notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing before a presiding officer other than the investigating officer. The notice may initially be given either orally or in writing. If given orally, it must be confirmed in writing and the written confirmation must be made promptly. Written confirmation which conforms to the notification provisions of an applicable collective bargaining agreement shall be deemed to satisfy the written confirmation requirements of this section. In the absence of an applicable collective bargaining agreement provision, the written confirmation must be made within 96 hours.

(3) Convene the hearing within the deadline prescribed by either paragraph (c)(1) of this section or the applicable collective bargaining agreement as permitted under paragraph (d) of this section;

(4) No later than the convening of the hearing and notwithstanding the terms of an applicable collective bargaining agreement, the railroad convening the hearing shall provide the person with a copy of the written information and list of witnesses the railroad will present at the hearing. If requested, a recess to the start of the hearing will be granted if that information is not provided until just prior to the convening of the hearing. If the information was provided through statements of an employee of the convening railroad, the railroad will make that employee available for examination during the hearing required by paragraph (b)(3) of this section. Examination may be telephonic where it is impractical to provide the witness at the hearing.

(5) Determine, on the record of the hearing, whether the person no longer meets the certification requirements of this part stating explicitly the basis for the conclusion reached;

(6) When appropriate, impose the pertinent period of revocation provided for in § 242.405 or § 242.115; and

(7) Retain the record of the hearing for 3 years after the date the decision is rendered.

(c) Except as provided for in paragraphs (d), (f), (i) and (j) of this section, a hearing required by this section shall be conducted in accordance with the following procedures:

(1) The hearing shall be convened within 10 days of the date the certificate is suspended unless the conductor requests or consents to delay in the start of the hearing.

(2) The hearing shall be conducted by a presiding officer, who can be any proficient person authorized by the railroad other than the investigating officer.

(3) The presiding officer will exercise the powers necessary to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(4) The presiding officer shall convene and preside over the hearing.

(5) Testimony by witnesses at the hearing shall be recorded verbatim.

(6) All relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(7) The presiding officer may:

(i) Adopt any needed procedures for the submission of evidence in written form;

(ii) Examine witnesses at the hearing;

(iii) Convene, recess, adjourn or otherwise regulate the course of the hearing; and

(iv) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(8) Parties may appear and be heard on their own behalf or through designated representatives. Parties may offer relevant evidence including testimony and may conduct such examination of witnesses as may be required for a full disclosure of the relevant facts.

(9) The record in the proceeding shall be closed at conclusion of the hearing unless the presiding officer allows additional time for the submission of information. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.

(10) No later than 10 days after the close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision in the proceeding.

(11) The decision shall:

(i) Contain the findings of fact as well as the basis therefor, concerning all material issues of fact presented on the record; and

(ii) Be served on the employee.

(12) The railroad shall have the burden of proving that the conductor's conduct was not in compliance with the applicable railroad operating rule or practice or part 219 of this chapter.

(d) A hearing required by this section which is conducted in a manner that conforms procedurally to the applicable collective bargaining agreement shall be deemed to satisfy the procedural requirements of this section.

(e) A hearing required under this section may be consolidated with any disciplinary or other hearing arising from the same facts, but in all instances a railroad official, other than the investigating officer, shall make separate findings as to the revocation required under this section.

(f) A person may waive the right to the hearing provided under this section. That waiver shall:

(1) Be made in writing;

(2) Reflect the fact that the person has knowledge and understanding of these rights and voluntarily surrenders them; and

(3) Be signed by the person making the waiver.

(g) A railroad that has relied on the certification by another railroad under the provisions of § 242.127 or § 242.301, shall revoke its certification if, during the period that certification is valid, the railroad acquires information which convinces it that another railroad has revoked its certification in accordance with the provisions of this section. The requirement to provide a hearing under this section is satisfied when any single railroad holds a hearing and no additional hearing is required prior to a revocation by more than one railroad arising from the same facts.

(h) The period of certificate suspension prior to the commencement of a hearing required under this section shall be credited towards satisfying any applicable revocation period imposed in accordance with the provisions of § 242.405.

(i) A railroad:

(1) Shall not revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the conductor's ability to comply with the railroad operating rule or practice which constitutes a violation under § 242.403(e)(1) through (e)(11); or

(2) May decide not to revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that the violation of § 242.403(e)(1) through (e)(11) was of a minimal nature and had no direct or potential effect on rail safety.

(j) The railroad shall place the relevant information in the records maintained in compliance with § 242.215 for Class I (including the National Railroad Passenger Corporation) and Class II railroads, and § 242.203 for Class III railroads if sufficient evidence meeting the criteria provided in paragraph (i) of this section, becomes available either:

(1) Prior to a railroad's action to suspend the certificate as provided for in paragraph (b)(1) of this section; or

(2) Prior to the convening of the hearing provided for in this section;

(k) Provided that the railroad makes a good faith determination after a reasonable inquiry that the course of conduct provided for in paragraph (i) of this section is appropriate, the railroad which does not suspend a conductor's certification, as provided for in paragraph (b) of this section, is not in violation of paragraph (a) of this section.

Subpart F—Dispute Resolution Procedures

§ 242.501 Review board established.

(a) Any person who has been denied certification, denied recertification, or has had his or her certification revoked and believes that a railroad incorrectly determined that he or she failed to meet the certification requirements of this regulation when making the decision to deny or revoke certification, may petition the Federal Railroad Administrator to review the railroad's decision.

(b) The Administrator has delegated initial responsibility for adjudicating such disputes to the Operating Crew Review Board.

(c) The Operating Crew Review Board shall be composed of employees of the Federal Railroad Administration selected by the Administrator.

§ 242.503 Petition requirements.

(a) To obtain review of a railroad's decision to deny certification, deny recertification, or revoke certification, a person shall file a petition for review that complies with this section.

(b) Each petition shall:

(1) Be in writing;

(2) Be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590;

(3) Contain all available information that the person thinks supports the person's belief that the railroad acted improperly, including:

(i) The petitioner's full name;

(ii) The petitioner's current mailing address;

(iii) The petitioner's daytime telephone number;

(iv) The petitioner's e-mail address (if available);

(v) The name and address of the railroad; and

(vi) The facts that the petitioner believes constitute the improper action by the railroad, specifying the locations, dates, and identities of all persons who were present or involved in the railroad's actions (to the degree known by the petitioner);

(4) Explain the nature of the remedial action sought;

(5) Be supplemented by a copy of all written documents in the petitioner's possession or reasonably available to the petitioner that document that railroad's decision; and

(6) Be filed in a timely manner.

(c) A petition seeking review of a railroad's decision to deny certification or recertification or revoke certification in accordance with the procedures required by § 242.407 filed with FRA more than 120 days after the date the railroad's denial or revocation decision was served on the petitioner will be denied as untimely except that the Operating Crew Review Board for cause shown may extend the petition filing period at any time in its discretion:

(1) Provided the request for extension is filed before the expiration of the period provided in this paragraph; or

(2) Provided that the failure to timely file was the result of excusable neglect.

(d) A party aggrieved by a Board decision to deny a petition as untimely or not in compliance with the requirements of this section may file an appeal with the Administrator in accordance with § 242.511.

§ 242.505 Processing certification review petitions.

(a) Each petition shall be acknowledged in writing by FRA. The acknowledgment shall contain the docket number assigned to the petition and a statement of FRA's intention that the Board will render a decision on this petition within 180 days from the date that the railroad's response is received or from the date upon which the railroad's response period has lapsed pursuant to paragraph (c) of this section.

(b) Upon receipt of the petition, FRA will notify the railroad that it has received the petition and provide the railroad with a copy of the petition.

(c) Within 60 days from the date of the notification provided in paragraph

(b) of this section, the railroad may submit to FRA any information that the railroad considers pertinent to the petition. Late filings will only be considered to the extent practicable.

(d) A railroad that submits such information shall:

(1) Identify the petitioner by name and the docket number of the review proceeding;

(2) Serve copy of the information being submitted to FRA to the petitioner and petitioner's representative, if any; and

(3) Submit the information in triplicate to the Docket Clerk, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(e) Each petition will then be referred to the Operating Crew Review Board for a decision.

(f) Based on the record, the Board shall have the authority to grant, deny, dismiss or remand the petition.

(g) If the Board finds that there is insufficient basis for granting or denying the petition, the Board shall issue an order affording the parties an opportunity to provide additional information or argument consistent with its findings.

(h) *Standard of review for factual issues.* When considering factual issues, the Board will determine whether there is substantial evidence to support the railroad's decision, and a negative finding is grounds for granting the petition.

(i) *Standard of review for procedural issues.* When considering procedural issues, the Board will determine whether substantial harm was caused the petitioner by virtue of the failure to adhere to the dictated procedures for making the railroad's decision. A finding of substantial harm is grounds for reversing the railroad's decision. To establish grounds upon which the Board may grant relief, Petitioner must show:

(1) that procedural error occurred, and

(2) the procedural error caused substantial harm.

(j) *Standard of review for legal issues.* Pursuant to its reviewing role, the Board will consider whether the railroad's legal interpretations are correct based on a *de novo* review.

(k) The Board will determine whether the denial or revocation of certification or recertification was improper under this regulation (*i.e.,* based on an incorrect determination that the person failed to meet the certification requirements of this regulation) and grant or deny the petition accordingly. The Board will not otherwise consider the propriety of a railroad's decision, *i.e.,* it will not consider whether the railroad properly applied its own more stringent requirements.

(l) The Board's written decision shall be served on the petitioner, including the petitioner's representative, if any, and the railroad.

§ 242.507 Request for a hearing.

(a) If adversely affected by the Operating Crew Review Board's decision, either the petitioner before the Board or the railroad involved shall have a right to an administrative proceeding as prescribed by § 242.509.

(b) To exercise that right, the adversely affected party shall, within 20 days of service of the Board's decision on that party, file a written request with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M–30), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. The form of such request may be in written or electronic form consistent with the standards and requirements established by the Federal Docket Management System and posted on its Web site at *http://www.regulations.gov.*

(c) If a party fails to request a hearing within the period provided in paragraph (b) of this section, the Operating Crew Review Board's decision will constitute final agency action.

(d) If a party elects to request a hearing, that person shall submit a written request to the Docket Clerk containing the following:

(1) The name, address, telephone number, and email address (if available) of the respondent and the requesting party's designated representative, if any;

(2) The specific factual issues, industry rules, regulations, or laws that the requesting party alleges need to be examined in connection with the certification decision in question; and

(3) The signature of the requesting party or the requesting party's representative, if any.

(e) Upon receipt of a hearing request complying with paragraph (d) of this section, FRA shall arrange for the appointment of a presiding officer who shall schedule the hearing for the earliest practicable date.

§ 242.509 Hearings.

(a) An administrative hearing for a conductor certification petition shall be conducted by a presiding officer, who can be any person authorized by the Administrator, including an administrative law judge.

(b) The presiding officer may exercise the powers of the Administrator to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(c) The presiding officer shall convene and preside over the hearing. The hearing shall be a de novo hearing to find the relevant facts and determine the correct application of this part to those facts. The presiding officer may determine that there is no genuine issue covering some or all material facts and limit evidentiary proceedings to any issues of material fact as to which there is a genuine dispute.

(d) The presiding officer may authorize discovery of the types and quantities which in the presiding officer's discretion will contribute to a fair hearing without unduly burdening the parties. The presiding officer may impose appropriate non-monetary sanctions, including limitations as to the presentation of evidence and issues, for any party's willful failure or refusal to comply with approved discovery requests.

(e) Every petition, motion, response, or other authorized or required document shall be signed by the party filing the same, or by a duly authorized officer or representative of record, or by any other person. If signed by such other person, the reason therefor must be stated and the power of attorney or other authority authorizing such other person to subscribe the document must be filed with the document. The signature of the person subscribing any document constitutes a certification that he or she has read the document; that to the best of his or her knowledge, information and belief every statement contained in the document is true and no such statements are misleading; and that it is not interposed for delay or to be vexatious.

(f) After the request for a hearing is filed, all documents filed or served upon one party must be served upon all parties. Each party may designate a person upon whom service is to be made when not specified by law, regulation, or directive of the presiding officer. If a party does not designate a person upon whom service is to be made, then service may be made upon any person having subscribed to a submission of the party being served, unless otherwise specified by law, regulation, or directive of the presiding officer. Proof of service shall accompany all documents when they are tendered for filing.

(g) If any document initiating, filed, or served in, a proceeding is not in substantial compliance with the applicable law, regulation, or directive of the presiding officer, the presiding officer may strike or dismiss all or part of such document, or require its amendment.

(h) Any party to a proceeding may appear and be heard in person or by an authorized representative.

(i) Any person testifying at a hearing or deposition may be accompanied, represented, and advised by an attorney or other representative, and may be examined by that person.

(j) Any party may request to consolidate or separate the hearing of two or more petitions by motion to the presiding officer, when they arise from the same or similar facts or when the matters are for any reason deemed more efficiently heard together.

(k) Except as provided in § 242.507(c) and paragraph (u)(4) of this section, whenever a party has the right or is required to take action within a period prescribed by this part, or by law, regulation, or directive of the presiding officer, the presiding officer may extend such period, with or without notice, for good cause, provided another party is not substantially prejudiced by such extension. A request to extend a period which has already expired may be denied as untimely.

(l) An application to the presiding officer for an order or ruling not otherwise specifically provided for in this part shall be by motion. The motion shall be filed with the presiding officer and, if written, served upon all parties. All motions, unless made during the hearing, shall be written. Motions made during hearings may be made orally on the record, except that the presiding officer may direct that any oral motion be reduced to writing. Any motion shall state with particularity the grounds therefor and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon which is not already part of the record. Any matter submitted in response to a written motion must be filed and served within fourteen (14) days of the motion, or within such other period as directed by the presiding officer.

(m) Testimony by witnesses at the hearing shall be given under oath and the hearing shall be recorded verbatim. The presiding officer shall give the parties to the proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the presiding officer. The presiding officer may permit oral argument on any issues for which the presiding officer deems it appropriate and beneficial. Any evidence or argument received or proffered orally shall be transcribed and made a part of the record. Any physical evidence or written argument received or proffered shall be made a part of the record, except that the presiding officer may authorize the substitution of copies, photographs, or descriptions, when deemed to be appropriate.

(n) The presiding officer shall employ the Federal Rules of Evidence for United States Courts and Magistrates as general guidelines for the introduction of evidence. Notwithstanding paragraph (m) of this section, all relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(o) The presiding officer may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided for in § 209.7 of this chapter;

(3) Adopt any needed procedures for the submission of evidence in written form;

(4) Examine witnesses at the hearing;

(5) Convene, recess, adjourn or otherwise regulate the course of the hearing; and

(6) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(p) The petitioner before the Operating Crew Review Board, the railroad involved in taking the certification action, and FRA shall be parties at the hearing. All parties may participate in the hearing and may appear and be heard on their own behalf or through designated representatives. All parties may offer relevant evidence, including testimony, and may conduct such cross-examination of witnesses as may be required to make a record of the relevant facts.

(q) The party requesting the administrative hearing shall be the "hearing petitioner." The hearing petitioner shall have the burden of proving its case by a preponderance of the evidence. Hence, if the hearing petitioner is the railroad involved in taking the certification action, that railroad will have the burden of proving that its decision to deny certification, deny recertification, or revoke certification was correct. Conversely, if the petitioner before the Operating Crew Review Board is the hearing petitioner, that person will have the burden of proving that the railroad's decision to deny certification, deny recertification, or revoke certification was incorrect. The party who is not the hearing petitioner will be a respondent.

(r) FRA will be a mandatory party to the administrative hearing. At the start of each proceeding, FRA will be a respondent.

(s) The record in the proceeding shall be closed at the conclusion of the evidentiary hearing unless the presiding officer allows additional time for the submission of additional evidence. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.

(t) At the close of the record, the presiding officer shall prepare a written decision in the proceeding.

(u) The decision:

(1) Shall contain the findings of fact and conclusions of law, as well as the basis for each concerning all material issues of fact or law presented on the record;

(2) Shall be served on the hearing petitioner and all other parties to the proceeding;

(3) Shall not become final for 35 days after issuance;

(4) Constitutes final agency action unless an aggrieved party files an appeal within 35 days after issuance; and

(5) Is not precedential.

§ 242.511 Appeals.

(a) Any party aggrieved by the presiding officer's decision may file an appeal. The appeal must be filed within 35 days of issuance of the decision with the Federal Railroad Administrator, 1200 New Jersey Avenue, SE., Washington, DC 20590 and with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M–30), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the presiding officer's decision, supported by reference to applicable laws and regulations and with specific reference to the record. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.

(b) A party may file a reply to the appeal within 25 days of service of the appeal. The reply shall be supported by reference to applicable laws and regulations and with specific reference to the record, if the party relies on evidence contained in the record.

(c) The Administrator may extend the period for filing an appeal or a response for good cause shown, provided that the written request for extension is served before expiration of the applicable period provided in this section.

(d) The Administrator has sole discretion to permit oral argument on the appeal. On the Administrator's own initiative or written motion by any party, the Administrator may grant the

parties an opportunity for oral argument.

(e) The Administrator may remand, vacate, affirm, reverse, alter or modify the decision of the presiding officer and the Administrator's decision constitutes final agency action except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted.

(f) An appeal from an Operating Crew Review Board decision pursuant to § 242.503(d) must be filed within 35 days of issuance of the decision with the Federal Railroad Administrator, 1200 New Jersey Avenue, SE., Washington, DC 20590 and with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M–30), West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. A copy of the appeal shall be served on each party. The Administrator may affirm or vacate the Board's decision, and may remand the petition to the Board for further proceedings. An Administrator's decision to affirm the Board's decision constitutes final agency action.

APPENDIX A TO PART 242—SCHEDULE OF CIVIL PENALTIES

A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $100,000 for any violation where circumstances warrant. *See* 49 CFR part 209, Appendix A.

(Penalty Schedule to be included in Final Rule).

APPENDIX B TO PART 242—PROCEDURES FOR SUBMISSION AND APPROVAL OF CONDUCTOR CERTIFICATION PROGRAMS

This appendix establishes procedures for the submission and approval of a railroad's program concerning the training, testing, and evaluating of persons seeking certification or recertification as a conductor in accordance with the requirements of this part. It also contains guidance on how FRA will exercise its review and approval responsibilities.

Submission by a Railroad

As provided for in § 242.101, each railroad must have a program for determining the certification of each person it permits or requires to perform as a conductor or as a passenger conductor. Each railroad must submit its individual program to FRA for approval as provided for in § 242.103. Each program must be accompanied by a request for approval organized in accordance with this appendix. Requests for approval must contain appropriate references to the relevant portion of the program being discussed. Requests should be submitted in writing on standard sized paper (8½ x 11) and can be in letter or narrative format. The railroad's submission shall be sent to the Associate Administrator for Railroad Safety/Chief Safety Officer, FRA. The mailing address for FRA is 1200 New Jersey Avenue, SE., Washington, DC 20590. Simultaneous with its filing with the FRA, each railroad must serve a copy of its submission on the president of each labor organization that represents the railroad's employees subject to this part.

Organization of the Submission

Each request should be organized to present the required information in the following standardized manner. Each section must begin by giving the name, title, telephone number, and mailing address of the person to be contacted concerning the matters addressed by that section. If a person is identified in a prior section, it is sufficient to merely repeat the person's name in a subsequent section.

Section 1 of the Submission: General Information and Elections

The first section of the request must contain the name of the railroad, the person to be contacted concerning the request (including the person's name, title, telephone number, and mailing address) and a statement electing either to accept responsibility for educating previously untrained persons to be certified conductors or recertify only conductors previously certified by other railroads. *See* § 242.103(b).

If a railroad elects not to conduct the training of persons not previously trained to be a conductor, the railroad is not obligated to submit information on how the previously untrained will be trained. A railroad that makes this election will be limited to recertifying persons initially certified by another railroad. A railroad that initially elects not to accept responsibility for training its own conductors can rescind its initial election by obtaining FRA approval of a modification of its program. *See* § 242.103(f).

If a railroad elects to accept responsibility for training persons not previously trained to be conductors, the railroad is obligated to submit information on how such persons will be trained but has no duty to actually conduct such training. A railroad that elects to accept the responsibility for the training of such persons may authorize another railroad or a non-railroad entity to perform the actual training effort. The electing railroad remains responsible for assuring that such other training providers adhere to the training program the railroad submits. This section must also state which types of service the railroad will employ. *See* § 242.107.

Section 2 of the Submission: Training Persons Previously Certified

The second section of the request must contain information concerning the railroad's program for training previously certified conductors. As provided for in § 242.119(o) each railroad must have a program for the ongoing education of its conductors to assure that they maintain the necessary knowledge concerning operating rules and practices, familiarity with physical characteristics, and relevant Federal safety rules.

Section 242.119(o) provides a railroad latitude to select the specific subject matter to be covered, duration of the training, method of presenting the information, and the frequency with which the training will be provided. The railroad must describe in this section how it will use that latitude to assure that its conductors remain knowledgeable concerning the safe discharge of their responsibilities so as to comply with the performance standard set forth in § 242.119(o). This section must contain sufficient detail to permit effective evaluation of the railroad's training program in terms of the subject matter covered, the frequency and duration of the training sessions, the training environment employed (for example, and use of classroom, use of computer based training, use of film or slide presentations, use of on-job-training) and which aspects of the program are voluntary or mandatory.

Time and circumstances have the capacity to diminish both abstract knowledge and the proper application of that knowledge to discrete events. Time and circumstances also have the capacity to alter the value of previously obtained knowledge and the application of that knowledge. In formulating how it will use the discretion being afforded, each railroad must design its program to address both loss of retention of knowledge and changed circumstances, and this section of the submission to FRA must address these matters.

For example, conductors need to have their fundamental knowledge of operating rules and procedures refreshed periodically. Each railroad needs to advise FRA how that need is satisfied in terms of the interval between attendance at such training, the nature of the training being provided, and methods for conducting the training. A matter of particular concern to FRA is how each railroad acts to assure that conductors remain knowledgeable about the territory over which a conductor is authorized to perform but from which the conductor has been absent. The railroad must have a plan for the familiarization training that addresses the question of how long a person can be absent before needing more education and, once that threshold is reached, how the person will acquire the needed education. Similarly, the program must address how the railroad responds to changes such as the introduction of new technology, new operating rule books, or significant changes in operations including alteration in the territory conductors are authorized to work over.

Section 3 of the Submission: Testing and Evaluating Persons Previously Certified

The third section of the request must contain information concerning the railroad's program for testing and evaluating previously certified conductors. As provided for in § 242.121, each railroad must have a program for the ongoing testing and evaluating of its conductors to assure that they have the necessary knowledge and skills concerning operating rules and practices, familiarity with physical characteristics of the territory, and relevant Federal safety rules. Similarly, each railroad must have a program for ongoing testing and evaluating to assure that its conductors have the necessary vision and hearing acuity as provided for in § 242.117.

Section 242.121 requires that a railroad rely on written procedures for determining that each person can demonstrate his or her knowledge of the railroad's rules and practices and skill at applying those rules and practices for the safe performance as a conductor. Section 242.121 directs that, when seeking a demonstration of the person's knowledge, a railroad must employ a written test that contains objective questions and answers and covers the following subject matters: (i) Safety and operating rules; (ii) timetable instructions; (iii) physical characteristics of the territory; and (iv) compliance with all applicable Federal regulations. The test must accurately measure the person's knowledge of all of these areas.

Section 242.121 provides a railroad latitude in selecting the design of its own testing policies (including the number of questions each test will contain, how each required subject matter will be covered, weighting (if any) to be given to particular subject matter responses, selection of passing scores, and the manner of presenting the test information). The railroad must describe in this section how it will use that latitude to assure that its conductors will demonstrate their knowledge concerning the safe discharge of their responsibilities so as to comply with the performance standard set forth in § 242.121.

Section 242.117 provides a railroad latitude to rely on the professional medical opinion of the railroad's medical examiner concerning the ability of a person with substandard acuity to safely perform as a conductor. The railroad must describe in this section how it will assure that its medical examiner has sufficient information concerning the railroad's operations to effectively form appropriate conclusions about the ability of a particular individual to safely perform as a conductor.

Section 4 of the Submission: Training, Testing, and Evaluating Persons Not Previously Certified

Unless a railroad has made an election not to accept responsibility for conducting the initial training of persons to be conductors, the fourth section of the request must contain information concerning the railroad's program for educating, testing, and evaluating persons not previously trained as conductors. As provided for in § 242.119(d), a railroad that is issuing an initial certification to a person to be a conductor must have a program for the training, testing, and evaluating of its conductors to assure that they acquire the necessary knowledge and skills concerning operating rules and practices, familiarity with physical characteristics of the territory, and relevant Federal safety rules.

Section 242.119 establishes a performance standard and gives a railroad latitude in selecting how it will meet that standard. A railroad must describe in this section how it will use that latitude to assure that its conductors will acquire sufficient knowledge and skill and demonstrate their knowledge and skills concerning the safe discharge of their responsibilities. This section must contain the same level of detail concerning initial training programs as that described for each of the components of the overall program contained in sections 2 through 4 of this appendix. A railroad that plans to accept responsibility for the initial training of conductors may authorize another railroad or a non-railroad entity to perform the actual training effort. The authorizing railroad may submit a training program developed by that authorized trainer but the authorizing railroad remains responsible for assuring that such other training providers adhere to the training program submitted. Railroads that elect to rely on other entities, to conduct training away from the railroad's own territory, must indicate how the student will be provided with the required familiarization with the physical characteristics for its territory.

Section 5 of the Submission: Monitoring Operational Performance by Certified Conductors

The fifth section of the request must contain information concerning the railroad's program for monitoring the operation of its certified conductors. As provided for in § 242.123, each railroad must have a program for the ongoing monitoring of its conductors to assure that they perform in conformity with the railroad's operating rules and practices and relevant Federal safety rules.

Section 6 of the Submission: Procedures for Routine Administration of the Conductor Certification Program

The final section of the request must contain a summary of how the railroad's program and procedures will implement the various specific aspects of the regulatory provisions that relate to routine administration of its certification program for conductors. At a minimum this section needs to address the procedural aspects of the rule's provisions identified in the following paragraph.

Section 242.109 provides that each railroad must have procedures for review and comment on adverse prior safety conduct, but allows the railroad to devise its own system within generalized parameters. Sections 242.111, 242.115 and 242.403 require a railroad to have procedures for evaluating data concerning prior safety conduct as a motor vehicle operator and as railroad workers, yet leave selection of many details to the railroad. Sections 242.109, 242.201, and 242.401 place a duty on the railroad to make a series of determinations but allow the railroad to select what procedures it will employ to assure that all of the necessary determinations have been made in a timely fashion; who will be authorized to conclude that person will or will be not certified; and how it will communicate adverse decisions. Documentation of the factual basis the railroad relied on in making determinations under §§ 242.109, 242.117, 242.119 and 242.121 is required, but these sections permit the railroad to select the procedures it will employ to accomplish compliance with these provisions. Sections 242.125 and 242.127 permit reliance on certification/qualification determinations made by other entities and permit a railroad latitude in selecting the procedures it will employ to assure compliance with these provisions. Similarly, § 242.301 permits the use of railroad selected procedures to meet the requirements for certification of conductors performing service in joint operations territory. Sections 242.211 and 242.407 allow a railroad a certain degree of discretion in complying with the requirements for replacing lost certificates or the conduct of certification revocation proceedings.

This section of the request should outline in summary fashion the manner in which the railroad will implement its program so as to comply with the specific aspects of each of the rule's provisions described in the preceding paragraph.

FRA Review

The submissions made in conformity with this appendix will be deemed approved within 30 days after the required filing date or the actual filing date whichever is later. No formal approval document will be issued by FRA. FRA has taken the responsibility for notifying a railroad when it detects problems with the railroad's program. FRA retains the right to disapprove a program that has obtained approval due to the passage of time as provided for in section § 242.103.

Rather than establish rigid requirements for each element of the program, FRA has given railroads discretion to select the design of their individual programs within a specified context for each element. The rule, however, provides a good guide to the considerations that should be addressed in designing a program that will meet the performance standards of this rule.

In reviewing program submissions, FRA will focus on the degree to which a particular program deviates from the norms identified in its rule. To the degree that a particular program submission materially deviates from the norms set out in its rule, FRA's review and approval process will be focused on determining the validity of the reasoning relied on by a railroad for selecting its alternative approach and the degree to which the alternative approach is likely to be effective in producing conductors who have the knowledge and ability to safely perform as conductors.

APPENDIX C TO PART 242—PROCEDURES FOR OBTAINING AND EVALUATING MOTOR VEHICLE DRIVING RECORD DATA

The purpose of this appendix is to outline the procedures available to individuals and railroads for complying with the requirements of §§ 242.109 and 242.111 of this part. Those provisions require that railroads consider the motor vehicle driving record of each person prior to issuing him or her certification or recertification as a conductor.

To fulfill that obligation, a railroad must review a certification candidate's recent motor vehicle driving record. Generally, that will be a single record on file with the state agency that issued the candidate's current license. However, it can include multiple records if the candidate has been issued a motor vehicle driving license by more than one state agency or foreign country.

Access to State Motor Vehicle Driving Record Data

The right of railroad workers, their employers, or prospective employers to have access to a state motor vehicle licensing agency's data concerning an individual's driving record is controlled by state law. Although many states have mechanisms through which employers and prospective employers such as railroads can obtain such data, there are some states in which privacy concerns make such access very difficult or impossible. Since individuals generally are entitled to obtain access to driving record data that will be relied on by a state motor vehicle licensing agency when that agency is taking action concerning their driving privileges, FRA places responsibility on individuals, who want to serve as conductors to request that their current state drivers licensing agency or agencies furnish such data directly to the railroad considering certifying them as a conductor. Depending on the procedures adopted by a particular state agency, this will involve the candidate's either sending the state agency a brief letter requesting such action or executing a state agency form that accomplishes the same effect. It will normally involve payment of a nominal fee established by the state agency for such a records check. In rare instances, when a certification candidate has been issued multiple licenses, it may require more than a single request.

Once the railroad has obtained the motor vehicle driving record(s), the railroad must afford the prospective conductor an opportunity to review that record and respond in writing to its contents in accordance with the provisions of § 242.401. The review opportunity must occur before the railroad evaluates that record. The railroad's required evaluation and subsequent decision making must be done in compliance with the provisions of this part.

APPENDIX D TO PART 242—MEDICAL STANDARDS GUIDELINES

(1) The purpose of this appendix is to provide greater guidance on the procedures that should be employed in administering the vision and hearing requirements of § 242.117.

(2) In determining whether a person has the visual acuity that meets or exceeds the requirements of this part, the following testing protocols are deemed acceptable testing methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry. The acceptable test methods are shown in the left hand column and the criteria that should be employed to determine whether a person has failed the particular testing protocol are shown in the right hand column.

Accepted tests	Failure criteria
Pseudoisochromatic Plate Tests	
American Optical Company 1965	5 or more errors on plates 1–15.
AOC—Hardy-Rand-Ritter plates-second edition	Any error on plates 1–6 (plates 1–4 are for demonstration—test plate 1 is actually plate 5 in book).
Dvorine—Second edition	3 or more errors on plates 1–15.
Ishihara (14 plate)	2 or more errors on plates 1–11.
Ishihara (16 plate)	2 or more errors on plates 1–8.
Ishihara (24 plate)	3 or more errors on plates 1–15.
Ishihara (38 plate)	4 or more errors on plates 1–21.
Richmond Plates 1983	5 or more errors on plates 1–15.
Multifunction Vision Tester	
Keystone Orthoscope	Any error.
OPTEC 2000	Any error.
Titmus Vision Tester	Any error.
Titmus II Vision Tester	Any error.

(3) In administering any of these protocols, the person conducting the examination should be aware that railroad signals do not always occur in the same sequence and that "yellow signals" do not always appear to be the same. It is not acceptable to use "yarn" or other materials to conduct a simple test to determine whether the certification candidate has the requisite vision. No person shall be allowed to wear chromatic lenses during an initial test of the person's color vision; the initial test is one conducted in accordance with one of the accepted tests in the chart and § 242.117(h)(3).

(4) An examinee who fails to meet the criteria in the chart, may be further evaluated as determined by the railroad's medical examiner. Ophthalmologic referral, field testing, or other practical color testing may be utilized depending on the experience of the examinee. The railroad's medical examiner will review all pertinent information and, under some circumstances, may restrict an examinee who does not meet the criteria for serving as a conductor at night, during adverse weather conditions or under other circumstances. The intent of § 242.117(j) is not to provide an examinee with the right to make an infinite number of requests for further evaluation, but to provide an examinee with at least one opportunity to prove that a hearing or vision test failure does not mean the examinee cannot safely perform as a conductor. Appropriate further medical evaluation could include providing another approved scientific screening test or a field test. All railroads should retain the discretion to limit the number of retests that an examinee can request but any cap placed on the number of retests should not limit retesting when changed circumstances would make such retesting appropriate. Changed circumstances would most likely occur if the examinee's medical condition has improved in some way or if technology has advanced to the extent that it arguably could compensate for a hearing or vision deficiency.

(5) Conductors who wear contact lenses should have good tolerance to the lenses and should be instructed to have a pair of corrective glasses available when on duty.

APPENDIX E TO PART 242—APPLICATION OF REVOCABLE EVENTS

Revocable Event		Application of Revocable Events						
		Periods of Revocation					Employees with Multiple Certifications	
		Main Track				Other than Main Track Where Restricted Speed or the Operational Equivalent Is in Effect	Main Track or Other than Main Track	
		1st Offense	2nd Offense Within 24 Months	3rd Offense Within 36 Months	4th Offense Within 36 Months	No Offense Within Previous 12 Months	Offense (as a Conductor)	Offense (as an Engineer)
1	Signal requiring complete stop before passing	30 Days	6 Months	1 Year	3 Years	Not Applicable	Employee May Not Work as an Engineer During the Period of Revocation	Employee May Not Work as a Conductor During the Period of Revocation
2	Restricted Speed & Speed; 10 mph over							
3	Required Air Brake Test							
4	Occupying Main Track without Authority							
5	Disabling a Safety Device							
6	Shoving Movements					Half Revocation Period	Employee May Work as an Engineer During the Period of Revocation	Not applicable
7	Equipment Fouling Adjacent Tracks							
8	Hand Operated Switches (Crossovers)							
9	Hand Operated Switches Connected to Main Track					Not Applicable		
10	Hand Operated Crossover Switches (before & after movement)					Half Revocation Period		
11	Hand Operated Derails							
12	Drug & Alcohol	Different periods of revocation may be applied (see 242.403 & 242.115)				Not Applicable	Employee May Not Work as an Engineer During the Period of Revocation	Employee May Not Work as a Conductor During the Period of Revocation

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Karen J. Rae,

Deputy Administrator.

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