be reported to the Office of Administration at Headquarters.

945.602–70 Local screening.

Local screening shall be done using EADS.

945.603 Abandonment, destruction or donation of excess personal property.

See 945.670 for DOE disposal methods.

945.604 Disposal of surplus property.

945.604–1 Disposal methods.

(b)(3) *Recovering precious metals.* Contractors generating contractor inventory containing precious metals or possessing precious metals excess to their programmatic requirements, shall identify and promptly report such items to the contracting officer for review, approval and reporting to the DOE Business Center for Precious Metals Sales & Recovery (Business Center). This includes Gold, Silver, Platinum, Rhodium, Palladium, Iridium, Osmium, and Ruthenium in any form, shape, concentration, or purity. Report all RCRA contaminated precious metals, but not radiological contaminated. The Y–12 NNSA Site Office is responsible for maintaining the DOE Business Center. Precious metals scrap will be reported to the DOE Business Center.

(d) See 945.670 for DOE disposal methods.

945.670 DOE disposal methods.

945.670–1 Plant clearance function.

If the plant clearance function has not been formally delegated to another Federal agency, the contracting officer shall assume all responsibilities of the plant clearance officer identified in 48 CFR 45.606–3.

945.670–2 Disposal of radioactively contaminated personal property.

Special procedures regarding the disposal of radioactively contaminated property may be found at 41 CFR 109–45.50.

945.670–3 Waiver of screening requirements.

(a) The Director of the Personal Property Management Division, within the Headquarters procurement organization may authorize exceptions from screening requirements.

(b) A request to the Director of the Personal Property Management Division, within the Headquarters procurement organization for the waiver of screening requirements must be submitted by the Procurement Directors with a justification setting forth the compelling circumstances warranting the exception.

945.671 Contractor inventory in foreign countries.

Contractor inventory located in foreign countries will be utilized and disposed of in accordance with DOE–PMR 41 CFR part 109–43, subpart 109–43.5, and part 109–45, subpart 45.51.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

15. The authority citation for part 970 continues to read as follows:

Authority: 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.*

970.5244–1 [Amended]

16. Section 970.5244–1 is amended by:

a. Revising the clause date to read as set forth below; and

b. Revising clause paragraph (k) and adding a paragraph (q)(13).

The revisions and additions read as follows:

970.5244–1 Contractor purchasing system.

* * * * *

CONTRACTOR PURCHASING SYSTEM (XXX 20XX) [abbreviated month and year of the date of publication of the final rule]

* * * * *

(k) *Government Property.* The Contractor shall establish and maintain a property management system that complies with criteria in 48 CFR 970.5245–1, Property, and 48 CFR 52.245–1, Government Property.

* * * * *

(q) * * *

(13) Products made in Federal penal and correctional institutions—41 CFR 101–26.702

* * * * *

17. Section 970.5245–1 is amended by:

a. Revising the date of the clause to read as set forth below;

b. Removing and reserving paragraph (i)(1)(ii)(B).

The revisions read as follows:

970.5245–1 Property.

* * * * *

PROPERTY (XXX 20XX) [abbreviated month and year 30 DAYS AFTER date of publication of the final rule]

* * * * *

(i) * * *

(1) * * *

(ii) * * *

(B) [Reserved]

* * * * *

[FR Doc. 2011–4350 Filed 3–3–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2009–0041, Notice No. 1]

49 CFR Part 234

RIN 2130–AC12

Systems for Telephonic Notification of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA is proposing amendments to its primary regulations on grade crossing safety. The major amendments proposed would require a railroad that dispatches a train through a public or private highway-rail or pathway grade crossing to establish and maintain a system that allows a member of the public to call the railroad and report an emergency or other unsafe condition at the crossing. Upon receiving such a report, the railroad would be required to warn all trains authorized to operate through the crossing of the reported unsafe condition, inform local law enforcement of the reported unsafe condition, and either investigate the report itself or request that the railroad with maintenance responsibility for the crossing investigate the report. If the report is substantiated, the railroad with maintenance responsibility for the crossing would be required to take certain actions to remedy the condition found.

DATES: Written comments must be received by May 3, 2011. Comments received after that date will be considered to the extent possible without incurring additional expenses or delays.

FRA anticipates being able to resolve this rulemaking without a public, oral hearing. However, if FRA receives a specific request for a public, oral hearing prior to May 3, 2011, one 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: *Comments:* Comments related to Docket No. FRA–2009–0041 may be submitted by any of the following methods:

- *Online:* Comments should be filed at the Federal eRulemaking Portal, *http://www.regulations.gov.* Follow the online instructions for submitting comments.

- *Fax:* 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:* Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to *http://www.regulations.gov* including any personal information. 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 visit the Docket Management Facility, U.S. Department of Transportation, West Building, Ground floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Beth Crawford, Transportation Specialist, Grade Crossing Safety and Trespass Prevention, Office of Safety Analysis, FRA, 1200 New Jersey Avenue, SE., Mail Stop 25, Washington, DC 20590 (telephone: 202–493–6288), *beth.crawford@dot.gov;* or Matthew Navarrete, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Mail Stop 10, Washington, DC 20590 (telephone: 202–493–0738), *matthew.navarrete@dot.gov.*

SUPPLEMENTARY INFORMATION:

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I. Statutory Background

The proposed rule is intended specifically to help implement Sec. 205 of the Rail Safety Improvement Act of 2008 (RSIA), Public Law 110–432, Division A, which was enacted October 16, 2008, and generally to increase safety at highway-rail and pathway grade crossings. *See* 49 U.S.C. 20152, Notification of grade crossing problems, and definitions in proposed § 234.301. Sec. 205 of RSIA mandates that the Secretary of Transportation (Secretary) require certain railroad carriers (railroads) to take a series of specified actions related to setting up and using systems for the public to notify the dispatching railroad of grade crossing problems. A separate statutory provision, 49 U.S.C. 20103, gives the Secretary very broad authority to prescribe rail safety regulations and issue rail safety orders pursuant to notice-and-comment procedures. The Secretary has delegated the responsibility to carry out both Sec. 205 of RSIA and 49 U.S.C. 20103 to the Administrator of FRA. 49 CFR 1.49(m), (oo). Essentially, Sec. 205 of RSIA imposes a mandate requiring FRA as the Secretary's delegate to prescribe regulations or orders imposing the requirements specified in that section; FRA has chosen to require the railroads to set up and use a notification program specified by Sec. 205 of RSIA by conducting a rulemaking and prescribing a regulation.

In particular, under Sec. 205 of RSIA, FRA is to require railroads to "establish and maintain a toll-free telephone service for rights-of-way over which the railroad dispatches trains" through "the grade crossing of railroad trains on those rights-of-way and public or private roads," "to directly receive calls reporting" any of three types of unsafe conditions at the grade crossings or other safety-related information involving such a grade crossing. Under that section, the three types of reportable unsafe conditions are as follows: (1) Malfunctions of warning signals, crossing gates, and other devices intended to promote safety at the highway-rail grade crossing; (2) disabled vehicles blocking railroad tracks at such grade crossings; and (3) obstructions to the view of a pedestrian or a vehicle operator for a reasonable distance in either direction of a train's approach to such a grade crossing. To the extent that the requirements proposed in this NPRM exceed the requirements specified by Sec. 205 of RSIA, such as covering pathway grade crossings, FRA relies primarily upon its general safety rulemaking authority under 49 U.S.C. 20103.

In addition to specifying the requirement that the Secretary must impose on dispatching railroads to establish a telephonic notification system, Sec. 205 of RSIA includes a series of additional specifications to be reflected in FRA's regulation. When a railroad receives a report of a malfunction of a warning signal, crossing gate, and/or other device intended to promote safety at the grade crossing or a report of a disabled vehicle blocking a railroad track at a grade crossing through which the railroad dispatches a train, the dispatching railroad must immediately contact trains operating near the grade crossing to warn them of the malfunctioning device or disabled vehicle. After contacting the trains as necessary, the dispatching railroad must contact, as necessary, appropriate public safety officials having jurisdiction over the grade crossing to provide them with the information necessary for them to direct traffic, assist in the removal of the disabled vehicle, or carry out other activities. When a railroad receives a report of either obstructions to the view of a pedestrian or a vehicle operator for a reasonable distance in either direction of a train's approach to the grade crossing or other safety information involving such grade crossings, the railroad must timely investigate the report, remove the obstruction if possible, or correct the unsafe condition.

Further, under Sec. 205 of RSIA, FRA must require that the owner of the track at the grade crossing "ensure the placement * * * of appropriately located signs" bearing, at a minimum, a toll-free telephone number to be used by the public for placing calls to report unsafe conditions at the crossing to the railroad that dispatches trains on that right-of-way through the crossing, an explanation of the purpose of that toll-free telephone number, and the grade crossing number assigned to that crossing by the U.S. Department of Transportation (DOT) National Crossing Inventory File.

Finally, Sec. 205 of RSIA allows FRA to waive the requirement in the mandated rule that the telephone service be toll-free for Class II and Class III rail carriers if the agency determines that the toll-free service would be cost prohibitive or unnecessary.

II. History of Accidents Relevant to This Rulemaking

There are approximately 221,000 public and private at-grade highway-rail and pathway grade crossings in the United States. In other words, the country has 221,000 locations where a collision can occur between a train and a car, truck, or other motor vehicle, or a pedestrian at any one time. Grade crossing collisions are among the most challenging areas in FRA's efforts to reduce deaths and injuries along the Nation's railroads. In fact, since 1997, grade crossing collisions have caused more railroad-related fatalities per year than any other single factor except for trespassing on railroad property. During the 11-year period from 1999–2009, 2,306 collisions occurred at highway-rail and pathway grade crossings where a vehicle was stalled or sight obstructions were reported to FRA. *See* accident reporting regulations at 49 CFR part 225 and 49 CFR 234.7.

A train striking a pedestrian can result in serious injury or death. Further, a collision between a train and a vehicle of any size can be catastrophic. Serious injuries or deaths are far more likely to occur with a collision between a train and a vehicle than with a collision between two vehicles. While significant improvements have been achieved over the last two decades, grade crossing collisions still pose a significant public safety threat that can spiral beyond the immediate impact of the vehicle and train.

The derailment of a train as a result of a collision at the grade crossing can have a disastrous effect on the train crew or even on an entire community, especially if the derailment results in a release of hazardous material that necessitates the evacuation of a neighborhood or the community. Moreover, if a passenger train derails as a result of a collision, the risk of injuries extends beyond the vehicle occupants to the crew and passengers of the train. This was the case in 1999 in Bourbonnais, Illinois, when a National Railroad Passenger Corporation (Amtrak) passenger train struck a truck loaded with steel at a highway-rail grade crossing. Almost the entire train derailed, causing 11 deaths and 131 injuries to the passengers and crew of the train.

Other vehicles and pedestrians in the vicinity of a highway-rail or pathway grade crossing collision can also be at grave risk. This was the scenario in 1993 when an Amtrak passenger train collided with a gasoline tanker truck at a highway-rail grade crossing in Ft. Lauderdale, Florida. The truck driver was attempting to cross through a grade crossing where traffic was congested. The tanker truck was punctured when it was struck by the Amtrak train; a fire erupted and engulfed the truck and nine other vehicles near the crossing. The fire killed the driver of the truck and five occupants of three stopped vehicles near the grade crossing.

III. History of Emergency Notification Systems

A. In General

The ability to provide an effective means for a member of the public to immediately alert the railroad to an emergency situation or other unsafe condition at a highway-rail or pathway grade crossing enables the railroad and local public safety officials to respond earlier to avert a serious incident. Currently, all Class I railroads have put in place some sort of means by which they can receive notification from the public of any emergency or unsafe condition at most of their grade crossings, whereas many regional and short line railroads do not have any such kind of notification system in place. The proposed rule would require certain railroads to implement such a system, which this proposed rule calls an Emergency Notification System (ENS), covering public and private highway-rail and pathway grade crossings.

B. Various ENS Programs in the United States

In 1983, the State government of Texas established the first toll-free call-in program in the United States that has enabled the public to notify a State call center of problems at the State's public highway-rail grade crossings equipped with automated warning devices. In the current Texas program, after receiving such a call, the Texas call center operated by the Texas Department of Public Safety in turn notifies the railroad involved. The call-in system requires that a sign be posted at the highway-rail grade crossing with the crossing's unique identifying number from the U.S. DOT National Crossing Inventory File, as well as a toll-free telephone number. Texas's call center has a dedicated computer with a modified inventory database that facilitates the call recipient's identification of the relevant crossing and railroad. The Center operator then calls the appropriate railroad and relays the report of the problem. At last report the Texas system handles more than 1,200 calls per month for the State's public crossings, even though only those crossings equipped with active warning devices are equipped with the signs containing the Center's toll-free telephone number. It should be noted that if FRA adopts the proposed rule, railroads using State programs for notification of unsafe conditions at grade crossings, such as Texas's program, may no longer comply with the regulation. However, a State would be allowed to operate as a "third-party telephone service" as described in the proposed rule as long as the program complies with all the conditions specified.

Following the successful establishment of this program in Texas, and in part at the urging of FRA and the National Transportation Safety Board (NTSB), our Nation's major railroads have voluntarily adopted similar systems for the majority of their highway-rail and pathway grade crossings, sometimes including all grade crossings, *i.e.,* systems not limited only to public highway-rail grade crossings or only to those equipped with active warning devices. Unfortunately, more than 72,000 public and private highway-rail and pathway grade crossings belonging to our Nation's short line and regional railroads are not included. Many of these railroads do not have 24-hour operations and do not have the resources to establish such a call-in program.

In 1994, Congress directed FRA to conduct pilot projects in at least two States to demonstrate the efficiency of such "emergency notification system" programs covering highway-rail grade crossings and to report to Congress on the results of the programs. Sec. 301, "Emergency Notification of Grade Crossing Problems," of Public Law 103–440 (108 Stat. 4626). Initial efforts were spent in a cooperative effort with the Texas Department of Emergency Management evaluating the Texas system. Texas was designated one of the pilot States, and an extensive list of software, hardware, and operating improvements was developed. FRA prepared and implemented new software on an upgraded system in 1999. Based on comments and suggestions, further improvements were implemented in 2001 when the Texas call center operation was transferred to the Texas Department of Public Safety.

This 2001 version was modified for use by a 911 center in Clinton County, Pennsylvania, with the participation of eight short line railroads. A 30-month demonstration program was initiated in November 2001.

In 2002, an agreement was reached with the Paducah & Louisville Railroad to conduct an additional pilot project (the third). At the time this was a

regional railroad with 24-hour operations and approximately 400 grade crossings. FRA modified the program software to accommodate the railroad's needs.

Further, the 1994 Highway-Rail Crossing Safety Action Plan issued by DOT recommended an automated telephone answering system for handling telephone calls to report emergencies, malfunctions, and other safety-related problems at highway-rail intersections. However, the automated system proved to be unworkable, whereas the staffed systems were successful.

C. FRA's 2006 Report to Congress

In May 2006, as mandated by Congress in Sec. 301, "Emergency Notification of Grade Crossing Problems," of Public Law 103–440, FRA published a report to Congress outlining the development of ENS programs up to that date (Report). A copy of the Report can be found at *http://www.fra.dot.gov/downloads/safety/1_800_report.pdf.* The Report covered, among other things, the Texas ENS program, the Pennsylvania ENS program, Congressional action, NTSB recommendations, and FRA actions. Based on the findings of the Report, FRA made certain recommendations, to Congress. These recommendations were as follows: (1) Class I railroads should continue to implement, augment, and review the emergency notification programs they have initiated; (2) smaller railroads, including commuter railroads, should work cooperatively through The American Short Line and Regional Railroad Association, or another suitable organization or organizations, to establish ENS programs serving member railroads; (3) signs installed or replaced at highway-rail grade crossings should be displayed prominently to crossing users (*e.g.,* mounted on signal masts where practicable) and conform to the Federal Highway Administration's (FHWA) Manual on Uniform Traffic Control Devices (MUTCD) guidance; and (4) any program that does not currently include passive highway-rail grade crossings be expanded to include, at minimum, all such public crossings where it is practicable to do so.

The Report concluded that the pilot ENS programs in both Texas and Pennsylvania afforded the general public a quick and easy means of alerting appropriate railroad officials of safety-related problems. Additionally, the Report concluded that the Texas ENS likely resulted in the prevention of numerous accidents and injuries, and Pennsylvania's ENS, albeit on a smaller scale than Texas's, demonstrated that it is possible to create emergency call systems through the development of agreements with multiple railroads. Finally, the Report emphasized that the Pennsylvania ENS also showed the value of including all highway-rail grade crossings, not just those with train-activated warning devices.

IV. Section-by-Section Analysis

Section 234.1 Scope

FRA proposes to expand this part to include new subpart E, Emergency Notification Systems for Reporting Unsafe Conditions at Highway-Rail and Pathway Grade Crossings. For this reason, FRA proposes to amend the description of the scope of the part, § 234.1, by inserting the following sentence: "[t]his part also prescribes minimum requirements that railroads establish a system for receiving toll-free telephone calls from the public at large about unsafe conditions at highway-rail and pathway grade crossings and taking certain actions in response." Further, for readability of the section, FRA proposes to designate the text of proposed § 234.1 as two paragraphs, with paragraph (b) consisting of the last sentence of current § 234.1.

Section 234.3 Application and Responsibility for Compliance

FRA also proposes to amend § 234.3, Application. Currently, that section, says that, except for § 234.11 (which requires certain States to file State-specific grade crossing safety action plans), part 234 applies to all railroads with the exception of three types. The first type of railroad not subject to part 234 is a railroad that "exclusively operates freight trains only on track which is not part of the general railroad system of transportation." 49 CFR 234.3(a). This existing exception is intended to cover "plant railroads" as defined in proposed § 234.5, discussed below. The second category of railroads not subject to part 234 is "[r]apid transit operations within an urban area that are not connected to the general railroad system of transportation." 49 CFR 234.3(b). The third category of railroads not subject to part 234 is each "railroad that operates passenger trains only on track inside an installation is insular * * *." The term "insular" is explained in the rest of the exception. 49 CFR 234.3(c).

Proposed § 234.3(a) would clarify that these same three categories—(1) Plant railroads, (2) urban rapid transit operations not connected to the general railroad system of transportation, and (3) insular tourist, scenic, historic, and excursion railroads (tourist railroads) that are not part of the general railroad system of transportation—are exempt from the requirements of part 234. *See* 49 CFR part 209, app. A for a discussion of the term "general railroad system of transportation" (general system). FRA's reasons for excluding these three categories of railroads are policy or statutory. FRA almost never exercises its statutory safety jurisdiction over plant railroads as a matter of policy. FRA lacks statutory jurisdiction over urban rapid transit operations not connected to the general system. *See* 49 U.S.C. 20102, 20103. As a matter of policy, FRA generally does not exercise its statutory jurisdiction over tourist railroads that operate only off the general system; however, part 234 is an existing example of an FRA safety regulation that does apply to tourist railroads that operate only off the general system but only if the tourist railroads are noninsular, *e.g.,* because they have a public highway-rail grade crossing that is in use.

In addition, proposed paragraph (b) of § 234.3 explains that even though a provision of part 234 is stated as requiring certain action by a railroad, a railroad may not avoid fulfilling the requirements of this part by using contractors or subcontractors. For example, if a railroad uses a contractor to put up ENS signs required by proposed § 234.311, FRA will still enforce the provisions of § 234.311 to ensure that the proper signs have been posted and maintained. FRA will hold the railroad liable for its contractor's or subcontractor's failing to fulfill the requirements of this proposed part.

Section 234.5 Definitions

FRA proposes three amendments to the existing "Definitions" section for part 234. First, FRA proposes to amend part 234's existing definition of "credible report of system malfunction." Currently, subpart C and proposed subpart E refer to "credible reports of warning system malfunctions" rather than "credible report of system malfunction." To address this inconsistency, FRA proposes to replace "credible report of system malfunction" with "credible report of warning system malfunction" in § 234.5. Furthermore, as a minor clarification within the definition of "credible report of system malfunction," FRA proposes to replace "an identified highway-rail crossing" with "an identified highway-rail grade crossing." "[H]ighway-rail crossing" would be replaced with "highway-rail grade crossing" because Subpart C was never intended to apply to grade-separated highway-rail crossings because Subpart C deals only with

reports of warning system malfunctions and grade-separated highway-rail crossings are not equipped with warning systems.

Second, FRA proposes to add a definition of "FRA." The term would be an acronym meaning the Federal Railroad Administration of the U.S. Department of Transportation.

Finally, FRA proposes to add a definition of "plant railroad." The term refers to a type of operation that has traditionally been excluded from the application of FRA regulations because it is not part of the general railroad system of transportation. There is a more extensive explanation of the general railroad system of transportation in appendix A to 49 CFR part 209, and it is explicitly defined there as "the network of standard gage track over which goods may be transported throughout the nation and passengers may travel between cities and within metropolitan and suburban areas."

Subpart E—Emergency Notification Systems for Reporting Unsafe Conditions at Highway-Rail and Pathway Grade Crossings

FRA proposes to amend part 234 by adding new subpart E, Emergency Notification Systems for Reporting Unsafe Conditions at Highway-Rail and Pathway Grade Crossings (proposed subpart E), which would include §§ 234.301–234.317.

Section 234.301 Definitions

This proposed section contains definitions of terms used in proposed subpart E, listed alphabetically without designations. "Automated answering service" means a type of answering service in which a telephone call is answered by any means other than a human being speaking live to the caller at the time the call is made. Multiple provisions in proposed subpart E prohibit a railroad from using an automated answering service to receive calls. *See* proposed §§ 234.303(a), 234.305(h)(2), 234.307(a), and 234.307(b)(2). The rationale for this prohibition is FRA's belief that because in certain scenarios, such as a disabled vehicle blocking the crossing, time is of the essence, and speaking to a human being rather than a machine or recording reduces the time required to initiate the appropriate remedial action, thus improving the opportunity to avert a collision. FRA is considering and seeks comment regarding setting forth a maximum amount of time a caller must wait before a call is answered by the railroad.

"Class II" and "Class III" have the meanings assigned by regulations of the Surface Transportation Board, which may be found at 49 CFR part 1201, General Instructions 1–1, Classification of carriers. To ensure that the definitions of "Class II" and "Class III" as used in this proposed subpart incorporate any changes that the Surface Transportation Board may make after the publication of this proposed subpart, FRA's definition includes any revision to the regulations as applied by the Surface Transportation Board, which includes modifications in the class threshold based on revenue deflator adjustments.

In certain scenarios the railroad that dispatches or otherwise provides the authority for the movement of a train through a grade crossing (such as movement on the mainline under yard limit authority) is not the same railroad that has maintenance responsibility for that crossing. To address this type of situation, FRA proposes to use the terms "dispatching railroad" and "maintaining railroad." "Dispatching railroad" is defined as a railroad that dispatches or otherwise provides the authority for the movement of one or more trains through a highway-rail or pathway grade crossing. The definition of "maintaining railroad" is discussed below.

To properly receive notification of unsafe conditions at grade crossings, a railroad or group of railroads would be required to implement a system that consists of multiple components. To refer to the entire set of these various components, the term "Emergency Notification System" or its abbreviation ("ENS") is used. Specifically, "Emergency Notification System" means a system in place by which a railroad informs the public how to report an unsafe condition at a highway-rail or pathway grade crossing and enables the public to do so and receives, processes, and attends to reports of unsafe conditions at highway-rail or pathway grade crossings. The required components of an Emergency Notification System are as follows: (1) Signs, placed and maintained at the grade crossings by the railroad responsible for maintaining the crossing, that display the information necessary for the public to report an unsafe condition at the grade crossing to the railroad that dispatches trains through the crossing; (2) the method that the dispatching railroad uses to receive and process a telephone call reporting the unsafe condition; (3) the remedial actions that the dispatching railroad takes to address the report of the unsafe condition; (4) the remedial actions that the maintaining railroad takes if the dispatching railroad does not have maintenance responsibility; and (5) the recordkeeping conducted by the railroad or railroads in response to the report of the unsafe condition at the grade crossing. Although the word "emergency" is part of the term "Emergency Notification System," FRA does not intend to imply that all reportable unsafe conditions are emergencies, *i.e.,* conditions that create an imminent hazard of death or injury to an individual or damage to property. In other words, some reportable unsafe conditions are not emergencies. The term "Emergency Notification System" is used in part because of its use in the 1994 legislation and its use colloquially.

It may be noted that this proposed section lacks a proposed definition of "highway-rail grade crossing." Such a proposed definition is unnecessary because the current definition in § 234.5 applies to part 234 as a whole and would apply to proposed subpart E. Existing § 234.5 defines "highway-rail grade crossing" as "a location where a public highway, road, street, or private roadway, including associated sidewalks and pathways crosses one or more railroad tracks at grade."

"Maintaining railroad" means the owner of the track at the highway-rail or a pathway grade crossing. If the track owner has contracted out the responsibility to maintain the warning system or track structure at a highway-rail or a pathway grade crossing, the contractor is considered the "maintaining railroad" for the purposes of this subpart. As mentioned previously, the railroad that dispatches a train through a grade crossing and the railroad that maintains the crossing may not necessarily be the same entity. To address this scenario, FRA proposes a definition for "maintaining railroad."

"Pathway grade crossing" means a pathway that has all of the following characteristics: (1) It is explicitly authorized by a public authority or a railroad; (2) it is dedicated for the use of nonvehicular traffic, including pedestrians, bicyclists, and others; (3) it is not associated with a public highway, road, or street, or a private roadway; and (4) it crosses one or more railroad tracks at grade. Sec. 205 of RSIA provides that the Secretary should require railroads to provide for telephonic notification of safety problems at "the grade crossing of railroad tracks on those rights-of-way and public or private roads." 49 U.S.C. 20152(a)(1)(A) and references to "such grade crossings" in 49 U.S.C. 20152(a)(1)(B)–(D). In other words, Sec. 205 of RSIA does not mention pathway grade crossings. Section 2 of RSIA, however, defines "crossing," as used in RSIA, as a location, other than a location where one more railroad tracks

cross one or more railroad tracks, where—

(A) A public highway, road, or street, or a private roadway, including associated sidewalks and pathways, crosses one or more railroad tracks either at grade or grade-separated; or

(B) A pathway explicitly authorized by a public authority or a railroad carrier that is dedicated for the use of nonvehicular traffic, including pedestrians, bicyclists, and others, that is not associated with a public highway, road, or street, or a private roadway, crosses one or more railroad tracks either at grade or grade-separated.

122 Stat. 4848, 4849–50. Since the term "crossing," as defined in section 2 of RSIA, includes pathway grade crossings, proposed subpart E will also include pathway grade crossings. Furthermore, during the 11-year period from 1999–2009, 22 deaths and 13 injuries resulted from accidents at pathway grade crossings. It is reasonable to expect that an ENS system that includes pathway grade crossings would increase the safety of pathway grade crossings by increasing the likelihood that the public will notify railroads of unsafe conditions there and enable the railroads to intervene in time to avert accidents at the crossings and any resulting fatalities and injuries. Therefore, FRA believes that the inclusion of pathway grade crossings in proposed subpart E is "necessary" for "railroad safety" within the meaning of 49 U.S.C. 20103.

FRA recognizes that the definition of "crossing" from section 2 of RSIA includes public, private, and pathway crossings that are grade separated; however, at this time FRA does not intend to expand part 234 and proposed subpart E to include grade-separated crossings. FRA declines to include grade-separated crossings in the proposed rule either because the unsafe conditions that an ENS addresses do not occur at grade-separated crossings [1] or because there is no clear, unambiguous place to put an ENS sign at a grade-separated highway-rail or pathway crossing; therefore, an ENS at grade-separated crossings would not be effective to increase the safety of those crossings.

Section 234.303 Telephonic Notification of Unsafe Conditions at Highway-Rail or Pathway Grade Crossings

Proposed § 234.303(a) requires each railroad that dispatches a train through a highway-rail or pathway grade crossing, or provides authority for a train to traverse such a crossing, to set up a system to directly receive telephonic notification of certain unsafe conditions at the crossing. This proposed section would require these dispatching railroads to establish and maintain a toll-free telephone service by which the railroad can directly receive calls from the public reporting any of the unsafe conditions listed in proposed § 234.303(b) (with respect to highway-rail grade crossings) and § 234.303(c) (with respect to pathway grade crossings).

FRA recognizes that in certain scenarios there may be multiple railroads dispatching trains on one or more tracks through one highway-rail or pathway grade crossing. While FRA believes that an ENS should include these types of crossings, it is not clear whether the responsibility to receive reports of unsafe conditions at these types of crossing should fall on one railroad or whether each railroad that dispatches a train through the crossing should be responsible to receive reports. FRA seeks comments on how to handle these types of situations.

The frequency with which a crossing is used does not determine whether it is included in the system established pursuant to proposed § 234.301(a). FRA believes that it is important to provide an immediate means to communicate a notice of an unsafe condition even at grade crossings traversed infrequently. Imagine, for example, the driver of a logging truck stuck at a seldom-used private crossing in the Rocky Mountains with no knowledge of what actions to take or whom to contact.

The FRA Administrator, as the Secretary's delegate, has the discretion to issue a waiver to a Class II or Class III railroad relieving it from the requirement that the telephone number used be toll-free. 49 U.S.C. 20152(b); 49 CFR 1.49. The Administrator may waive the toll-free telephone service requirement for a Class II or Class III railroad if the Administrator determines that the use of a toll-free telephone service would be cost prohibitive or unnecessary. FRA's procedures for seeking a waiver are at 49 CFR part 211 (*e.g.,* §§ 211.7, 211.9, and 211.41).

A railroad that dispatches a train through a highway-rail or pathway grade crossing or provides authority for a train to traverse such a grade crossing must be able to directly receive calls through the toll-free telephone service. "Directly" does not necessarily mean that the railroad must be the first entity that receives the telephone call when the toll-free service is used. However, "directly" does mean that only a limited number of entities may be placed between the caller reporting the unsafe condition(s) at the grade crossing and the dispatching railroad. FRA proposes that only one entity may exist between the caller and the railroad. This restriction is addressed further in proposed § 234.307. Regardless if an additional entity is used, the railroad ultimately remains responsible for setting up and using a system by which it can receive notification of unsafe conditions at a grade crossing and take the appropriate action in response to a notification. This responsibility is placed on the railroad because it is in the best position to immediately contact and warn the trains authorized to operate through the grade crossing about which the report pertains.

The four types of unsafe conditions at highway-rail grade crossings that are to be reportable through the ENS system are set forth in proposed § 234.303(b). (Again, the four types of unsafe conditions at pathway grade crossings that are to be reportable through the ENS system are listed in proposed § 234.303(c).) The first type of reportable unsafe condition at a highway-rail grade crossing is a warning system malfunction at the crossing. "Warning system malfunction," as defined in proposed § 234.5, means an activation failure, a partial activation, or a false activation of a highway-rail grade crossing warning system. The terms "activation failure," "partial activation," and "false activation" are all defined in existing § 234.5 as well.

The second type of reportable unsafe condition at a highway-rail grade crossing is a disabled vehicle or other obstruction blocking a railroad track at the crossing. As mentioned in Section II of this preamble, a significant number of collisions between a train and a vehicle have occurred at highway-rail grade crossings due to a vehicle blocking the railroad tracks at the crossing, with many of these collisions resulting in injuries and fatalities. While FRA acknowledges that not all of these incidents may have been prevented by the presence of an ENS, such a system increases the likelihood that the dispatching railroad will learn of the disabled vehicle in time to alert any trains authorized to operate through that crossing, thus potentially averting a collision and any resulting casualties. Further, other obstructions, aside from a disabled vehicle, may block the tracks at a crossing and create an unsafe condition that needs to be reported to the railroad. For instance, as a result of a severe storm, a large tree may fall onto the tracks at a highway-rail grade crossing, and if a railroad is not alerted

[1] For example, warning system malfunctions do not occur at grade-separated crossings because grade-separated crossings do not have warning systems.

about this unsafe condition, a train that is authorized to operate through that crossing could collide with the downed tree, thus potentially causing a derailment. Under Sec. 205 of RSIA, the second category of unsafe conditions is a disabled vehicle blocking the tracks at a grade crossing. To the extent that FRA's proposed rule requires more than Sec. 205 of RSIA would have it require, the agency relies on its general safety rulemaking authority.

The third type of a reportable unsafe condition at a highway-rail crossing is an obstruction to the view of a pedestrian or a vehicle operator for a reasonable distance in either direction of a train's approach to the crossing. FRA's Track Safety Standards provide that "vegetation on railroad property which is on or immediately adjacent to the roadbed shall be controlled so that it does not [o]bstruct visibility of railroad signs and signals [a]t highway-rail grade crossings." 49 CFR 213.7(b)(1) (§ 213.7(b)(1)). Proposed § 234.303(b)(3) allows a member of the public to inform the railroad of conditions at highway-rail grade crossings that may not fall under § 213.7(b)(1), but that, in the individual's opinion, present an unsafe condition involving a sight obstruction at the crossing. FRA seeks comment regarding what is a "reasonable distance" to determine whether an obstruction to a pedestrian or vehicle operator's view of a train's approach to a highway-rail grade crossing presents an unsafe condition at the grade crossing.

The final type of reportable unsafe condition at a highway-rail grade crossing is any condition at the crossing that may be considered unsafe and is not covered by § 234.303(b)(1)–(3). A downed or missing crossbuck sign illustrates the type of condition at a highway-rail grade crossing that may be deemed unsafe, and therefore should be reported to the railroad, but does not fall into one of the three other categories. However, a downed or missing crossbuck sign is merely an example and is not intended to be an exhaustive list of the various conditions that may be considered unsafe under this catch-all provision.

Proposed § 234.303(c) sets forth the four types of reportable unsafe conditions at pathway grade crossings as opposed to highway-rail grade crossings. These four types of reportable unsafe conditions at pathway grade crossings are, essentially, the same as those for highway-rail grade crossings, but, as detailed below, the four types of reportable unsafe conditions at pathway grade crossings are not described in the exact same words, and unlike the first type of report for a highway-rail grade crossing, the first type of report for a pathway grade crossing does not trigger the duty to address the report in the manner prescribed by existing 49 CFR part 234, subpart C (subpart C).

The first type of reportable condition for a pathway grade crossing is a failure of the active warning system at the pathway grade crossing to perform as intended. Proposed § 234.303(c)(1) does not use term "warning system malfunction" to refer to a failure of an active warning system at a pathway grade crossing because, as defined in § 234.5, a "warning system malfunction" is an activation failure, partial activation, or false activation of the active warning system at a highway-rail grade crossing, not a pathway grade crossing. Further, "activation failure," "partial activation," and "false activation" are all defined in § 234.5 and only apply to highway-rail grade crossings. FRA has not proposed specific standards regarding the maintenance and repair of active warning systems at pathway grade crossings and does not intend to do so at this time. However, FRA does intend to require that certain railroads provide the public with a means to report when the active warning system at a pathway grade crossing is not performing as intended and is creating an unsafe condition at the crossing.

While the term "failure of the active warning system at the pathway grade crossing to perform as intended" as used in proposed § 234.303(c)(1) is not specifically defined, FRA believes that the term sufficiently addresses the scenarios in which an active warning system at a pathway grade crossing malfunctions and poses a significant safety risk to a pathway grade crossing user. FRA seeks comment regarding the types of failures of an active warning system at a pathway grade crossing that may differ from failures of active warning systems at highway-rail grade crossings. Additionally, FRA seeks comment regarding how the maintenance and repair of an active warning system at a pathway grade crossing differ from the required maintenance and repair of an active warning system at a highway-rail grade crossing.

The second type of reportable unsafe condition at a pathway grade crossing is an obstruction blocking a railroad track at the crossing. To avoid confusion, the term "disabled vehicle" is purposely omitted from proposed § 234.303(c)(2), though it is used in proposed § 234.303(b)(2), because, as defined in proposed § 234.301, a "pathway grade crossing" is, among other things, dedicated for the use of nonvehicular traffic; thus, by the definition, a vehicle should not be using a pathway grade crossing. However, to ensure that all possible scenarios in which an obstruction could be blocking the tracks at a pathway grade crossing, including certain disabled vehicles that may be using the pathway (such as all-terrain vehicles, golf carts, maintenance vehicles, or snowmobiles), § 234.303(c)(2) uses the broad term "obstruction."

The third type of reportable unsafe condition at a pathway grade crossing is an obstruction to the view of a pathway user for a reasonable distance in either direction of a train's approach to the crossing. *See* discussion of proposed § 234.303(b)(3).

The final type of reportable unsafe condition at a pathway grade crossing is any condition at the crossing that may be considered unsafe and is not covered by § 234.303(c)(1)–(3). *See* discussion of proposed § 234.303(b)(4).

As mentioned previously, the FRA Administrator has the discretion to waive the requirement that the ENS telephone number be toll-free for Class II and Class III railroads. The Administrator may waive the toll-free requirement for these railroads if he or she determines that the use of a toll-free service would be cost prohibitive or unnecessary. FRA believes that there may be certain scenarios in which a caller would be discouraged from reporting an unsafe condition at a grade crossing because the use of a non-toll-free number would impose an additional cost on the caller as opposed to if a toll-free number was used. Further, the requirement for the number to be toll-free may be overly burdensome to a short line or other small railroad. To avoid these types of situations, FRA proposes in § 234.303(d) that if a Class II or Class III railroad dispatches trains within an area in which the use of a non-toll-free number would not incur any additional fees for the caller compared to if a toll-free number was used, then that railroad may use that non-toll-free number to receive calls pursuant to § 234.303(a) regarding each grade crossing in that area.

Paragraph (e) ensures that if a report of an unsafe condition at a highway-rail or pathway grade crossing was not made through the telephone service described in proposed § 234.303(a), subpart E does not apply. Since subpart E only sets forth the requirements of an ENS and the actions taken in response to a report of unsafe condition received through an ENS, a report that is not received

through an ENS does not invoke the requirements in subpart E.

FRA is considering whether to extend proposed subpart E to cover all public highway-rail grade crossings located within a port, or dock facility, railroad yard or private industrial facility and such a facility/yard is subject to part 234 as set forth in amended § 234.3. If these types of crossings are covered by proposed subpart E, FRA is considering whether to treat all of the crossings located in such facilities/yards as a single public highway-rail grade crossing for the purposes of proposed subpart E. These areas often have a significant number of crossings located in a small area, and FRA believes that it may be impracticable to consider each crossing within these areas as a separate grade crossing. Treating all the public highway-rail grade crossings within these facilities/yards as one public highway-rail grade crossing is consistent with the U.S. DOT National Highway-Rail Crossing Inventory, Policy, Procedures and Instructions for States and Railroads, published August 2007, which can be found at— *http://www.fra.dot.gov/downloads/safety/RXIPolicyInstructions0807.pdf.* FRA seeks comment whether proposed subpart E should be extended to incorporate public highway-rail grade crossings located within a port, or dock facility, railroad yard or private industrial facility. FRA also seeks comment whether it is practicable to treat all of the public highway-rail grade crossings within such facilities/yards as one public highway-rail grade crossing for the purposes of proposed subpart E.

Section 234.305 Remedial Actions

Proposed § 234.305 addresses the actions that a railroad must take in response to an ENS-generated report of an unsafe condition at a highway-rail or pathway grade crossing. Paragraph (a) of the proposed section is the general rule on required response to ENS-generated credible reports of warning system malfunctions. If a railroad receives an ENS-generated report of a warning system malfunction that is a credible report of warning system malfunction and the railroad has maintenance responsibility for the warning system at the highway-rail grade crossing to which the report pertains, the railroad is required to take the appropriate action as required by subpart C. As defined in proposed § 234.5, a "credible report of warning system malfunction" is "specific information regarding a malfunction at an identified highway-rail grade crossing, supplied by a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity." If a report of a warning system malfunction is not provided by one of the four specific types of people listed, then the report is not a credible report of system malfunction within the meaning of both subpart C and proposed subpart E, and subpart C does not require any remedial action in response to those reports. It should be noted that a credible report of warning system malfunction only applies to highway-rail grade crossings and does not include pathway grade crossings. At this time FRA does not plan to expand the definition of "credible report of warning system malfunction" to include pathway grade crossings. Thus, regardless of who reports a warning system malfunction at a pathway grade crossing, the report is not considered a "credible report of warning system malfunction" within the meaning of both subpart C and proposed subpart E. However, it is important to note that the term "credible" does not go to the accuracy or truthfulness of the report; rather, it distinguishes the type of person providing the report to the railroad. Just because a report is not considered a "credible report of warning system malfunction," as defined by proposed § 234.5, does not mean that it is not accurate or truthful.

If the report is a credible report of warning system malfunction, but the railroad that initially receives the report is not the railroad that has maintenance responsibility for the warning system at the highway-rail grade crossing to which the report pertains, that railroad is already responsible for contacting the trains that are authorized to operate through the highway-rail grade crossing and warn the trains of the reported malfunction under subpart C. After warning the trains, the railroad must then contact the railroad that has maintenance responsibility for the warning system at the highway-rail grade crossing, which will then be responsible for taking the appropriate remedial action under subpart C. FRA recognizes that in many instances the railroad that initially receives the report may not be the railroad that has maintenance responsibility over the warning system at that crossing. Therefore, to ensure that the responsibility to take the appropriate remedial action as required by subpart C falls on the appropriate railroad, proposed § 234.305(a)(2) requires the railroad with maintenance responsibility to take the appropriate remedial action under subpart C, except for immediately contacting the trains operating through the crossing; this responsibility remains with the dispatching railroad.

Paragraph (b) of proposed § 234.305 is the general rule on response to ENS-generated reports of warning system malfunctions at highway-rail grade crossings that are not considered credible reports of warning system malfunctions as defined by proposed § 234.5 and requires that railroads take certain specified remedial action in response to those reports. In other words, proposed § 234.305(b) addresses ENS-generated reports of warning system malfunctions that do not fall within the amended definition of "credible report of warning system malfunction" in § 234.5 because the report is made by someone who is not a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity. In particular, if a railroad receives a report of a warning system malfunction that is not a credible report of warning system malfunction and that railroad has maintenance responsibility for the warning system at the crossing, the railroad must immediately contact all trains that are authorized to operate through the grade crossing about which the report pertains and warn those trains of the reported malfunction. The railroad must then promptly contact the law enforcement agency that has jurisdiction over the crossing and provide the necessary information for the law enforcement agency to direct traffic or carry out other activities to maintain safety at the grade crossing. Further, the railroad must promptly investigate the report and determine the nature of the malfunction and, if necessary, take appropriate action as required by a provision of existing 49 CFR part 234, subpart D, *i.e.,* § 234.207(a), which requires that "[w]hen any essential component of a highway-rail grade crossing warning system fails to perform its intended function, the cause shall be determined and the faulty component adjusted, repaired, or replaced without undue delay."

If a railroad receives a report of a warning system malfunction that is not a credible report of warning system malfunction and that railroad does not have maintenance responsibility for the warning system at the highway rail grade crossing, the railroad must immediately contact all trains that are authorized to operate through the grade crossing to which the report pertains and warn those trains of the reported malfunction. The railroad must then promptly contact the law enforcement agency that has jurisdiction over the

grade crossing and provide the necessary information for the law enforcement agency to direct traffic or carry out other activities to maintain safety at the grade crossing. The railroad must then promptly contact the railroad that has maintenance responsibility for the warning system and inform that railroad of the reported malfunction. The railroad having maintenance responsibility must promptly investigate the report, determine the nature of the malfunction and take the appropriate action as required by § 234.207(a) if necessary.

Proposed § 234.305(c) is the general rule on response to a warning system failure at a pathway grade crossing. If the dispatching railroad receives a report pursuant to § 234.303(c)(1) and that railroad also has maintenance responsibility for the active warning system at the pathway grade crossing, the railroad shall immediately contact all trains that are authorized to operate through the pathway grade crossings to which the report pertains and warn the trains of the reported failure. The railroad shall then promptly contact the law enforcement agency having jurisdiction over the pathway grade crossing and provide the necessary information to the law enforcement agency to direct traffic or carry out other activities to maintain safety at the pathway grade crossing. Finally, the railroad shall the promptly investigate the report and determine the nature of the reported failure and repair the warning system if necessary.

If the dispatching railroad receives a report of a warning system failure at a pathway grade crossing and that dispatching railroad does not have maintenance responsibility for the warning system at the pathway grade crossing, the dispatching railroad must immediately contact all trains that are authorized to operate through the pathway grade crossing to which the report pertains and warn those trains of the reported failure. The dispatching railroad must then promptly contact the law enforcement agency that has jurisdiction over the pathway grade crossing and provide the necessary information for the law enforcement agency to direct traffic or carry out other activities to maintain safety at the pathway grade crossing. The dispatching railroad must then promptly contact the railroad that has maintenance responsibility for the warning system at the pathway grade crossing and inform that railroad of the reported failure. The railroad having maintenance responsibility shall then promptly investigate the report and determine the nature of the reported failure and repair the warning system if necessary.

Proposed § 234.305(d) is the general rule on a dispatching railroad's response to reports of a disabled vehicle or other obstruction blocking a railroad track at a highway-rail or pathway grade crossing through which it dispatches trains. When a railroad receives a report of a disabled vehicle or obstruction blocking a railroad track at a grade crossing, the railroad must immediately contact all trains that are authorized to operate through the grade crossing to which the report pertains and warn the trains of the reported disabled vehicle or obstruction. Once all of the necessary trains are contacted, the railroad must then contact the law enforcement agency having jurisdiction over the grade crossing to provide that agency with the information necessary to assist in the removal of the disabled vehicle or other obstruction or carry out other activities as appropriate. FRA is considering and seeks comments on whether to require the railroad that receives the report (dispatching railroad) to contact the maintaining railroad if the obstruction is anything other than a disabled vehicle. The maintaining railroad would then be responsible for contacting the law enforcement agency and any other entities to assist in directing traffic (if necessary) and removing the obstruction.

Proposed § 234.305(e) is the special rule on contacting a train that is not required to have communication equipment. Section 220.9 of FRA's regulations on railroad communications sets forth communication equipment standards for trains. 49 CFR 220.9 (§ 220.9). These standards vary according to specific criteria set forth in § 220.9. According to § 220.9(b), no communication equipment is required on a train if that train does not transport passengers or hazardous material and does not engage in joint operations or operate at greater than 25 miles per hour. *See* 63 FR 47188; § 220.9(b)(1)–(4). However, as proposed in subpart E, upon receipt of a report of a warning system malfunction, a warning system failure at a pathway grade crossing, or a disabled vehicle or other obstruction blocking a track, a railroad will be required to immediately contact a train authorized to operate through the highway-rail or pathway grade crossing to which the report pertains. If that train is not required by § 220.9 to have any communications equipment, the railroad must contact that train by the quickest means available. Currently, railroad employees are required by 49 CFR 220.13(a) (§ 220.13(a)) to immediately report certain emergencies by the quickest means available. To maintain consistency among FRA regulations, proposed § 234.305(e) requires that the quickest means used to contact a train upon receipt of a report of a warning system malfunction or disabled vehicle or other obstruction blocking a track at the crossing is consistent with the quickest means that an employee would use to report an emergency pursuant to § 220.13(a).

Proposed § 234.305(f) is the general rule on response to reports of an obstruction to the view of a pedestrian or a vehicle operator for a reasonable distance in either direction of a train's approach to the highway-rail or pathway grade crossing (visual obstruction). FRA proposes that when the dispatching railroad receives a report of a visual obstruction and the railroad also has maintenance responsibility for the highway-rail or pathway grade crossing, the railroad shall timely investigate the report and, if the report is confirmed, shall remove the visual obstruction if it is feasible and lawful to do so. If the dispatching railroad does not have maintenance responsibility for the highway-rail or pathway grade crossing, the dispatching railroad shall promptly contact the railroad having maintenance responsibility for the highway-rail or pathway grade crossing, which shall timely investigate the report; and, if the report is confirmed, shall remove the visual obstruction, if it is lawful and feasible to do so. FRA recognizes that in certain instances a visual obstruction may not be removed, such as a natural visual obstruction due to the steepness of the road or path approaching the crossing or a visual obstruction due to the curvature of the track, or it may not be lawful to do so. Therefore, proposed § 234.305(f)(2) imposes a duty on the maintaining railroad to remove the visual obstruction only if it is lawful and feasible to do so. FRA seeks comment on what types of visual obstructions are not feasible to remove.

Proposed § 234.305(g) is the general rule on response to reports of other unsafe conditions at highway-rail or pathway grade crossings. Proposed § 234.305(g)(1) states that if the railroad receives a report related to a safety device at a highway-rail or pathway grade crossing, such as a downed crossbuck, that is not covered by proposed § 234.305(a), (b), or (c), and the railroad has maintenance responsibility for the device, the railroad must timely investigate the report, and if the railroad finds that the unsafe condition exists, the railroad must timely correct it. However, if the

railroad that receives the report does not have maintenance responsibility over the device, upon receipt of the report, the railroad must timely inform the railroad with maintenance responsibility for correcting the unsafe condition. The railroad with maintenance responsibility must then timely investigate the report and if it finds that the unsafe condition exists, it must timely correct it if it is lawful and feasible to do so. FRA seeks comment on what types of other unsafe conditions are not feasible to correct.

Proposed § 234.305(g)(2) states that if the dispatching railroad receives a report relating to any other unsafe condition at the highway-rail or pathway grade crossing that is not covered by proposed § 234.305(g)(1) and the dispatching railroad is also the maintaining for the grade crossing, the dispatching railroad shall timely investigate the report and if it finds that the unsafe condition exists, the dispatching railroad shall timely correct it if it is lawful and feasible to do so. If the dispatching railroad is not the maintaining railroad, the dispatching railroad shall timely inform the maintaining railroad of the report and the maintaining railroad shall timely investigate the report. If, after investigating the report, the maintaining railroad finds that the unsafe condition exists, the maintaining railroad shall timely correct it if it is lawful and feasible to do.

Paragraph (h) is the general rule on contacting the maintaining railroad. If the dispatching railroad is not the same as the maintaining railroad, the maintaining railroad shall provide the dispatching railroad with sufficient contact information by which the dispatching railroad may immediately contact the maintaining railroad upon receipt of a report if necessary. Furthermore, the maintaining railroad shall not use an automated answering service for the purpose of receiving a call from the dispatching railroad.

Section 234.307 Third-Party Telephone Service

Proposed § 234.307 would address the third-party telephone service that a dispatching railroad may use to receive reports concerning an unsafe condition at a highway-rail or pathway grade crossing pursuant to proposed § 234.303.

For a railroad to "directly" receive calls reporting unsafe conditions at a crossing as required by proposed § 234.303, FRA proposes that one entity is the maximum number of entities that may exist between (1) a caller reporting an unsafe condition at a grade crossing and (2) the railroad. FRA believes that allowing more than one entity in between could potentially delay the railroad's receipt of the report and therefore delay its response to the unsafe condition to the extent that the ENS would not be effective. Proposed § 234.307 sets forth the requirements for the third-party telephone service.

FRA recognizes that many regional and short line railroads may not have the capability and resources to set up and operate a 24-hour system to respond to reports of unsafe conditions at highway-rail and pathway grade crossings. To ensure that the public can call in such reports and that more dispatching railroads can receive the reports, the proposed rule allows railroads to use a third-party telephone service.

Paragraph (a) permits a railroad to use a third-party telephone service to receive reports pursuant to proposed § 234.303. FRA believes that it is in the railroad's interest to use a third-party telephone service that is in the business of receiving and processing calls from the public because that is its specialty. Even if the railroad uses a third-party telephone service, the railroad ultimately remains responsible for receiving the report received by the third party, and the railroad is responsible for taking the appropriate remedial action as required by proposed § 234.305 and complying with the proper recordkeeping requirements proposed in § 234.313. The third-party telephone service is merely an extension of the railroad. The third-party service must be reached directly by the telephone number placed on the sign pursuant to proposed § 234.309. Furthermore, the third-party service is prohibited from using an automated answering service, as defined in proposed § 234.301, to receive calls. The railroad remains responsible for ensuring that an automated answering service is not used.

Proposed paragraph (b) obliges a railroad that uses the third-party service to provide the service with sufficient contact information so that when the third-party service receives a report of an unsafe condition at a grade crossing, it can immediately contact the railroad. The railroad is prohibited from using an automated answering service to receive calls from the third-party service. There may be an unsafe condition for which immediate action by the railroad is necessary, such as a disabled vehicle blocking a track at the crossing; therefore, the contact information that the railroad provides the third-party service must be sufficient to the extent that when the third-party service contacts the railroad, a railroad employee answers the call and takes the appropriate action necessary under proposed § 234.305. The responsibility of the third-party service is solely to receive reports and relay those reports to the railroad; any remedial action that is necessary to correct the unsafe condition is the responsibility of the railroad.

Proposed paragraph (b) also requires a railroad to promptly inform FRA of its intent to use a third-party service to receive reports pursuant to proposed § 234.303. The railroad must also provide FRA with the contact information of the third-party service that the railroad intends to use. Further, the railroad must provide FRA with a list of the grade crossings about which the third-party service will be receiving reports pursuant to proposed § 234.303. This information will allow FRA to evaluate whether the use of a third-party service substantially increases the railroad's response time to the extent that, because of the use of the service, the railroad is no longer considered to be receiving calls "directly." Finally, proposed paragraph (b) reaffirms the requirement that once a railroad receives a report of an unsafe condition at a grade crossing pursuant to proposed § 234.303, the railroad must, at a minimum, take the remedial action required by proposed § 234.305.

Proposed paragraph (c) sets forth the duties of the third-party service. The third-party service is required to contact the contracting railroad immediately when the third-party service receives a report pursuant to proposed § 234.303. The third-party service must then provide the contracting railroad with a minimum amount of information. The first type of information that the third-party service must provide is the nature of the reported unsafe condition. The nature of the reported unsafe condition must fall into one of the categories listed in proposed § 234.303(b)(1)–(4) or (c)(1)–(4) so that the contracting railroad can take the appropriate remedial action as required by proposed § 234.305. Second, the third-party service must provide information on the location of the unsafe condition, which includes providing the U.S. DOT National Crossing Inventory File Number for the crossing. Third, the third-party service must inform the contracting railroad whether the person reporting the unsafe condition is a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity. The third-party service is required to provide this information so that the contracting railroad can determine

whether the report is a credible report of warning system malfunction and, if it is, the railroad can take the appropriate remedial action required by proposed § 234.305 and existing subpart C. Finally, the third-party service must provide the contracting railroad with any additional information provided by the caller that may be useful to restore the crossing to a safe condition.

Paragraph (d) ensures that the third-party service, in addition to the contracting railroad, is responsible for complying with proposed subpart E and that both the railroad and the third party service can be held liable for a violation of proposed subpart E.

FRA recognizes that future advances in technology may provide opportunities for call-in systems that are not specifically described in this rule. FRA is willing to review any new technology and consider its applicability to the regulation, or consider amending the regulation in the future if warranted. FRA welcomes comments on any such technologies that meet the requirements of the proposed regulation.

Section 234.309 Signs in General

Proposed § 234.309 would specify the color, minimum required dimensions, contents, and other aspects of the signs that § 234.311 requires to be placed and maintained at highway-rail and pathway grade crossings as part of an ENS. A minimum amount of information must be placed on the sign so that the unsafe condition may be properly reported and remedied. This minimum information is the toll-free number established to receive reports pursuant to § 234.303(a) (or non-toll-free number as provided for in § 234.303(d)), an explanation of the purpose of the sign, and the U.S. DOT National Crossing Inventory File Number assigned to the crossing. To maintain a certain amount of consistency among the signs so that a grade crossing user may be able to easily identify and understand it, FRA proposes that the sign dimensions must be at least 12 inches by 9 inches, the lettering must be, at a minimum, 1 inch in height, and the sign must have a white legend and border on a blue background.

FRA is considering whether the final rule should require that the sign be designed in accordance with the applicable provisions of the FHWA's MUTCD and *Standard Highway Signs and Markings* (SHSM) book. Currently, § 8B.18 of the 2009 edition of the MUTCD provides standards and guidance regarding emergency notification signs. Figure 1 is the example of an emergency notification sign provided in the MUTCD. Further, the new edition of the SHSM book, which had not been published at the time of the writing of this NPRM, provides two alternate designs for emergency notification signs, one of which is identical to the emergency notification sign provided in the MUTCD. The SHSM can be found at *http://mutcd.fhwa.dot.gov/shsm_interim/index.htm.* Figure 2 is an alternate design found in the new edition of the SHSM book. FRA is seeking comment regarding which standards and guidance provided in the MUTCD and SHSM book should be adopted in the final rule as the requirements for the signs placed at crossings pursuant to proposed §§ 234.309 and 234.311.

Figure 1–MUTCD Emergency Notification Sign

Figure 2 – SHSM Alternate Design

Section 234.311 Sign Placement and Maintenance

Proposed § 234.311 would require signs of the type specified by proposed § 234.309 to be placed and maintained at highway-rail and pathway grade crossings. The maintaining railroad would be responsible for the proper placement and maintenance of the sign. The dispatching railroad would be responsible for providing the telephone number posted on the sign to the maintaining railroad if the two are not the same railroad.

A sign must be placed and maintained for each direction of traffic at that grade crossing. This will ensure that grade crossing users will be able to see the sign from whichever direction they

approach the crossing. A pathway grade crossing is considered to have a minimum of two directions of traffic unless specifically designed for traffic in one direction only.

Each sign placed at a highway-rail or pathway grade crossing must be placed and maintained so that the sign is conspicuous to the users of the roadway or pathway, optimizes nighttime visibility, minimizes the effect of mud splatter and debris, and does not obscure any other sign at the crossing. FRA does not propose a specific location at a crossing where a sign must be placed because such a specific location may not exist at every crossing. However, FRA proposes general requirements regarding the placement of the sign so that the sign may be easily seen and does not interfere with any other traffic control devices at the crossing. FRA is seeking comment on sign placement so the appropriate placement for optimal visual effectiveness of the sign may be determined. FRA is also seeking comment on how many and where to place signs at a highway-rail or pathway grade crossing in which there are multiple railroads dispatching trains on one or more tracks through that crossing.

Proposed paragraph (c) does not prohibit the placement of an ENS sign on a signal bungalow; however, a sign on the signal bungalow and nowhere else at the crossing does not comply with proposed § 234.311. It is difficult to envision a scenario in which placing the sign on the signal bungalow would satisfy all of the requirements in proposed § 234.311(b), particularly, § 234.311(b)(1), which requires a sign to be placed at a grade crossing so that it is conspicuous to the users of the roadway or pathway. FRA seeks comment on other locations at grade crossings where the placement of the sign would not satisfy proposed § 234.311(b).

As mentioned previously, FRA is considering whether to expand proposed subpart E to cover all public highway-rail grade crossings located within a port or dock facility, railroad yard, or private industrial facility and to make such a facility or yard subject to part 234. In turn, if these types of crossings would be covered by proposed subpart E, FRA is considering whether to treat all of the crossings located in such a facility or yard as a single public highway-rail grade crossing for the purposes of proposed subpart E. If these crossings are treated as a single public highway-rail grade crossing, FRA is considering whether to require a sign that conforms to proposed § 234.309 to be placed and maintained as provided under proposed § 234.311(a) and (b) at each point at which a public highway enters the facility or yard. FRA seeks comment whether this would be the optimal location for the sign for these types of facilities or yards if they are covered.

Section 234.313 Recordkeeping

Proposed § 234.313 sets forth the recordkeeping requirements for this proposed subpart that apply to each railroad subject to this proposed subpart. Proposed paragraph (a) of this section requires each railroad to keep records pertaining to compliance with this subpart. Records may be kept on paper forms generated by the railroad or kept electronically in a manner that conforms with proposed § 234.315. Each railroad must keep the following information for each report received under the proposed subpart: (1) The nature of the reported unsafe condition; (2) the location of the grade crossing (by highway name and U.S. DOT National Crossing Inventory File Number); (3) the time and date of receipt of the report by the railroad; (4) whether the person who provided the report was a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity; (5) the actions taken by the railroad prior to rectifying the reported unsafe condition; (6) the actions taken by the railroad to rectify, if possible, the reported grade crossing problem; (7) the date and time at which the reported unsafe condition was rectified; and (8) if the railroad is required to contact the railroad with maintenance responsibility, the time and date the railroad contacted the railroad having maintenance responsibility. FRA is considering whether to require the railroad to also record the caller's name and contact information so the railroad can follow-up with the caller if necessary. FRA seeks comment on what other information the railroad should be required to record.

Subpart C at 49 CFR 234.109 (§ 234.109) already has specific recordkeeping requirements for a railroad that receives a credible report of warning system malfunction; therefore, there is no separate recordkeeping requirement in proposed subpart E for credible reports of warning system malfunction. Proposed § 234.313(c) requires that each railroad retain for at least one year (from the latest date of railroad activity in response to a report received under this part) all records that it makes that are required by this section. Records required to be kept must be made available to FRA as provided by statute (49 U.S.C. 20107).

Section 234.315 Electronic Recordkeeping

Proposed § 234.315 would address the keeping of records required by proposed subpart E electronically. This proposed section applies to railroads that choose to conduct electronic recordkeeping under proposed subpart E. These proposed electronic recordkeeping requirements are modeled after the requirements set forth in 49 CFR 217.9(g).

If a railroad chooses to conduct electronic recordkeeping of records required by proposed subpart E, the railroad must provide adequate security measures to limit employee access to its electronic data processing system and must prescribe who is allowed to create, modify, or delete data from the database. Although FRA does not identify the management position authorized to institute changes in the database, the railroad must indicate the source authorized to make such changes. The railroad must have a computer and a facsimile or printer connected to the computer to retrieve and produce records for immediate review. Section 217.9(g) requires the computer to be a desk-top computer. However, FRA recognizes that all railroads may not necessarily maintain their records on a desktop computer, so rather than adopting this requirement from § 217.9(g); FRA proposes to allow railroads the flexibility to maintain their records on other types of computers, such as laptops. However, regardless of the computer on which the railroad maintains its electronic records, it must be possible for a facsimile or printer to be connected to the computer to retrieve and produce records for immediate review. The documents must be made available for FRA inspection during "normal business hours," which FRA interprets as the time, any day of the week, when railroads conduct their regular business transactions. Nevertheless, FRA reserves the right to review and examine the documents prepared in accordance with the applicable section of part 234 at any reasonable time if situations warrant. Each railroad must also designate who will be authorized to authenticate the hard copies produced from the electronic format. In short, each railroad electing to retain its records electronically must ensure the integrity of the information and prevent possible tampering of data, enabling FRA to fully execute its enforcement responsibilities.

Section 234.317 Compliance Dates

Proposed § 234.317 would state the date by which each of various groups of railroads must comply with this proposed subpart. If a railroad does not have an ENS of any kind in place on the effective date of the subpart, the railroad has 18 months from the effective date of the final rule to implement a system that conforms to the subpart. This paragraph applies to railroads that do not have anything any place that could be considered an ENS as defined in § 234.301. However, if a railroad has a system in place, but some or all of the components do not conform to this subpart, the amount of time the railroad has to bring it into compliance depends on which component is non-compliant.

If a railroad already has its own ENS telephone service or is using a third-party telephone service on the effective date of this subpart, but that telephone service does not comply with the requirements proposed in §§ 234.303 and 243.307, the railroad has six months from the effective date of the final rule to bring the telephone service into compliance.

If a railroad already has ENS signs in place on the effective date, but those signs do not comply with the requirements set forth in proposed § 234.309, subject to proposed § 234.317(d)(2), the railroad has five years from the effective date of the final rule to bring the signs into compliance. If the railroad replaces a non-conforming sign before the five-year period, the railroad must replace the sign with one that conforms to proposed § 234.309. However, there is an exception to this five-year period. To ensure that a non-conforming sign is still large enough to be visible to the majority of grade crossing users, if a sign is less than 60 square inches, the railroad has 18 months from the effective date of the final rule to bring the sign into compliance with proposed § 234.309. If the railroad replaces a non-conforming sign before the 18-month period, the railroad must replace the sign with one that conforms to proposed § 234.309.

FRA is considering whether to reduce the amount of time that the railroad has to bring the sign into compliance based on whether the non-compliant element of the sign effectively renders the sign useless. For example, if a sign does not comply because the telephone number on the sign is not the correct number, the sign is effectively useless because a person is unable to report any unsafe conditions at the crossing to the appropriate railroad. In these instances it is as if there were not a sign at the crossing, thus, the railroad would then have 18 months, as required by § 234.317(a), to place a sign at the crossing. Therefore, FRA is considering reducing the compliance period from five years to 18 months if the non-compliant element of the sign effectively renders the sign useless. FRA seeks comment regarding reducing the compliance period.

If a railroad already has ENS signs in place on the effective date, but the placement of those signs does not comply with the requirements set forth in proposed § 234.311, the railroad has five years from the effective date of the final rule to ensure the placement of the signs conforms to proposed § 234.311. If the railroad changes the placement of the sign before the expiration of the five-year period, the placement of the sign must conform to proposed § 234.311. Furthermore, if a railroad replaces a sign before the expiration of the five-year period so that the sign conforms to proposed § 234.309 and the placement of the sign does not conform to proposed § 234.311, the railroad must also change the placement of the sign so that it conforms to proposed § 234.311.

FRA is considering whether to reduce the amount of time that the railroad would have to bring the placement of the sign into compliance if the only sign at the crossing is placed on the signal bungalow. As mentioned previously, signs placed on a signal bungalow are not considered to be conspicuous to the grade crossing user; therefore, FRA believes that giving the railroad five years to replace signs on the bungalow may be excessive and is considering reducing this period to 18 months. FRA welcomes comments regarding reducing the compliance period from five years to 18 months.

If a railroad already conducts recordkeeping as part of its ENS on the effective date, but the recordkeeping does not conform to proposed § 234.313, the railroad has six months from the effective date of the final rule to ensure that the recordkeeping conforms to proposed § 234.313.

V. Regulatory Impact

A. Executive Order 12866 and 13563 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 13563 and DOT policies and procedures. *See* 44 FR 11034; February 26, 1979. FRA has prepared and placed in the docket a regulatory evaluation addressing the economic impact of this proposed rule. FRA has met with and made presentations to those who are likely to be affected by this rule in order to seek their views on the rule.

As part of the regulatory evaluation, FRA has assessed quantitative measurements of the cost streams expected to result from the implementation of this proposed rule. For the 20-year period analyzed, the estimated quantified cost that would be imposed on industry totals $36.6 million with a present value (PV, 7 percent) of $18.9 million. The requirements that are expected to impose the largest burdens relate to recordkeeping and the purchase and installation of signs at grade crossings. The table below presents the estimated costs associated with the proposed rulemaking.

Section 234.303—Toll-free telephone service	$2,052,898
Section 234.307—Third-party telephone service	3,520
Section 234.309—Signs (materials)	6,709,437
Section 234.309—Signs (installation)	4,704,433
Section 234.311—Post (materials)	410,379
Section 234.311—Post (installation)	345,293
Section 234.313—Recordkeeping (initial)	363,571
Section 234.313—Recordkeeping (remedial)	4,265,979
Total	18,855,511

Dollars are discounted at a Present value rate of 7 percent.

As part of the regulatory evaluation, 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 highway-rail and pathway grade crossings have adequate signage to enable the public to inform the railroad of emergencies and other unsafe conditions. The primary benefits include a heightened safety environment in grade crossing areas and potential avoidance of casualties, fatalities, and damage through earlier awareness of track obstructions, including stalled highway vehicles, and other safety hazards. Thus, in general, the proposed rule should decrease grade crossing accidents and incidents and associated casualties and damages. FRA believes the value of the anticipated safety benefits would meet or exceed the cost of implementing the proposed rule. Over a 20-year period, this analysis finds that $49.2 million in cost savings

would accrue through casualty prevention and damage avoidance. The discounted value of this is $23.4 million (PV, 7 percent). The table below presents the estimated benefits associated with the proposed rule.

10.2 Fatalities (Prevented) ...	$17,663,562
10.3 Injuries (Prevented)	4,908,998
10.4 Highway Vehicle Damage (Avoided)	436,715
10.5 Railroad Equipment Damage (Avoided)	249,537
10.6 Track/Structure Damage (Avoided)	138,718
Total	23,397,531

Dollars are discounted at a Present value rate of 7 percent.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461; August 16, 2002) require agency review of proposed and final rules to assess their impact on small entities. The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant impact on a substantial number of small entities. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the FRA Administrator certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. No small railroads will be affected by the rule. FRA has prepared and placed in the docket this certification. FRA requests comments on this certification as well as all other aspects of this NPRM.

"Small entity" is defined in 5 U.S.C. 601 as including a small business concern that is independently owned and operated, and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a "small entity" in the railroad industry is a for profit "line-haul railroad" that has fewer than 1,500 employees, a "short line railroad" with fewer than 500 employees, or a "commuter rail system" with annual receipts of less than seven million dollars. *See* "Size Eligibility Provisions and Standards," 13 CFR part 121, subpart A. Additionally, 5 U.S.C. 601(5) defines as "small entities" governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000. Federal agencies use a different standard for small entities, in consultation with SBA and in conjunction with public comment. Pursuant to that authority FRA has published a final statement of agency policy that formally establishes "small entities" or "small businesses" as being railroads, contractors and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is $20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. *See* 68 FR 24891, May 9, 2003, codified at appendix C to 49 CFR part 209. The $20-million limit is based on the Surface Transportation Board's revenue threshold for a Class III railroad. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1–1. FRA is using this definition for this rulemaking.

Certain provisions of this proposed rule would apply to all railroads that dispatch trains over highway-rail or pathway grade crossings. Out of the 674 Class III railroads, FRA estimates there are 117 small railroads that do not have a dispatching function as part of their operations and, therefore, would not be affected by these certain provisions of this regulation. Therefore, FRA has concluded that 557 small railroads would be affected by those provisions of this rule. However, the impact on these small railroads would not be significant.

Other provisions of this proposed rule would require railroads that own track at highway-rail or pathway grade crossings (or maintain grade crossing signal warning systems at such crossings per rule text) to incur fixed costs, such as the purchase of signs and posts, which are directly proportional to the number of crossings. Additionally, the number of calls received is also expected to be proportional to the number of highway-rail or pathway grade crossings owned or maintained by each railroad.

Smaller railroads generally have fewer highway-rail or pathway grade crossings than larger railroads do. Although each grade crossing may have the same probability of being the subject of an ENS-generated call, the total burden on smaller railroads should be smaller, when implementing and complying with the major requirements of purchasing signage and recordkeeping. For example, FRA has found that there are 137 extremely small railroads, accounting for 4,408 grade crossings. On average, each of the 137 railroads has approximately 32 grade crossings. Additionally, the average total implementation cost for these railroads is approximately $2,300 per railroad for the first year and $519 per railroad per year for each of the following 14 years. Expressed differently, the cost for these railroads to comply with this proposed rule is about $72 per crossing per railroad for the first year and approximately $16 per crossing per railroad for each of the following 14 years. Railroads with just a few crossings would incur minimal costs to comply with this proposed rule. Thus, FRA believes that this proposed regulation would not have a significant impact on these railroads.

Some small railroads are subsidiaries of large short-line holding companies with the expertise and resources comparable to larger railroads. The proposed requirements to install two new signs per highway-rail or pathway grade crossing and provide a toll-free telephone number to report emergencies and other unsafe conditions would not have a significant impact on these railroads. Short lines affected by this proposed rule might collaborate with other small railroads to jointly implement its requirements, which would lower the burden on these small railroads.

Previously, FRA sampled small railroads and found that revenue averaged approximately $4.7 million (not discounted) in 2006. One percent of average annual revenue per small railroad, or $47,000, is far less than the average annual cost that these railroads would incur because of this proposed rule. FRA concludes that the proposed burden would not have a noticeable impact on the competitive position of small entities, or on the small entity segment of the railroad industry as a whole.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601(b)), FRA certifies that this proposed rule would not have a significant impact on a substantial number of small entities. Although a substantial number of small railroads would be affected by the proposed rule, these entities would be significantly impacted. A more thorough discussion on the basis of this certification can be found in Appendix B of the Regulatory Evaluation, which has been submitted to the docket for this proposed rulemaking. 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 final determination for certification of the final rule.

C. Federalism

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. FRA has determined that the proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, nor on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that this proposed rule will not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

This NPRM amends part 234, which contains FRA principal regulations regarding grade crossing safety. Although the final rule on State-specific highway-rail grade crossing action plans published June 28, 2010 (75 FR 36552) removed the preemptive effect provision in part 234, FRA notes that this part could have preemptive effect by the operation of law under a provision of the former Federal Railroad Safety Act of 1970 (former FRSA), that is, 49 U.S.C. 20106 (Sec. 20106). Sec. 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 Sec. 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 preemption of State laws covering the subject matter of this proposed rule, which occurs by operation of law under 49 U.S.C. 20106 whenever FRA issues a safety rule or order. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

D. 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 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.

E. 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
234.303(b)—Report to ENS—Unsafe Condition at Highway-Rail Crossing.	594 railroads	63,891 reports	1 minute	1,065 hours.
234.303(c)—Report to ENS Service—Unsafe Condition at Pathway Grade Crossing.	594 railroads	1,860 reports	1 minute	155 hours.
234.305(a)—Reported Malfunction of Warning System at Highway-Rail Grade Crossing Necessitating Immediate Contact by Dispatching RR of All Trains Authorized to Operate through That Crossing.	594 railroads	465 contacts	1 minute	8 hours.
—Contact of Crossing Maintenance Railroad by Dispatching Railroad.	594 railroads	465 contacts	1 minute	8 hours.
—(b) Other Report of Warning System Malfunction at Highway-Rail Grade Crossing Necessitating Immediate Contact by Dispatching RR of All Trains Authorized to Operate Through That Crossing.	594 railroads	925 contacts	1 minute	15 hours.
—Other Report of Warning System Malfunction at Highway-rail Grade Crossing Necessitating Prompt Contact by Dispatching RR of Law Enforcement Agency to Direct Traffic/Maintain Safety.	594 railroads	925 contacts	1 minute	15 hours.
—(2) Other Report of Warning System Malfunction at Highway-rail Grade Crossing Necessitating Immediate Contact by Dispatching RR of All Trains Authorized to Operate Through That Crossing.	594 railroads	925 contacts	1 minute	15 hours.
—Dispatching RR Contact of Law Enforcement Authority to Direct Traffic/Maintain Safety.	594 railroads	920 contacts	1 minute	15 hours.

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Dispatching RR Contact of Maintaining RR re: Malfunction ..	594 railroads	920 contacts	1 minute	15 hours.
234.305(c)(1)—Report of Warning System Failure at Pathway Grade Crossing and Need of Dispatching RR to Contact All Trains Operating Through It.	594 railroads	2 contacts	1 minute	.03333 hour.
—Report of Warning System Failure at Pathway Grade Crossing and Need of Dispatching RR to Contact Law Enforcement Agencies.	594 railroads	2 contacts		.03333 hour.
—(d) Dispatching RR Contact of All Trains Operating Through Highway-rail or Pathway Grade Crossing Upon Receiving Report of Disabled Vehicle or Other Obstruction.	594 railroads	2,556 contacts	1 minute	43 hours.
—Dispatching RR Contact of Law Enforcement Authority Upon Receiving Report of Disabled Vehicle or Other Obstruction.	594 railroads	2,556 contacts	1 minute	43 hours.
—(h) Maintaining RR Provision of Contact Information to Dispatching RR.	594 railroads	10 contacts	1 minute	.1667 hour.
234.307—3rd Party Telephone Service	594 railroads	50 contacts	15 minutes	13 hours.
—RR Contact Information to Service	594 railroads	50 letters	60 minutes	50 hours.
—RR Notification to FRA of Use of Service	594 railroads	100 contacts	1 minute	2 hours.
—3rd Party Notification to RR of Report Pursuant to section 234.303.	50 third parties	100 contacts	1 minute	2 hours.
234.309(a)—ENS Signs—General—Provision of ENS Telephone Number to Maintaining RR by Dispatching RR.	594 railroads	10 contacts	30 mintues	5 hours.
—(b) ENS Signs Located at Highway-Rail or Pathway Grade Crossings as required by section 234.311 with Necessary Information to Receive Reports Required under section 234.303.	594 railroads	422,802 signs	15 minutes	105,701 hrs.
234.313—Recordkeeping—Records of Reported Unsafe Conditions Pursuant to Section 234.303.	594 railroads	186,000 records	4 minutes	12,400 hours.

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 the following issues: 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. Kimberly Toone at 202–493–6132.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Kimberly Toone, 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. Toone at the following address: *Robert.Brogan@dot.gov; Kimberly.Toone@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**.

F. Environmental Assessment

FRA has evaluated this proposed 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.) Section 4(c)(20) reads as follows: "(c) Actions categorically excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. * * * The following classes of FRA actions are categorically excluded: * * * (20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions or air or water pollutants or noise or increased traffic congestion in any mode of transportation."

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.

G. 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 $100,000,000 or more (adjusted annually for inflation) in any 1 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. For the year 2010, this monetary amount of $100,000,000 has been adjusted to $140,800,000 to account for inflation. This proposed rule would not result in the expenditure of more than $140,800,000 by the public sector in any one year, and thus preparation of such a statement is not required.

H. 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 a notice of inquiry, advance notice of proposed rulemaking, and notice of proposed rulemaking) that (1)(i) 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) 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 will not have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a "significant energy action" within the meaning of Executive Order 13211.

I. Privacy Act Statement

Interested parties should be aware 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 (Volume 65, Number 70; Pages 19477–78), or you may visit *http://www.regulations.gov.*

List of Subjects in 49 CFR Part 234

Highway safety; Penalties; Railroad safety; and Reporting and recordkeeping requirements.

The Proposal

In consideration of the foregoing, FRA proposes to amend part 234 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 234—GRADE CROSSING SIGNAL SYSTEM SAFETY, STATE ACTION PLANS, AND EMERGENCY NOTIFICATION SYSTEMS

1. The authority citation for part 234 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20152, 21301, 21304, 21311, 22501 note; Pub. L. 110–432, Div. A, § 202; 28 U.S.C. 2461, note; and 49 CFR 1.49.

2. The heading for part 234 is revised to read as set forth above.

3. Section 234.1 is revised to read as follows:

§ 234.1 Scope.

(a) This part imposes minimum maintenance, inspection, and testing standards for highway-rail grade crossing warning systems. This part also prescribes standards for the reporting by railroad and public agency employees of failures of such systems and prescribes minimum actions that railroads must take when such warning systems malfunction. This part also requires particular identified States to develop State highway-rail grade crossing action plans. This part also prescribes minimum requirements that railroads establish systems for receiving toll-free telephone calls from the public at large about unsafe conditions at highway-rail and pathway grade crossings and for taking certain actions in response to those calls.

(b) This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

4. Section 234.3 is revised to read as follows:

§ 234.3 Application and responsibility for compliance.

(a) With the exception of § 234.11, this part applies to all railroads, all contractors for railroads, and all subcontractors for railroads except the following:

(1) Operations of a plant railroad as defined in § 234.5;

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

(3) Tourist, scenic, historic, or excursion operations conducted only on track used exclusively for that purpose (*i.e.,* there is no freight, intercity passenger, or commuter passenger railroad operation on the track) and only on track inside an installation that is insular; *i.e.,* the operations are limited to a separate enclave in such a way that there is no reasonable expectation that the safety of the public—except a business guest, a licensee of the railroad or an affiliated entity, or a trespasser—would be affected by the operation. An operation will not be considered insular if one or more of the following exists on its line:

(i) A public highway-rail crossing that is in use;

(ii) An at-grade rail crossing that is in use;

(iii) A bridge over a public road or waters used for commercial navigation; or

(iv) A common corridor with a railroad, *i.e.,* its operations are within 30 feet of those of any railroad.

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

5. Section 234.5 is revised by revising the definition of "Credible report of system malfunction" and adding definitions of "FRA" and "Plant railroad" in alphabetical order to read as follows:

§ 234.5 Definitions.

As used in this part—

* * * * *

Credible report of warning system malfunction means specific information regarding a malfunction at an identified highway-rail grade crossing, supplied by

a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity.

* * * * *

FRA means the Federal Railroad Administration, U.S. Department of Transportation.

* * * * *

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

* * * * *

6. The heading to subpart C of part 234 is revised to read as follows:

Subpart C—Response to Reports from Railroad and Public Agency Employees of Warning System Malfunction at Highway-Rail Grade Crossings.

* * * * *

7. Subpart E of part 234 is added to read as follows:

Subpart E—Emergency Notification Systems for Reporting Unsafe Conditions at Highway-Rail and Pathway Grade Crossings

Sec.

234.301 Definitions.
234.303 Telephonic notification of unsafe conditions at a highway-rail or pathway grade crossing.
234.305 Remedial actions.
234.307 Third-party telephone service.
234.309 ENS signs in general.
234.311 ENS sign placement and maintenance.
234.313 Recordkeeping.
234.315 Electronic recordkeeping.
234.317 Compliance dates.

§ 234.301 Definitions.

As used in this subpart—

Automated answering service means a type of answering service in which a telephone call is answered by any means other than an actual human being speaking live to the caller at the time that the call is made.

Class II and *Class III* have the meaning assigned by regulations of the Surface Transportation Board (49 CFR part 1201; General Instructions 1–1), as those regulations may be revised and applied by order of the Board (including modifications in class threshold based on revenue deflator adjustments).

Dispatching railroad means a railroad that dispatches or otherwise provides the authority for the movement of one or more trains through a highway-rail or pathway grade crossing.

Emergency Notification System means a system in place by which a railroad receives, processes, and attends to reports of an unsafe condition at a highway-rail or pathway grade crossing through which it dispatches a train. An Emergency Notification System includes the following components:

(1) Signs, placed and maintained at the grade crossings by the railroad responsible for maintaining the crossing, that display the information necessary for the public to report an unsafe condition at the grade crossing to the railroad that dispatches trains through the crossing;

(2) The method that the dispatching railroad uses to receive and process a telephone call reporting the unsafe condition;

(3) The remedial actions that the dispatching railroad takes to address the report of the unsafe condition;

(4) The remedial actions that the maintaining railroad takes if the dispatching railroad does not have maintenance responsibility; and

(5) The recordkeeping conducted by the railroad or railroads in response to the report of the unsafe condition at the grade crossing.

ENS means Emergency Notification System as defined in this section.

Highway-rail and pathway grade crossing means a highway-way rail grade crossing and a pathway grade crossing.

Highway-rail or pathway grade crossing means either a highway-rail grade crossing or a pathway grade crossing.

Maintaining railroad means the owner of the track at the highway-rail or the pathway grade crossing. If the track owner has contracted out the responsibility to maintain a warning system or track structure at a highway-rail or a pathway grade crossing, the contractor is considered the "maintaining railroad" for the purposes of this subpart.

Pathway grade crossing means a pathway that has all of the following characteristics:

(1) That is explicitly authorized by a public authority or a railroad;

(2) That is dedicated for the use of nonvehicular traffic, including pedestrians, bicyclists, and others;

(3) That is not associated with a public highway, road, or street, or a private roadway; and

(4) That crosses one or more railroad tracks at grade.

§ 234.303 Telephonic notification of unsafe conditions at a highway-rail or pathway grade crossing.

(a) *Duty of dispatching railroad in general.* Each dispatching railroad shall establish and maintain a toll-free telephone service by which the railroad can directly receive calls from the public reporting any of the conditions listed in paragraph (b) of this section with respect to a highway-rail grade crossing through which the railroad dispatches a train and paragraph (c) of this section with respect to a pathway grade crossing through which the railroad dispatches a train. The railroad shall not use an automated answering service for the purpose of receiving reports pursuant to this section.

(b) *Reportable unsafe conditions at highway-rail grade crossings.* Each dispatching railroad shall establish a service pursuant to § 234.303(a) to receive reports or specific information regarding the following conditions with respect to a highway-rail grade crossing through which it dispatches a train:

(1) A warning system malfunction at the highway-rail grade crossing;

(2) A disabled vehicle or other obstruction blocking a railroad track at the highway-rail grade crossing;

(3) An obstruction to the view of a pedestrian or a vehicle operator for a reasonable distance in either direction of a train's approach to the highway-rail grade crossing; or

(4) Any information relating to any other unsafe condition at the highway-rail grade crossing.

(c) *Reportable unsafe conditions at pathway grade crossings.* Each dispatching railroad shall establish a service pursuant to § 234.303(a) to receive reports or information regarding the following conditions with respect to a pathway grade crossing through which it dispatches a train:

(1) A failure of the active warning system at the pathway grade crossing to perform as intended;

(2) An obstruction blocking a railroad track at the pathway grade crossing;

(3) An obstruction to the view of a pathway grade crossing user for a reasonable distance in either direction of a train's approach to the pathway grade crossing; or

(4) Any information relating to any other unsafe condition at the pathway grade crossing.

(d) *Class II or III dispatching railroads.* A Class II or Class III railroad that dispatches a train through a highway-rail or pathway grade crossing within an area in which the use of a non-toll-free number would not incur any additional fees for the caller compared to if a toll-free number was used, may use that non-toll-free number to receive calls pursuant to § 234.303(a) regarding each such crossing in that area.

(e) If a report of an unsafe condition at a highway-rail or pathway grade crossing was not made through the telephone service described in paragraph (a) of this section, subpart E does not apply to that report.

§ 234.305 Remedial actions.

(a) *General rule on response to credible reports of warning system malfunction at highway-rail grade crossing.* (1) If a railroad receives a report pursuant to § 234.303(b)(1) that is a credible report of warning system malfunction at a highway-rail grade crossing and the railroad has maintenance responsibility for the warning system to which the report pertains, the railroad shall take the appropriate action required by subpart C of this part.

(2) If a railroad receives a report pursuant to § 234.303(b)(1) that is a credible report of warning system malfunction at a highway-rail grade crossing and that railroad does not have maintenance responsibility for the warning system to which the report pertains, the railroad shall immediately contact all trains that are authorized to operate through the highway-rail grade crossing and warn the trains of the reported malfunction. The railroad shall then immediately contact the railroad that has maintenance responsibility for the warning system and inform it of the reported malfunction. The railroad that has maintenance responsibility for the warning system at the highway-rail grade crossing shall take the appropriate action required by subpart C of this part.

(b) *General rule on response to other reports of warning system malfunction at highway-rail grade crossing.* (1) If a railroad receives a report of warning system malfunction pursuant to § 234.303(b)(1) that is not a credible report of warning system malfunction at a highway-rail grade crossing and that railroad has maintenance responsibility for the warning system to which the report pertains, the railroad shall immediately contact all trains that are authorized to operate through the highway-rail grade crossing and warn the trains of the reported malfunction. The railroad shall also promptly contact the law enforcement agency having jurisdiction over the highway-rail grade crossing and provide the necessary information for the law enforcement agency to direct traffic or carry out other activities to maintain safety at the highway-rail grade crossing. The railroad shall then promptly investigate the report and determine the nature of the malfunction and shall take the appropriate action required by § 234.207(a).

(2) If a railroad receives a report of warning system malfunction pursuant to § 234.303(b)(1) that is not a credible report of warning system malfunction and that railroad has dispatching responsibility for the crossing but does not have maintenance responsibility for the warning system at the highway-rail grade crossing, the railroad shall immediately contact all trains that are authorized to operate through the highway-rail grade crossing to which the report pertains and warn the trains of the reported malfunction. The railroad shall also promptly contact the law enforcement agency having jurisdiction over the highway-rail grade crossing and provide the necessary information for the law enforcement agency to direct traffic or carry out other activities to maintain safety at the highway-rail grade crossing. The railroad shall then promptly contact the railroad that has maintenance responsibility for the warning system and inform it of the reported malfunction. The railroad having maintenance responsibility shall promptly investigate the report and determine the nature of the malfunction and shall take the appropriate action required by § 234.207(a).

(c) *General rule on response to warning system failure at a pathway grade crossing.* (1) If a railroad receives a report of warning system failure at a pathway grade crossing pursuant to § 234.303(c)(1) and that railroad has maintenance responsibility for the warning system to which the report pertains, the railroad shall immediately contact all trains that are authorized to operate through the pathway grade crossing and warn the trains of the reported failure. The railroad shall also promptly contact the law enforcement agency having jurisdiction over the pathway grade crossing and provide the necessary information for the law enforcement agency to direct traffic or carry out other activities to maintain safety at the pathway grade crossing. The railroad shall then promptly investigate the report and determine the nature of the failure and repair the active warning system if necessary.

(2) If a railroad receives a report of warning system failure at a pathway grade crossing pursuant to § 234.303(c)(1) and that railroad has dispatching responsibility for the pathway grade crossing but does not have maintenance responsibility for the warning system to which the report pertains, the railroad shall immediately contact all trains that are authorized to operate through the pathway grade crossing to which the report pertains and warn the trains of the reported failure. The railroad shall also promptly contact the law enforcement agency having jurisdiction over the pathway grade crossing and provide the necessary information for the law enforcement agency to direct traffic or carry out other activities to maintain safety at the pathway grade crossing. The railroad shall then promptly contact the railroad that has maintenance responsibility for the warning system and inform it of the reported failure. The railroad having maintenance responsibility shall then promptly investigate the report and determine the nature of the failure and shall repair the warning system if necessary.

(d) *General rule on dispatching railroad's response to reports of a disabled vehicle or other obstruction blocking a railroad track at a highway-rail or pathway grade crossing.* Upon receiving a report pursuant to § 234.303(b)(2) or (c)(2), the railroad shall immediately contact all trains that are authorized to operate through the highway-rail or pathway grade crossing to which the report pertains and warn the trains of the reported disabled vehicle or other track obstruction. After contacting the necessary trains, the railroad shall promptly contact the law enforcement agency having jurisdiction over the highway-rail or pathway grade crossing to provide it with the information necessary to assist in the removal of the reported track obstruction or to carry out other activities as appropriate.

(e) *Special rule on contacting a train that is not required to have communication equipment.* If a railroad is not required by § 220.9 of this chapter to have a working radio or working wireless communications in each occupied controlling locomotive of its trains and the dispatching railroad receives a report pursuant to § 234.303(b)(1), (b)(2), (c)(1), or (c)(2)

about a crossing that one of the trains is authorized to operate through, the dispatching railroad shall immediately contact the occupied controlling locomotive of the train as required by § 234.305(a), (b), (c), or (d) by the quickest means available consistent with § 220.13(a) of this chapter.

(f) *General rule on response to reports of obstruction of view at highway-rail or pathway grade crossings.* Upon receiving a report pursuant to § 234.303(b)(3) or (c)(3), the dispatching railroad, if it is also the maintaining railroad, shall timely investigate the report and shall remove the obstruction if it is feasible and lawful to do so. If the dispatching railroad is not the maintaining railroad, the dispatching railroad shall promptly contact the maintaining railroad, which shall timely investigate the report and which shall remove the obstruction, if it is lawful and feasible to do so.

(g) *General rule on response to reports of other unsafe conditions at highway-rail or pathway grade crossings.* (1) Upon receiving a report pursuant to § 234.303(b)(4) or (c)(4) related to the maintenance of a crossbuck sign or other similar grade crossing safety device not covered by § 234.305(a), (b), or (c), the dispatching railroad, if it also has maintenance responsibility for the device, shall timely investigate the report; and, if it finds that the unsafe condition exists, the dispatching railroad shall timely correct it if it is lawful and feasible to do so. If the dispatching railroad does not have maintenance responsibility for the device, the dispatching railroad shall timely inform the railroad with maintenance responsibility for the device, and the maintaining railroad shall timely investigate the report; and, if the maintaining railroad finds that the unsafe condition exists, the railroad shall timely correct it if it is lawful and feasible to do so.

(2) Upon receiving a report pursuant § 234.303(b)(4) or (c)(4), not covered by § 234.305(g)(1), the dispatching railroad, if it is also the maintaining railroad, shall timely investigate the report; and, if it finds that the unsafe condition exists, the dispatching railroad shall timely correct it if it is lawful and feasible to do so. If the dispatching railroad is not the maintaining railroad, the dispatching railroad shall timely inform the maintaining railroad of the report, and the maintaining railroad shall timely investigate the report; and, if the maintaining railroad finds that the unsafe condition exists, the railroad shall timely correct it if it is lawful and feasible to do so.

(h) *General rule on contacting the maintaining railroad and use of an automated answering service.* If the dispatching railroad is required under this section to contact the maintaining railroad, the maintaining railroad shall—

(1) Provide the dispatching railroad with sufficient contact information by which the dispatching railroad may immediately contact the maintaining railroad upon receipt of a report; and

(2) Not use an automated answering service for the purpose of receiving a call from the dispatching railroad.

§ 234.307 Third-party telephone service.

(a) *Use of a third-party service.* A railroad may use a third-party service to directly receive reports pursuant to § 234.303. The third-party service shall be reached directly by the telephone number placed on the sign pursuant to § 234.309. The third-party service shall not use an automated answering service for the purpose of receiving such reports, and the contracting railroad shall ensure that the third-party service does not use an automated answering service for the purpose of receiving such reports.

(b) *Duties of railroad using third-party service.* If a railroad uses a third-party service to directly receive reports pursuant to § 234.303, the railroad—

(1) Shall provide the third-party service with sufficient contact information by which the third-party service may immediately contact the contracting railroad upon receipt of a report;

(2) Shall not use an automated answering service to receive calls from the third-party service for the purpose of receiving reports pursuant to § 234.303;

(3) Shall promptly inform FRA of its intent to use a third-party service and shall provide FRA with contact information for the third-party service, and information identifying the highway-rail and pathway grade crossings about which the third-party service will receive reports; and

(4) Upon being contacted by the third-party service about a report pursuant to § 234.303, the railroad shall take appropriate action as required by § 234.305.

(c) *Duties of third-party service.* Upon receiving a report pursuant to § 234.303, the third-party service shall immediately contact the contracting railroad, and, at a minimum, provide the railroad with the following:

(1) Information on the nature of the reported unsafe condition;

(2) Information on the location of the unsafe condition, including the U.S. DOT National Crossing Inventory File Number;

(3) Information on whether the person reporting the unsafe condition is a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity; and

(4) Any additional information provided by the caller that may be useful to restore the crossing to a safe condition.

(d) *Third-party service and contracting railroad liability.* A third-party service is responsible for complying with this subpart. In addition, the contracting railroad is vicariously liable for the acts or omissions of the third-party service under the contract in violation of this subpart.

§ 234.309 ENS signs in general.

(a) No later than 30 days before the implementation of an ENS, the dispatching railroad for a highway-rail or pathway grade crossing shall provide to the maintaining railroad for the crossing the telephone number to be posted on the ENS sign at the crossing if the dispatching railroad and the maintaining railroad are not the same.

(b) Each ENS sign located at each highway-rail or pathway grade crossing as required by § 234.311 shall have the necessary information for the dispatching railroad to receive reports of unsafe conditions at the crossing. This information, at a minimum, includes the toll-free number (or non-toll-free number as provided for in § 234.303(d)) established to receive reports pursuant to § 234.303(a), an explanation of the purpose of the sign, and the U.S. DOT National Crossing Inventory File Number assigned to that crossing.

(c) Each ENS sign shall be at least 12 inches wide by 9 inches high, have lettering measuring, at a minimum, 1 inch in height, and have a white legend and border on a blue background.

§ 234.311 ENS sign placement and maintenance.

(a) The maintaining railroad for a highway-rail or pathway grade crossing shall place and maintain a sign that conforms to § 234.309 at the crossing for each direction of traffic at that crossing. A pathway grade crossing is considered to have a minimum of two directions of traffic unless specifically designed for traffic in one direction only.

(b) Each sign required by paragraph (a) of this section shall be located and maintained by the maintaining railroad so that it—

(1) Is conspicuous to users of the roadway or pathway;

(2) Optimizes its visibility at nighttime;

(3) Minimizes the effect of mud splatter and debris; and

(4) Does not obscure any other sign at the crossing.

(c) A sign placed on the signal bungalow shall not be deemed to comply with § 234.311(b).

§ 234.313 Recordkeeping.

(a) Each railroad subject to this subpart shall keep records in accordance with paragraph (b) of this section pertaining to its compliance with this subpart. Records may be kept either on paper forms provided by the railroad or by electronic means in a manner that conforms with § 234.315. Each railroad responsible for receiving reports pursuant to § 234.303(a) and, if applicable, each railroad with maintenance responsibility shall keep, at a minimum, the following information for each report received under this subpart:

(1) The nature of the reported unsafe condition;

(2) Location of the highway-rail or pathway grade crossing (by highway name, if applicable, and U.S. DOT National Crossing Inventory File Number);

(3) Time and date of receipt of the report by the railroad;

(4) Whether the person who provided the report was a railroad employee, law enforcement officer, highway traffic official, or other employee of a public agency acting in an official capacity;

(5) Actions taken by the railroad prior to rectifying the reported unsafe condition at the grade crossing;

(6) If the reported unsafe condition is substantiated, actions taken by the railroad to rectify the reported unsafe condition, if possible;

(7) Time and date at which the reported unsafe condition was rectified; and

(8) If a railroad is required by this subpart to contact a railroad with maintenance responsibility, the time and date the railroad contacted the railroad having maintenance responsibility.

(b) A railroad having maintenance responsibility over warning devices at a highway-rail grade crossing that maintains records pursuant to § 234.109, shall be deemed to comply with the recordkeeping requirements of this subpart with regards to credible reports of warning system malfunctions.

(c) Each railroad shall retain for at least one year (from the latest date of railroad activity in response to a report received under this subpart) all records referred to in paragraph (a) of this section. Records required to be kept shall be made available to the FRA as provided by 49 U.S.C. 20107.

§ 234.315 Electronic recordkeeping.

(a) If a railroad subject to this subpart keeps a record required by this subpart electronically in lieu of on paper, the system for keeping the electronic record must meet all of the following conditions:

(1) The railroad adequately limits and controls accessibility to the record retained in its electronic database system and identifies those individuals who have such access;

(2) The railroad has a terminal at the location designated by the railroad as the general office for the railroad system and at each division headquarters;

(3) Each such terminal has a computer and either a facsimile machine or a printer connected to the computer to retrieve and produce information in a usable format for immediate review by FRA representatives;

(4) The railroad has a designated representative who is authorized to authenticate retrieved information from the electronic system as a true and accurate copy of the electronically kept record; and

(5) The railroad provides FRA representatives with immediate access to the record for inspection and copying during normal business hours and provides a printout of such record upon request.

(b) If a record required by this part is in the form of an electronic record kept by an electronic recordkeeping system that does not comply with paragraph (a) of this section, then the record must be kept on paper.

§ 234.317 Compliance dates.

(a) If a railroad subject to this subpart does not have an ENS of any kind in place on the effective date of this subpart, the railroad shall implement an ENS that conforms to this subpart no later than 18 months after the effective date of this subpart.

(b) If a railroad subject to this subpart already has its own ENS telephone service or is using a third-party ENS telephone service on the effective date of this subpart, and that telephone service does not conform to the requirements in § 234.303 or § 234.307, respectively, the railroad shall comply with § 234.303 or § 234.307, respectively, no later than six months after the effective date of this subpart.

(c)(1) If a railroad subject to this subpart already has ENS signs in place on the effective date of this subpart and those signs do not conform to the requirements in § 234.309, subject to § 234.317(c)(2), the railroad's ENS signs shall conform to § 234.309 no later than five years after the effective date of this subpart. If the railroad replaces a non-conforming sign before the expiration of the five-year period, the railroad shall replace that sign with a sign that conforms to § 234.309.

(2) If a railroad subject to this subpart already has ENS signs in place on the effective date of this subpart and those signs measure less than 60 square inches, those ENS signs shall conform to § 234.309 no later than 18 months after the effective date of this subpart. If the railroad replaces a non-conforming sign before the expiration of the 18-month period, the railroad shall replace that sign with a sign that conforms to § 234.309.

(d) If a railroad subject to this subpart already has ENS signs in place on the effective date of this subpart and the placement of those signs does not conform to the requirements in § 234.311, the placement of the railroad's ENS signs shall conform to § 234.311 no later than five years after the effective date of this subpart. If a railroad replaces a sign before the five-year period so that the sign conforms with § 234.309, and the placement of that sign does not conform with § 234.311, the railroad shall also change the placement of the sign so that it conforms to § 234.311.

(e) If a railroad subject to this subpart already conducts recordkeeping as part of its ENS on the effective date of this subpart and that recordkeeping does not conform to § 234.313 or § 234.315, the railroad's recordkeeping shall conform to § 234.313 or § 234.315 no later than six months after the effective date of this subpart.

Issued in Washington, DC, on February 28, 2011.

Joseph C. Szabo,

Administrator, Federal Railroad Administration.

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