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Federal Railroad Administration

49 CFR Part 270

System Safety Program; Proposed Rule

**DEPARTMENT OF TRANSPORTATION****Federal Railroad Administration****49 CFR Part 270**

[Docket No. FRA–2011–0060, Notice No. 1]

RIN 2130–AC31

**System Safety Program**

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** FRA proposes to require commuter and intercity passenger railroads to develop and implement a system safety program (SSP) to improve the safety of their operations. An SSP would be a structured program with proactive processes and procedures developed and implemented by commuter and intercity passenger railroads to identify and mitigate or eliminate hazards and the resulting risks on each railroad's system. A railroad would have a substantial amount of flexibility to tailor an SSP to its specific operations. An SSP would be implemented by a written SSP plan and submitted to FRA for review and approval. A railroad's compliance with its SSP would be audited by FRA.

**DATES:** Written comments must be received by November 6, 2012. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

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 October 9, 2012, 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–2011–0060, Notice No. 1, may be submitted by any of the following methods:

- *Web site:* The Federal eRulemaking Portal, [www.regulations.gov](http://www.regulations.gov). Follow the Web site's online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590.
- *Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12–140 on the

Ground level of the West Building, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Instructions:* All submissions must include the agency name, docket name, and docket number or Regulatory Identification Number (RIN) for this rulemaking (2130–AC31). Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

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

**FOR FURTHER INFORMATION CONTACT:** Daniel Knote, Staff Director, Passenger Rail Division, U.S. Department of Transportation, Federal Railroad Administration, Office of Railroad Safety, Mail Stop 25, West Building 3rd Floor, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 631–965–1827), [Daniel.Knote@dot.gov](mailto:Daniel.Knote@dot.gov); or Matthew Navarrete, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, Mail Stop 10, West Building 3rd Floor, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 202–493–0138), [Matthew.Navarrete@dot.gov](mailto:Matthew.Navarrete@dot.gov).

**SUPPLEMENTARY INFORMATION:****Table of Contents for Supplementary Information**

- I. Executive Summary
- II. Background & History
  - A. System Safety Program—Generally
  - B. System Safety Program—History
    - i. System Safety in FRA
    - ii. Federal Transit Administration's Part 659 Program
    - iii. FRA's Confidential Close Call Reporting System and Clear Signal for Action Program
  - C. FRA's Railroad Safety Advisory Committee
    - i. Overview
    - ii. Passenger Safety Working Group
    - iii. General Passenger Safety Task Force
    - iv. System Safety Task Group
    - v. RSAC Vote
- III. Statutory Background and History
  - A. Rail Safety Improvement Act of 2008
  - B. Related Risk Reduction Rulemaking
  - C. System Safety Information Protection

- i. Exemption from Freedom of Information Act Disclosure
- ii. Discovery and Other Use of Risk Analysis Information in Litigation
  1. RSIA Mandate
  2. The Study and its Conclusions
  3. FRA's Proposal
- IV. Guidance Manual
- V. Section-by-Section Analysis
- VI. Regulatory Impact and Notices
  - A. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures
  - B. Regulatory Flexibility Act and Executive Order 13272
  - C. Federalism
  - D. International Trade Impact Assessment
  - E. Paperwork Reduction Act
  - F. Environmental Assessment
  - G. Unfunded Mandates Reform Act of 1995
  - H. Energy Impact
  - I. Privacy Act

**I. Executive Summary**

This proposal would require commuter and intercity passenger railroads to develop and implement a system safety program (SSP). An SSP is a structured program with proactive processes and procedures developed and implemented by commuter and intercity passenger railroads (passenger railroads) to identify and mitigate or eliminate hazards and the resulting risks on the railroad's system. An SSP encourages a railroad and its employees to work together to proactively identify hazards and to jointly determine what, if any, action to take to mitigate or eliminate the resulting risks. The proposed rule would provide each railroad with a substantial amount of flexibility to tailor its SSP to its specific operations. FRA is proposing the SSP rule as part of its efforts to continuously improve rail safety and to satisfy the statutory mandate contained in sections 103 and 109 of the Rail Safety Improvement Act of 2008 (RSIA), Public Law 110–432, Division A, 122 Stat. 4848 *et seq.*, codified at 49 U.S.C. 20156, and 20118–20119.

Section 103 of RSIA directs the Secretary of Transportation (Secretary) to issue a regulation requiring certain railroads, including passenger railroads, to develop, submit to the Secretary for review and approval, and implement a railroad safety risk reduction program. The proposed rule would implement this safety risk mandate for passenger railroads. Section 109 of RSIA authorizes the Secretary to issue a regulation protecting from discovery and admissibility into evidence in litigation documents generated for the purpose of developing, implementing, or evaluating a SSP. The proposed rule would implement section 109 with respect to the system safety program covered by part 270 and a railroad safety

risk reduction rule required by FRA for Class I freight railroads and railroads with an inadequate safety performance. The Secretary has delegated the responsibility to carry out his responsibilities under both sections 103 and 109 of RSIA, as well as the general responsibility to conduct rail safety rulemakings, codified at 49 U.S.C. 20103, to the Administrator of FRA. 49 CFR 1.49(m) and (oo). The proposed SSP rule is a performance-based rule and FRA seeks comments on all aspects of the proposed rule.

An SSP would be implemented by a written system safety program plan (SSP plan). The proposed regulation sets forth various elements that a railroad's SSP plan would be required to contain to properly implement an SSP. The main components of an SSP would be the risk-based hazard management program and risk-based hazard analysis. A properly implemented risk-based hazard management program and risk-based hazard analysis would identify the hazards and resulting risks on the railroad's system, develop methods to mitigate or eliminate, if practicable, these hazards and risks, and set forth a plan to implement these methods. As part of its risk-based hazard analysis, a railroad would consider various technologies that may mitigate or eliminate the identified hazards and risks, as well as consider the role of fatigue in creating hazards and risks.

As part of its SSP plan, a railroad would also be required to describe the various procedures, processes, and programs it has in place that support the goals of the SSP. These procedures, processes, and programs include, but are not limited to, the following: a maintenance, inspection, and, repair program; rules compliance and procedures review(s); SSP employee/contractor training; and a public safety outreach program. Since most of these are procedures, processes, and programs railroads should already have in place, the railroads would most likely only have to identify and describe such procedures, processes, and programs to comply with the regulation.

An SSP can be successful only if a railroad engages in a robust assessment of the hazards and resulting risks on its system. However, a railroad may be reluctant to reveal such hazards and risks if there is the possibility that such information may be used against it in a court proceeding for damages. Congress directed FRA to conduct a study to determine if it was in the public interest to withhold certain information, including the railroad's assessment of its safety risks and its statement of mitigation measures, from discovery

and admission into evidence in proceedings for damages involving personal injury and wrongful death. See 49 U.S.C. 20119. FRA contracted with an outside organization to conduct this study and the study concluded that it was in the public interest to withhold this type of information from these types of proceedings. See FRA, *Study of Existing Legal Protections for Safety-Related Information and Analysis of Considerations for and Against protecting Railroad Safety Risk Reduction Program Information*, docket no. FRA-2011-0025-0031, Oct. 21, 2011, available at <http://www.fra.dot.gov/Downloads/FRA-Final-Study-Report.pdf>. Furthermore, Congress authorized FRA, by delegation from the Secretary, to prescribe a rule, subject to notice and comment, to address the results of the study. 49 U.S.C. 20119(b). The proposed rule addresses the study's results and sets forth protections of certain information from discovery, admission into evidence, or use for other purposes in a proceeding for damages.

An SSP will affect almost all facets of a railroad's operations. To ensure that all employees directly affected by an SSP have an opportunity to provide input on the development, implementation, and evaluation of a railroad's SSP, a railroad would be required to consult in good faith and use its best efforts to reach agreement with all of its directly affected employees on the contents of the SSP plan and amendments to the plan. In an appendix, the proposed rule provides guidance regarding what constitutes "good faith" and "best efforts."

FRA anticipates the rule would become effective 60 days after the publication of the final rule. However, by statute, the protection of certain information from discovery, admission into evidence, or use for other purposes in a proceeding for damages will not become applicable until one year after the publication of the final rule. A railroad would be required to submit its SSP plan to FRA for review not more than 90 days after the applicability date of the discovery protections, i.e., 395 days after the effective date of the final rule, or not less than 90 days prior to commencing operations, whichever is later. Within 90 days of receipt of the SSP plan, or within 90 days of receipt of an SSP plan submitted prior to the commencement of railroad operations, FRA would review the plan and determine if it meets all the requirements set forth in the regulation. If, during the review, FRA determines that the railroad's SSP plan does not comply with the requirements, FRA

would notify the railroad of the specific points in which the plan is deficient. The railroad would then have 60 days to correct these deficient points and resubmit the plan to FRA. Whenever a railroad amends its SSP, it would be required to submit an amended SSP plan to FRA for approval and provide a cover letter describing the amendments. A similar approval process and timeline would apply whenever a railroad amends its SSP.

A railroad's submission of its SSP plan to FRA would not be FRA's first interaction with the railroad. FRA plans on working with the railroad throughout the development of its SSP to help the railroad properly tailor the program to its specific operation. To this end, shortly after publication of the final rule, FRA would publish a guidance manual to assist a railroad in the development, implementation, and evaluation of its SSP.

Most of the passenger railroads affected by this proposal already participate in the American Public Transportation Association (APTA) System Safety Program, which also has a triennial audit program. FRA currently provides technical assistance to new passenger railroads for the development and implementation of system safety programs and conduct of preliminary hazard analyses in the design phase. Thus, the economic impact of the proposed rule is generally incremental in nature for documentation of existing information and inclusion of certain elements not already addressed by railroads in their programs. Total estimated twenty-year costs associated with implementation of the proposed rule, for existing passenger railroads, range from \$1.8 million (discounted at 7%) to \$2.5 million (discounted at 3%).

FRA believes that there will be new, startup, passenger railroads, that will be formed during the twenty-year analysis period. FRA is aware of two passenger railroads that intend to commence operations in the near future. FRA assumed that one of these railroads would begin developing its SSP in Year 2, and that the other would begin developing its SSP in Year 3. FRA further assumed that one additional passenger railroad would be formed and develop its SSP every other year after that, in Years 5, 7, 9, 11, 13, 15, 17 and 19. Total estimated twenty-year costs associated with implementation of the proposed rule, for startup passenger railroads, range from \$270 thousand (discounted at 7%) to \$437 thousand (discounted at 3%).

Total estimated twenty-year costs associated with implementation of the proposed rule, for existing passenger

railroads and startup passenger railroads, range from \$2.0 million (discounted at 7%) to \$3.0 million (discounted at 3%).

Properly implemented SSPs are successful in optimizing the returns on railroad safety investments. Railroads can use them to proactively identify potential hazards and resulting risks at an early stage, thus minimizing associated casualties and property damage or avoiding them altogether. Railroads can also use them to identify a wide array of potential safety issues and solutions, which in turn allows them to simultaneously evaluate various alternatives for improving overall safety with available resources. This results in more cost effective investments. In addition, system safety planning helps railroads maintain safety gains over time. Without an SSP plan railroads could adopt countermeasures to safety problems that become less effective over time as the focus shifts to other issues. With SSP plans, those safety gains are likely to continue for longer time periods. SSP plans can also be instrumental in addressing casualties resulting from hazards that are not well-addressed through conventional safety programs, such as slips, trips and falls, or risks that occur because safety equipment is not used correctly, or routinely.

During the course of daily operations, hazards are continually discovered. Railroads must decide which hazards to address and how to do so with the limited resources available. Without a SSP plan in place, the decision process might become arbitrary. In the absence of the protections provided by the NPRM against discovery in legal proceedings for damages, railroads might also be reluctant to keep detailed records of known hazards. With a SSP plan in place, railroads are able to identify and implement the most cost effective measures to reduce casualties.

Railroad operations and maintenance activities have inherent safety critical elements. Thus, every capital expenditure is likely to have a safety component, whether for equipment, right-of-way, signaling or infrastructure. SSPs can increase the safety return on any investment related to the operation and maintenance of the railroad. FRA believes a very conservative estimate of all safety-related expenditures by all passenger railroads affected by the NPRM is \$11.6 billion per year. In the first twenty years of the proposed rule, SSP plans can result in improved cost effectiveness of investments totaling between \$92 billion (discounted at 7%) and \$139 billion (discounted at 3%). Through anecdotal evidence, FRA is

aware of situations where railroads unknowingly introduced hazards because they did not conduct hazard analyses. If the cost to remedy such situations is \$100,000 on average and five remedies are avoided per year, railroads can save \$500,000 per year and the proposed rule would be justified. FRA believes that it is reasonable to expect higher savings when considering there are 30 existing passenger rail operators impacted. The impact on the effectiveness of investments by startup railroads would likely be greater than for existing railroads, as more of their expenses are for new infrastructure or other systems that can have safety designed in from the start at little or no marginal cost.

Another way to look at the benefits that might accrue from implementing the proposed rule is based on potential accident prevention. Between 2001 and 2010, on average, passenger railroads had an average of 3,723.2 accidents, resulting in 207 fatalities, 3,543 other casualties, and \$21.1 million in damage to railroad track and equipment each year. Total quantified twenty-year accident costs total between \$24 billion (discounted at 7%) and \$36 billion (discounted at 3%). Of course, these accidents also resulted in damage to other property, delays to both railroads and highway users, emergency response and clean-up costs, and other costs not quantified in this analysis. FRA estimated the accident reduction benefits necessary for the NPRM benefits to at least equal the implementation costs and found that a reduction of approximately 0.007% would suffice. FRA believes that such risk reduction is more than attainable.

FRA also believes that the SSP Plans will identify numerous unnecessary risks that are avoidable at no additional cost but simply through the selection of the most appropriate safety measure to address a hazard. For instance, railroads may mitigate or eliminate hazards that cause or contribute to slips, trips and falls, such as through measures that ensure the proper use of safety equipment. FRA believes that railroads will make additional investments to mitigate or eliminate many risks identified through the SSPs. FRA cannot reasonably predict the kinds of measures that may be adopted or the additional costs and benefits that will result from these. Nonetheless, FRA believes that such measures will not be undertaken unless the benefits exceed the costs and the funding is available.

In conclusion, FRA is confident that the accident reduction and cost effectiveness benefits together would justify the \$2.0 million (discounted at

7%) to \$3.0 million (discounted at 3%) implementation cost over the first twenty years of the proposed rule.

## II. Background

### III. System Safety Program—Generally

Railroads operate in a dynamic, fast-paced environment that at one time posed extreme safety risks. Through concerted efforts by railroads, labor organizations, the U.S. DOT, and many other entities, railroad safety has vastly improved. But even though FRA has issued safety regulations and guidance that address many aspects of railroad operations, gaps in safety exist, and hazards and risks may arise from these gaps. FRA believes that railroads are in an excellent position to identify some of these gaps and take the necessary action to mitigate or eliminate the arising hazards and resulting risks. Rather than prescribing the specific actions the railroads need to take, FRA believes it would be more effective to allow the railroads to use their knowledge of their unique operating environment to identify the gaps and determine the best methods to mitigate or eliminate the hazards and resulting risks. An SSP would provide a railroad with the tools to systematically and continuously evaluate its system to identify the hazards and risks that result from gaps in safety and to mitigate or eliminate these hazards and risks.

There are many programs that are similar to the SSP proposed by this part. Most notably, the Federal Aviation Administration (FAA) has published an NPRM proposing to require each certificate holder operating under 14 CFR part 121 to develop and implement a safety management system (SMS). 75 FR 68224, Nov. 5, 2010; and 76 FR 5296, Jan. 31, 2011. An SMS “is a comprehensive, process-oriented approach to managing safety throughout the organization.” 75 FR 68224, Nov. 5, 2010. An SMS includes: “an organization-wide safety policy; formal methods for identifying hazards, controlling, and continually assessing risk; and promotion of safety culture.” *Id.* Under FAA’s proposed regulation, an SMS would have four components: Safety Policy, Safety Risk Management, Safety Assurance, and Safety Promotion. *Id.* at 68225.

The U.S. Department of Defense (DoD) has also set forth guidelines for a System Safety Program. In July 1969, DoD published “System Safety Program Plan Requirements” (MIL-STD-882). MIL-STD-882 is DoD’s standard practice for system safety, with the most recent version, MIL-STD-882E, published on May 11, 2012. DoD, *MIL-*

*STD-882E, Department of Defense Standard Practice System Safety* (May 11, 2012). MIL-STD-882 is used by many industries in the U.S. and internationally and certainly could be of use to a railroad when trying to determine which methods to use to comply with the proposed rule. In fact, MIL-STD-882 is cited in FRA's safety regulations for railroad passenger equipment, 49 CFR part 238, as an example of a formal safety methodology to use in complying with certain analysis requirements in that rule. See 49 CFR 238.103 and 238.603.

#### A. System Safety Program-History

##### i. System Safety in FRA

System safety is not a new concept to FRA. On February 20, 1996, in response to New Jersey Transit (NJT) and Maryland Rail Commuter Service accidents in early 1996, FRA issued Emergency Order No. 20, Notice No. 1 (EO 20). 61 FR 6876, Feb. 22, 1996. EO 20 required, among other things, commuter and intercity passenger railroads to promptly develop an interim system safety plan addressing the safety of operations that permit passengers to occupy the leading car in a train. In particular, EO 20 required "railroads operating scheduled intercity or commuter rail service to conduct an analysis of their operations and file with FRA an interim safety plan indicating the manner in which risk of a collision involving a cab car is addressed." *Id.* at 6879. FRA intended these plans to serve as a temporary measure in the light of the passenger equipment safety standards that FRA was developing. The plans were submitted to FRA and FRA initially determined that they were inadequate. As part of the Advance Notice of Proposed Rulemaking for the passenger equipment safety standards, FRA proposed system safety program and plans for railroads. 61 FR 30672, 30684, June 17, 1996.

On June 24, 1996, the chairman of APTA's Commuter Railroad Committee sent a letter to FRA to announce that APTA commuter railroads were in compliance with the requirements of EO 20 and agreed to adopt additional safety measures, including comprehensive system safety plans. These comprehensive system safety plans were broader in scope than the interim plans had been and were modeled after the Federal Transit Administration's (FTA) part 659 system safety plans, which were being successfully used by rapid transit authorities and include a triennial audit process. See 49 CFR part 659. In 1997, APTA and the commuter railroads, in conjunction with FRA and

the U.S. DOT, developed the Manual for the Development of System Safety Program Plans for Commuter Railroads. Pursuant to APTA's manual, the existing commuter railroads developed system safety plans, and the triennial audit process of these plans began in early 1998 with FRA's participation.

In January of 2005, in Glendale, CA, a Southern California Regional Rail Authority (Metrolink) commuter train derailed after striking an abandon vehicle left on the tracks. The derailment caused the Metrolink train to collide with the trains on both sides of it, a Union Pacific Railroad Company (UP) freight train and another Metrolink train and resulted in the death of 11 people. After this incident, FRA developed a Collision Hazard Analysis Guide to assist in conducting collision hazard assessments. The Collision Hazard Analysis Guide supports APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads by providing a "step-by-step procedure on how to perform hazard analysis and how to develop effective mitigation strategies that will improve passenger rail safety." FRA, *Collision Hazard Analysis Guide: Commuter and Intercity Passenger Rail Service*, 5 (October 2007), available on FRA's Web site at [www.fra.dot.gov](http://www.fra.dot.gov). The hazard guidelines used in the Collision Hazard Analysis Guide are based on MIL-STD-882 and the hazard identification/resolution processes described in APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads." *Id.* After the publication of the Collision Hazard Analysis Guide, the commuter railroads, in conjunction with APTA, requested a meeting with FRA to discuss the implications of conducting a collision hazard analysis and having a record of such an analysis. The railroads expressed concern that to the extent the analysis revealed information about a railroad's operations that was not currently available, the information could be used against the railroad in court proceedings.

FRA has codified certain discrete aspects of system safety planning in the Passenger Train Emergency Preparedness regulations, issued in May 1998, and the Passenger Equipment Safety Standards, issued in May 1999, but comprehensive system safety planning has remained the province of the individual passenger railroads. A majority of commuter railroads still participate in the system safety program established in 1997 by APTA. The latest version of APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads was

published on May 15, 2006. As mentioned previously, the Manual for the Development of System Safety Program Plans for Commuter Railroads was developed jointly with FRA, and FRA participates in the audits of the railroad's system safety plans based on this guide. From this experience, FRA has gained substantial knowledge regarding the best methods to develop, implement, and evaluate an SSP. Many components of the proposed rule are modeled after elements in APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads.

##### ii. Federal Transit Administration's Part 659 Program

In 1991, Congress required FTA to establish a program that required State-conducted oversight of the safety and security of rail fixed guideway systems that were not regulated by FRA. See Intermodal Surface Transportation Efficiency Act of 1991, Public Law 102-240, sec. 3029, also codified at 49 U.S.C. 5330. In December 1995, FTA adopted 49 CFR part 659, Rail Fixed Guideway Systems; State Safety Oversight, which implemented Congress's mandate. 60 FR 67034, Dec. 27, 1995. In April 2005, FTA amended part 659 to incorporate the experience and insight it had gained regarding the benefits of and recommended practices for implementing State safety oversight requirements. 70 FR 22562, Apr. 29, 2005.

FTA's part 659 program applies only to rapid transit systems or portions thereof not subject to FRA's regulations. 49 CFR 659.3 and 659.5. Therefore, the requirements of FTA's part 659 would not overlap with any of the requirements proposed in this SSP regulation. However, as mentioned previously, APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads is based on FTA's part 659, so many of the elements in APTA's system safety program are based on FTA's part 659 program. FRA has always maintained a close working relationship with FTA and the implementation of the part 659 program and proposes to use many of the same concepts from the part 659 program in the SSP rule. FRA has noted where the elements in the proposed SSP rule are directly from or are based on elements from FTA's part 659.

##### iii. FRA's Confidential Close Call Reporting System and Clear Signal for Action Program

FRA believes that in addition to process and technology innovations, human factors-based solutions can make

a significant contribution to improving safety in the railroad industry. Based on this belief, FRA implemented the Confidential Close-Call Reporting System (C3RS). The C3RS includes: (1) Voluntary confidential reporting of close-call events by employees and root-cause-analysis problem solving by a Peer Review Team composed of labor, management, and FRA; (2) identification and implementation of corrective actions; (3) tracking the results of change; and (4) reporting the results of change to employees. Confidential reporting and joint labor-management-FRA root-cause problem solving are the most innovative of these characteristics for the railroad industry. Demonstration pilot sites for C3RS are at Union Pacific Railroad, Canadian Pacific Railway, New Jersey Transit, and Amtrak. C3RS is in the pilot stage and, currently, only implemented by two railroads providing intercity and passenger service, New Jersey Transit and Amtrak. Ranney, J. and Raslear, T., *Derailments decrease at a C3RS site at midterm*, FRA Research Results: RR12-04, April 2012, available at [http://www.fra.dot.gov/rpd/downloads/RR\\_Derailments\\_Decrease\\_C3RS\\_Site\\_at\\_Midterm\\_final.pdf](http://www.fra.dot.gov/rpd/downloads/RR_Derailments_Decrease_C3RS_Site_at_Midterm_final.pdf).

FRA also implemented the Clear Signal for Action (CSA) program, another human factors-based solution shown to improve safety. The CSA Program includes: (1) Voluntary, anonymous labor peer-to-peer feedback in the work environment on risky behaviors and conditions; (2) labor Steering Committee root cause analysis and the development of behavior and condition-related corrective actions; (3) Steering Committee implementation of behavior-related corrective actions; (4) joint labor-management Barrier Removal Team refining condition-related corrective actions and implementation; (5) tracking the results of the change; and (6) reporting the results of change to employees. Anonymous labor peer to peer feedback on risky behaviors and conditions, root cause analysis and cooperation between labor and management in corrective actions are the most innovative of these characteristics for the railroad industry. FRA considers the CSA program ready for broad implementation across the industry with three demonstration pilots completed demonstrating its applicability in diverse railroad work settings. One setting was with Amtrak baggage handlers; a second was with UP yard crews; and a third was with UP road crews. Currently FRA is funding the development of low cost program materials to aid in its distribution

starting with passenger rail. Coplen, M. Ranney, J. & Zuschlag, M., *Promising Evidence of Impact on Road Safety by Changing At-risk Behavior Process at Union Pacific*, FRA Research Results: RR08-08, June 2008, available at <http://www.fra.dot.gov/downloads/Research/rr0808.pdf>; Coplen, M. Ranney, J., Wu, S. & Zuschlag, M., *Safe Practices, Operating Rule Compliance and Derailment Rates Improve at Union Pacific Yards with STEEL Process—A Risk Reduction Approach to Safety*, FRA Research Results: RR09-08, May 2009, available at <http://www.fra.dot.gov/downloads/research/rr0908Final.pdf>.

The C3RS and CSA program embody many of the concepts and principles found in an SSP: proactive identification of hazards and risks, analysis of those hazards and risks, and implementing the appropriate action to eliminate or mitigate the hazards and risks. While FRA does not intend to require any railroad to implement a C3RS or CSA program as part of their SSP, FRA does believe that these types of programs would prove useful in the development of an SSP and encourages railroads to include such programs as part of their SSP. FRA seeks comment on the extent these programs might be useful in the development of an SSP or as a component of an SSP.

#### B. FRA's Railroad Safety Advisory Committee

##### i. Overview

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

An alphabetical list of RSAC members includes the following:

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

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

\*Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. The working group may establish one or more task forces or other task groups to develop facts and options on a particular aspect of a given task. The task force, or other task group, reports to the working group. If a working group comes to consensus on recommendations for action, the package is presented to the full RSAC for a vote. If the proposal is accepted by

a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, and because the RSAC recommendation constitutes the consensus of some of the industry's leading experts on a given subject, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation and the agency exercises its independent judgment on whether the recommended regulatory proposal achieves the agency's regulatory goals, is soundly supported, and is in accordance with applicable policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. However, to the maximum extent practicable, FRA utilizes RSAC to provide consensus recommendations with respect to both proposed and final agency actions. If RSAC is unable to reach consensus on a recommendation for action, the task is withdrawn and FRA determines the best course of action.

#### ii. Passenger Safety Working Group

The RSAC established the Passenger Safety Working Group to handle the task of reviewing passenger equipment safety needs and programs. The Passenger Safety Working Group recommends consideration of specific actions that could be useful in advancing the safety of rail passenger service and develop recommendations for the full RSAC to consider. Members of the Passenger Safety Working Group, in addition to FRA, include the following:

- AAR, including members from BNSF Railway Company, CSX Transportation, Inc., and UP;
- AAPRCO;
- AASHTO;
- Amtrak;
- APTA, including members from Bombardier, Inc., Herzog Transit Services, Inc., Interfleet Technology, Inc. (Interfleet, formerly LDK Engineering, Inc.), Long Island Rail Road, Maryland Transit Administration, Metrolink, Metro-North Commuter Railroad Company, Northeast Illinois Regional Commuter Railroad Corporation, and Southeastern Pennsylvania Transportation Authority;
- ASLRRRA;
- BLET;
- BRS;

- FTA;
- NARP;
- NTSB;
- RSI;
- SMWIA;
- STA;
- TCIU/BRC;
- TSA;
- TWU; and
- UTU.

#### iii. General Passenger Safety Task Force

In 2006, the General Passenger Safety Task Force was established under the Passenger Safety Working Group to focus on door securement, passenger safety in train stations, and system safety plans. Members of the General Passenger Safety Task Force, in addition to FRA, include the following:

- AAR, including members from BNSF, CSXT, Norfolk Southern Railway Co., and UP;
- AASHTO;
- Amtrak;
- APTA, including members from Alaska Railroad Corporation, Peninsula Corridor Joint Powers Board (Caltrain), LIRR, Massachusetts Bay Commuter Railroad Company, Metro-North, MTA, NJT, New Mexico Rail Runner Express, Port Authority Trans-Hudson, SEPTA, Metrolink, and Utah Transit Authority;
- ASLRRRA;
- ATDA;
- BLET;
- FTA;
- NARP;
- NRCMA;
- NTSB;
- Transport Canada; and
- UTU.

The General Passenger Safety Task Force was formed from the membership of the Passenger Safety Working Group and held its first meeting in February 2007 and the second meeting in April 2007 in conjunction with Passenger Safety Working Group. At the April 2007 meeting, the decision was made to create a System Safety Task Group to focus on the core elements and features of a system safety regulation and to draft language to recommend to the full RSAC for a system safety regulation.

#### iv. System Safety Task Group

The System Safety Task Group was formed from the membership of the General Passenger Safety Task Force and first met as an independent group in June 2008 in Baltimore, MD. Additional meetings were held on December 2–4, 2008 in Cambridge, MA, August 25–27, 2009 in Washington, DC, October 6–8, 2009 in Orlando, FL, March 16–17, 2010 in Washington, DC, February 1–2, 2012 in Cambridge, MA, and March 8, 2012 by teleconference.

The System Safety Task Group produced recommended draft language for a system safety regulation, but work on this language was delayed until completion of the study to determine whether it was in the public interest to withhold from discovery or admission into evidence in a Federal or State court proceeding for damages involving personal injury or wrongful death against a carrier any information (including a railroad's analysis of its safety risks and its statement of the mitigation measures with which it will address those risks) compiled or collected for the purpose of evaluating, planning, or implementing a risk reduction program. *See* 49 U.S.C. 20119(a). This study was completed in October 2011 and is discussed further in the Statutory Background section of this preamble. The General Passenger Safety Task Force, including the members of the System Safety Task Group, met on February 1–2, 2012, and continued work on finalizing the language that it would recommend to the Passenger Safety Working Group. A final combined General Passenger Safety Task Force and System Safety Task Group meeting was held by teleconference on March 8, 2012.

#### v. RSAC Vote

On May 2, 2012, the General Passenger Safety Task Force formally voted to unanimously accept the system safety regulation language recommended by the System Safety Task Group. On May 10, 2012, the Passenger Safety Working Group voted to unanimously accept the system safety regulation language recommended by the General Passenger Safety Task Force. On May 21, 2012, the RSAC unanimously voted to accept the system safety regulation language recommended by the Passenger Safety Working Group. Thus, the Passenger Safety Working Group's recommendation was adopted by the full RSAC as a formal recommendation to FRA.

The proposed rule incorporates the majority of RSAC's recommendations. FRA decided not to incorporate certain recommendations because they were unnecessary or duplicative and their exclusion would not have a substantive effect on the rule. The proposed rule also contains elements that were not part of RSAC's recommendations. The majority of these elements are added to provide clarity and to conform with **Federal Register** formatting requirements. However, FRA will note in this NPRM the areas in which the exclusion of the RSAC recommendations or the inclusion of

elements not part of the RSAC recommendations do have a substantive effect on the rule and will provide an explanation for doing so.

#### IV. Statutory Background

##### A. *The Rail Safety Improvement Act of 2008*

The proposed SSP rule would implement sections 103 and 109 RSIA as they apply to railroad carriers that provide intercity rail passenger or commuter rail passenger transportation (passenger railroads). See 49 U.S.C. 20156, 20118, and 20119. In section 103 Congress directed the Secretary to issue a regulation requiring certain railroads to develop, submit to the Secretary for review and approval, and implement a railroad safety risk reduction program. The Secretary has delegated this responsibility to the FRA Administrator. See 49 CFR 1.49(o), 74 FR 26981, Jun. 5, 2009; see also 49 U.S.C. 103(g). The railroads required to be subject to such a regulation include the following:

- (1) Class 1 railroads;
- (2) Railroad carriers with inadequate safety performance, as determined by the Secretary; and
- (3) Railroad carriers that provide intercity rail passenger or commuter rail passenger transportation (passenger railroads).

This proposed SSP rule would implement this railroad safety risk reduction mandate (and the other specific safety risk reduction program requirements found in section 103) for passenger railroads. The SSP rule is a risk reduction program in that it would require a passenger railroad to assess and manage risk and to develop proactive hazard management methods to promote safety improvement. The proposed rule contains provisions that, while not explicitly required by the RSIA safety risk reduction program mandate, are necessary to properly implement the mandate and are consistent with the intent behind the mandate. Further, as mentioned previously, many of the elements in the proposed rule are modeled after APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads. The majority of railroads, therefore, will have already implemented those elements. The proposed rule would also implement section 109 of the RSIA, which addresses the protection of information in railroad safety risk analyses and will be discussed later in this NPRM.

##### B. *Related Risk Reduction Rulemaking*

FRA is currently developing, also with the assistance of the RSAC, a

separate risk reduction rule that would implement the requirements of sections 103 and 109 of the RSIA for Class I freight railroads and railroads with inadequate safety performance. Although passenger railroads could be subject to the requirements of this second risk reduction rule, the rule would specify that passenger railroads that are in compliance with the SSP rule be deemed in compliance with the risk reduction rule. Establishing separate safety risk reduction rules for passenger and freight railroads will allow those rules to account for the significant differences between passenger and freight operations. For example, passenger operations generate risks uniquely associated with the passengers that utilize their services. The proposed SSP rule can be specifically tailored to these types of risks, which are not independently generated by freight railroads.

##### C. *System Safety Information Protection*

Section 109 of the RSIA (codified at 49 U.S.C. 20118–20119) authorizes FRA to issue a rule protecting risk analysis information generated by railroads. These provisions would apply to information generated by passenger railroads pursuant to the proposed system safety rulemaking and to any railroad safety risk reduction programs required by FRA for Class I railroads and railroads with inadequate safety performance.

###### i. Exemption From Freedom of Information Act Disclosure

In section 109 of the RSIA (codified at 49 U.S.C. 20118–20119), Congress determined that for risk reduction programs to be effective, the risk analyses must be shielded from production in response to Freedom of Information Act (FOIA) requests. See 49 U.S.C. 20118. FOIA is a Federal statute establishing certain requirements for the public disclosure of records held by Federal agencies. See 5 U.S.C. 552. Generally, FOIA requires a Federal agency to make most records available upon request, unless a record is protected from mandatory disclosure by one of nine exemptions.

Section 109(a) of RSIA specifically provides that a record obtained by FRA pursuant to a provision, regulation, or order related to a risk reduction program or pilot program is exempt from disclosure under FOIA. The term “record” includes, but is not limited to, “a railroad carrier’s analysis of its safety risks and its statement of the mitigation measures it has identified with which to address those risks.” *Id.* This FOIA exemption also applies to records made

available to FRA for inspection or copying pursuant to a risk reduction program or pilot program.

Railroad system safety records in FRA’s possession, therefore, are generally exempt from mandatory disclosure under FOIA. The RSIA, however, establishes two exceptions to this prohibition on FOIA disclosure. The first exception permits disclosure when it is necessary to enforce or carry out any Federal law. The second exception permits disclosure when a record is comprised of facts otherwise available to the public and when FRA, in its discretion, has determined that disclosure would be consistent with the confidentiality needed for a risk reduction program or pilot program.

###### ii. Discovery and Other Use of Risk Analysis Information in Litigation

###### 1. The RSIA Mandate

The RSIA also addressed the disclosure and use of risk analysis information in litigation. Section 109 directed FRA to conduct a study to determine whether it was in the public interest to withhold from discovery or admission into evidence in a Federal or State court proceeding for damages involving personal injury or wrongful death against a carrier any information (including a railroad’s analysis of its safety risks and its statement of the mitigation measures with which it will address those risks) compiled or collected for the purpose of evaluating, planning, or implementing a risk reduction program. See 49 U.S.C. 20119(a). In conducting this study, the RSIA required FRA to solicit input from railroads, railroad non-profit employee labor organizations, railroad accident victims and their families, and the general public. See *id.* The RSIA also states that upon completion of the study, if in the public interest, FRA may prescribe a rule to address the results of the study (i.e., a rule to protect risk analysis information from disclosure during litigation). See 49 U.S.C. 20119(b). The RSIA prohibits any such rule from becoming effective until one year after its adoption. See *id.*

###### 2. The Study and Its Conclusions

FRA contracted with a law firm, Baker Botts L.L.P., to conduct the study on FRA’s behalf. Various documents related to the study are available for review in public docket number FRA–2011–0025, which can be accessed online at [www.regulations.gov](http://www.regulations.gov). As a first step, the contracted law firm prepared a comprehensive report identifying and evaluating other Federal safety programs that protect risk reduction information

from use in litigation. *See Report on Federal Safety Programs and Legal Protections for Safety-Related Information*, FRA, docket no. FRA–2011–0025–0002, April 14, 2011. Next, as required by section 109 of the RSIA, FRA published a **Federal Register** notice seeking public comment on the issue of whether it would be in the public interest to protect certain railroad risk reduction information from use in litigation. *See* 76 FR 26682, May 9, 2011. Comments received in response to this notice may be viewed in the public docket.

On October 21, 2011, the contracted law firm produced a final report on the study. *See Study of Existing Legal Protections for Safety-Related Information and Analysis of Considerations for and Against protecting Railroad Safety Risk Reduction Program Information*, FRA, docket no. FRA–2011–0025–0031, Oct. 21, 2011, available at <http://www.fra.dot.gov/Downloads/FRA-Final-Study-Report.pdf>. The final report contained analyses of other Federal programs that protect similar risk reduction data, the public comments submitted to the docket, and whether it would be in the public interest, including the interests of public safety and the legal rights of persons injured in railroad accidents, to protect railroad risk reduction information from disclosure during litigation. The final report concluded that it would be within FRA's authority and in the public interest for FRA to promulgate a regulation protecting certain risk analysis information held by the railroads from discovery and use in litigation and makes recommendations for the drafting and structuring of such a regulation. *See id.* at 63–64.

### 3. FRA's Proposal

In response to the final study report, this NPRM is proposing to protect any information compiled or collected solely for the purpose of developing, implementing or evaluating an SSP from discovery, admission into evidence, or consideration for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, and property damage. The information protected would include a railroad's identification of its safety hazards, analysis of its safety risks, and its statement of the mitigation measures with which it would address those risks and could be in the following forms: Plans, reports, documents, surveys, schedules, lists, or data. (Similar protection will be proposed for railroad safety risk reduction programs required by FRA for

Class I railroads and railroads with inadequate safety performance). Additional specifics regarding this proposal will be discussed in the section-by-section analysis of this NPRM.

## V. Guidance Manual

FRA has been working with railroads for many years to implement many of the principles and elements that the SSP rule contains. From this experience, FRA has learned the best practices and the pitfalls of implementing an SSP. Since each railroad operation is unique, the best practices for each railroad will be different. Therefore, rather than setting forth specific requirements that may be applicable for one railroad, but unworkable for another, FRA will set forth general requirements of a SSP in the rule and allow each railroad the flexibility to tailor those requirements to their specific operations. To this end, FRA plans on providing the railroads with a guidance manual that will assist in the development, implementation, and evaluation of their SSPs. This guidance manual ("Guide") will provide the railroads with the most efficient and effective methods to implement their SSPs. Regarding most aspects of an SSP, a railroad will be able to refer to this Guide for assistance in implementing its SSP. FRA expects to publish the Guide shortly after the publication of the final rule in this proceeding. FTA has published a similar document regarding implementation of its part 659 program. *See Resource Toolkit for State Oversight Agencies Implementing 49 CFR part 659* (March 2006).

## VI. Section-by-Section Analysis

FRA proposes to add a new part 270 to chapter 49 of the CFR. Part 270 would satisfy the RSIA requirements regarding safety risk reduction programs for railroads providing intercity rail passenger or commuter rail passenger service. 49 U.S.C. 20156. It will also protect certain information compiled or collected pursuant to a safety risk reduction program from admission into evidence or discovery during court proceedings for damages. 49 U.S.C. 20119.

### Subpart A—General

#### Section 270.1 Purpose and scope

Paragraph (a) states that the purpose of the proposed rule is to improve railroad safety through structured, proactive processes and procedures developed and implemented by railroads. The proposed rule would require a railroad to establish a program that systematically evaluates railroad

safety hazards on its system and manages those risks in order to reduce the numbers and rates of railroad accidents, incidents, injuries, and fatalities.

Paragraph (b) states that the proposed rule prescribes minimum Federal safety standards for the preparation, adoption, and implementation of railroad system safety programs. The proposed rule would not restrict railroads from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

Paragraph (c) states that the proposed rule provides for the protection of information generated solely for the purpose of developing, implementing, or evaluating a system safety program under this part or a railroad safety risk reduction program required by this chapter for Class I railroads and railroads with inadequate safety performance.

#### Section 270.3 Application

The RSIA mandates that FRA require each railroad carrier that is a Class I railroad, a railroad carrier that has inadequate safety performance, or a railroad that provides intercity rail passenger or commuter rail passenger transportation to establish a railroad safety risk reduction program. 49 U.S.C. 20156(a)(1). This proposed rule sets forth the requirements related to a railroad safety risk reduction program for a railroad that provides intercity rail passenger or commuter rail passenger transportation. Safety risk reduction programs for Class I railroads and railroads with inadequate safety performance will be addressed in the separate Risk Reduction Program rulemaking proceeding.

Paragraph (a) proposes that this rule apply to railroads that operate intercity or commuter passenger train service on the general railroad system of transportation and railroads that provide commuter or other short-haul rail passenger train service in a metropolitan or suburban area (as described by 49 U.S.C. 20102(2)), including public authorities operating passenger train service. A public authority that indirectly provides passenger train service by contracting out the actual operation to another railroad or independent contractor would be regulated by FRA as a railroad under the provisions of the proposed rule. Although the public authority would ultimately be responsible for the development and implementation of an SSP (along with all related recordkeeping requirements), the railroad or other independent contractor that operates the authority's passenger

train service would be expected to fulfill all of the responsibilities under this part with respect to the SSP, including implementation.

FRA proposes to except certain railroads from the proposed rule's applicability. The first exception, proposed in paragraph (b)(1), covers rapid transit operations in an urban area that are not connected to the general railroad system of transportation. This paragraph is intended merely to clarify the circumstances under which rapid transit operations are not subject to FRA jurisdiction under this part. It should be noted, however, that some rapid transit type operations, given their links to the general system, are within FRA's jurisdiction and FRA specifically intends for part 270 to apply to those rapid transit type operations.

Paragraph (b)(2) proposes an exemption for operations commonly described as tourist, scenic, historic, or excursion service whether on or off the general railroad system. Tourist, scenic, historic, or excursion rail operations is defined by proposed § 270.5 and this exemption is consistent with FRA's other regulations concerning passenger operations. See 49 CFR 238.3(c)(3) and 239.3(b)(3). Further, the basis of this exemption is consistent with that underlying FRA's other regulations concerning passenger operations. See 63 FR 24644, May 4, 1998; 64 FR 25576, May 12, 1999.

Paragraph (b)(3) makes clear that the requirements of the proposed rule would not apply to the operation of private passenger train cars, including business or office cars and circus train cars. While FRA believes that a private passenger car operation should be held to the same basic level of safety as other passenger train operations, such operations were not specifically identified in the statutory mandate and FRA is taking into account the burden that would be imposed by requiring private passenger car owners and operators to conform to the requirements of this part. Private passenger cars are often hauled by host railroads such as Amtrak and commuter railroads, and these hosts often impose their own safety requirements on the operation of the private passenger cars. Pursuant to this proposal, these host railroads would already be required to have SSPs in place to protect the safety of their own passengers; the private car passengers would presumably benefit from these programs even without the rule directly covering private car owners or operators. In the case of non-revenue passengers, including employees and guests of railroads that are transported in business and office cars, as well as

persons traveling on circus trains, the railroads would be expected to provide for their safety in accordance with existing safety operating procedures and protocols relating to normal freight train operations.

Finally, paragraph (b)(4) proposes an exception from the requirements of this part for railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (i.e., plant railroads, as defined in § 270.5). Plant railroads are typified by operations such as those in steel mills that do not go beyond the plant's boundaries and that do not involve the switching of rail cars for entities other than themselves.

Section 103(a)(4) of RSIA allows a railroad carrier that is not required to submit a railroad safety risk reduction program to voluntarily submit such a program. 49 U.S.C. 20156(a)(4). If the railroad voluntarily submits a program, it shall comply with the requirements set forth in RSIA and is subject to approval by the Secretary. *Id.* FRA anticipates that railroads who voluntarily submit a railroad safety risk reduction program under RSIA would do so pursuant to the risk reduction program regulation that is currently being developed. Proposed paragraph (a) is broad and intended to cover the majority of the railroads that provide intercity and passenger service. Absent the exceptions in paragraph (b), if a railroad is not required by this proposed part to establish an SSP, that railroad more than likely does not provide intercity or passenger service and, therefore, may be required to establish a risk reduction program. If these railroads are not required to establish a risk reduction program but decide to voluntarily establish a railroad safety risk reduction program pursuant to RSIA, the risk reduction program regulation would more than likely be better suited for their operations. FRA does not intend to prohibit railroads that are not required to establish either an SSP or risk reduction program from voluntarily establishing an SSP. FRA seeks comment on whether a provision that allows a railroad to voluntarily establish an SSP should be included in the proposed SSP rule.

#### Section 270.5 Definitions

This proposed section contains a set of definitions that clarify the meaning of important terms as they are used in the rule. The proposed definitions are carefully worded in an attempt to minimize the potential for misinterpretation of the rule. Many of the proposed definitions are based on definitions in FTA's part 659 and APTA's system safety program. FRA

requests comment and input regarding the terms defined in this section and specifically whether other terms should be defined.

"Administrator" refers to Federal Railroad Administrator or his or her delegate.

"Configuration management" means the process a railroad would use to ensure that the configurations of all property, equipment and system design elements are properly documented.

"FRA" means the Federal Railroad Administration.

"Fully implemented" means that all the elements of the railroad's SSP plan required by this part are established and applied to the safety management of the railroad. A railroad's SSP is considered "fully implemented" when all of the elements described in the railroad's SSP plan are properly established and effectively applied to the safety management of the railroad.

"Hazard" means any real or potential condition, as identified in the railroad's risk-based hazard analysis under § 270.103(r), that can cause injury, illness, or death; damage to or loss of a system; or damage to equipment, property, or the environment. This definition is based on the existing definition of the term contained in FTA's part 659. 49 CFR 659.5.

"Passenger" means a person, excluding an on-duty employee, who is on board, boarding, or alighting from a rail vehicle for the purpose of travel. This definition is modeled after the definition of "passenger" contained in FTA's regulations at part 659, which "means a person who is on board, boarding, or alighting from a rail transit vehicle for the purpose of travel." 49 CFR 659.5. FRA has added the phrase "excluding an on-duty employee" to the proposed definition to clarify that, if a person is engaging in these activities (on board, boarding, or alighting) and they are an off-duty railroad employee, that person is considered a passenger for the purposes of this rule.

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

"Plant railroad" means 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. Under § 270.3, FRA has chosen to exempt plant railroads, as defined in proposed § 270.5, from the proposed regulation. In the past, FRA has not defined the term “plant railroad” in other regulations that it has issued because FRA assumed that its *Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws, The Extent and Exercise of FRA’s Safety Jurisdiction*, 49 CFR part 209, Appendix A (FRA’s Policy Statement or the Policy Statement) provided sufficient clarification as to the definition of that term. However, it has come to FRA’s attention that certain rail operations believed that they met the characteristics of a plant railroad, as set forth in the Policy Statement, when, in fact, their rail operations were part of the general railroad system of transportation (general system) and therefore did not meet the definition of a plant railroad. FRA would like to avoid any confusion as to what types of rail operations qualify as plant railroads. FRA would also like to save interested persons the time and effort needed to cross-reference and review FRA’s Policy Statement to determine whether a certain operation qualifies as a plant railroad. Consequently, FRA has decided to define the term “plant railroad” in part 270.

The proposed definition would clarify that when an entity operates a locomotive to move rail cars in service for other entities, rather than solely for its own purposes or industrial processes, the services become public in nature. Such public services represent the interchange of goods, which characterizes operation on the general system. As a result, even if a plant railroad moves rail cars for entities other than itself solely on its property, the rail operations will likely be subject to FRA’s safety jurisdiction because those rail operations bring plant trackage into the general system.

The proposed definition of the term “plant railroad” is consistent with FRA’s longstanding policy that it will exercise its safety jurisdiction over a rail operation that moves rail cars for entities other than itself because those movements bring the track over which the entity is operating into the general system. See 49 CFR part 209, Appendix A. Indeed, FRA’s Policy Statement provides that “operations by the plant railroad indicating it [i]s moving cars on \* \* \* trackage for other than its own purposes (e.g., moving cars to neighboring industries for hire)” brings plant track into the general system and thereby subjects it to FRA’s safety jurisdiction. 49 CFR part 209, Appendix

A. Additionally, this interpretation of the term “plant railroad” has been upheld in litigation before the U.S. Court of Appeals for the Fifth Circuit. See *Port of Shreveport-Bossier v. Federal Railroad Administration*, No. 10–60324 (5th Cir. 2011) (unpublished per curiam opinion).

“Positive train control system” means a system designed to prevent train-to-train collisions, overspeed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position, as described in subpart I of 49 CFR part 236.

“Rail vehicle” means railroad rolling stock, including, but not limited to, passenger and maintenance vehicles.

“Railroad” means: (1) Any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including—

(i) Commuter or other short-haul rail passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

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

(2) A person or organization that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person.

The definition of “railroad” is based upon 49 U.S.C. 20102(1) and (2), and encompasses any person providing railroad transportation directly or indirectly, including a commuter rail authority that provides railroad transportation by contracting out the operation of the railroad to another person, as well as any form of non-highway ground transportation that runs on rails or electromagnetic guideways, but excludes urban rapid transit not connected to the general system.

“Risk” means the combination of the probability (or frequency of occurrence) and the consequence (or severity) of a hazard.

“System Safety” means the application of management and engineering principles and techniques to optimize all aspects of safety, within the constraints of operational effectiveness, time, and cost, throughout all phases of the system life cycle. By specifying that system safety operates within certain constraints, this

definition is intended to clarify that there may be hazards on the railroad’s system that a railroad may not be capable of fully mitigating or eliminating. Rather, the railroad would monitor the hazard and at some point, if feasible, employ methods to mitigate or eliminate that hazard and resulting risk.

The definition for “Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation” means railroad operations that carry passengers, often using antiquated equipment, with the conveyance of the passengers to a particular destination not being the principal purpose. Train movements of new passenger equipment for demonstration purposes are not tourist, scenic, historic, or excursion operations. This definition is consistent with FRA’s other regulations concerning passenger operations. See 49 CFR 238.5 and 239.5.

RSAC recommended including definitions for the following terms: contractor, FTA, hazard analysis, improvement plan, individual investigation, passenger operations, passenger railroad, railroad property, risk-based hazard management, safety, safety certification, safety culture, safety-related services, safety-related employee, sponsoring railroad, system safety program, and system safety program plan. FRA determined that these definitions did not provide any additional clarity and were unnecessary. FRA seeks comments regarding whether any of these definitions or any other definitions should be added to the final rule.

#### Section 270.7 Waivers

This section explains the process for requesting a waiver from a provision of the proposed rule. FRA has historically entertained waiver petitions from parties affected by an FRA regulation. In reviewing such requests, FRA conducts investigations to determine if a deviation from the general regulatory criteria is in the public interest and can be made without compromising or diminishing railroad safety.

The rules governing the FRA waiver process are found in 49 CFR part 211. In general, these rules state that after a petition for a waiver is received by FRA, a notice of the waiver request is published in the **Federal Register**, an opportunity for public comment is provided, and an opportunity for a hearing is afforded the petitioning or other interested party. After reviewing information from the petitioning party and others, FRA would grant or deny the petition. In certain circumstances,

conditions may be imposed on the grant of a waiver if FRA concludes that the conditions are necessary to assure safety or if they are in the public interest, or both.

#### Section 270.9 Penalties and Responsibility for Compliance

This section contains provisions regarding the proposed penalties for failure to comply with the rule and the responsibility for compliance.

Paragraph (a) identifies the civil penalties that FRA may impose upon any person that violates or causes a violation any requirement of this part. These penalties are authorized by 49 U.S.C. 20156(h), 21301, 21302, and 21304. The penalty provision parallels penalty provisions included in numerous other safety regulations issued by FRA. Essentially, any person who violates any requirement of this part or causes the violation of any such requirement would be subject to a civil penalty of at least \$650 and not more than \$25,000 per violation. Civil penalties may be assessed against individuals only for willful violations. Where a grossly negligent violation or a pattern of repeated violations creates an imminent hazard of death or injury to persons, or causes death or injury, a penalty not to exceed \$105,000 per violation may be assessed. In addition, each day a violation continues constitutes a separate offense. Maximum penalties of \$25,000 and \$105,000 are required by the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, 28 U.S.C. 2461, note, as amended by the Debt Collection Improvement Act of 1996, Public Law 104–134, 110 Stat. 1321–373, which requires each agency to regularly adjust certain civil monetary penalties in an effort to maintain their remedial impact and promote compliance with the law. Furthermore, a person may be subject to criminal penalties under 49 U.S.C. 21311 for knowingly and willfully falsifying reports required by these regulations. FRA believes that the inclusion of penalty provisions for failure to comply with the regulations is important in ensuring that compliance is achieved. Even though this proposed rule does not include a schedule of civil penalties, the final rule would contain such a schedule.

Proposed paragraph (b) is intended to make clear that any person, including but not limited to a railroad, contractor or subcontractor for a railroad, or a local or State governmental entity that performs any function covered by this part, must perform that function in accordance with the requirements of this part.

#### Subpart B—System Safety Program Requirements

##### Section 270.101 System Safety Program; General

This section sets forth the general requirements of the rule. Each railroad subject to part 270 (i.e., each passenger railroad) would be required to establish and fully implement an SSP that systematically evaluates railroad safety hazards on its system and manages the resulting risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities. The main components of a railroad's SSP would be the risk-based hazard management program and risk-based hazard analysis that would be designed to proactively identify risks and mitigate or eliminate the resulting risks from those hazards. The risk-based hazard management program and risk-based hazard analysis requirements are set forth in § 270.103(q) and (r).

To properly implement an SSP, a railroad would be required to set forth an SSP plan, as required by § 270.103. The SSP plan would be a document or a series/collection of documents that contain all of the elements required by this part. A railroad's SSP plan can reference documents and does not have to make unnecessary duplication of these documents to include in the plan. The SSP plan shall be designed to support the railroad's SSP.

Proposed paragraph (b) would require that a railroad's SSP be designed so that it promotes a positive safety culture. Safety culture may be defined as the shared values, actions and behaviors that demonstrate commitment to safety over competing goals and demands. U.S. DOT, Safety Council Research Paper, *SAFETY CULTURE: A Significant Driver Affecting Safety in Transportation* (May 2011). Research has shown that when an organization has a strong safety culture, accidents and incidents are less frequent and less severe. *Id.* Whereas, if an organization's safety culture is weak, significant and catastrophic accidents are more likely to occur. *Id.* For an SSP to achieve its goal, the mitigation or elimination of safety hazards and risks on the rail system, the railroad must have a positive and strong safety culture, so it is vital that the railroad's SSP be designed so that it promotes a positive safety culture. A railroad would have to describe its safety culture pursuant to § 270.103(c)(1) and describe how it measures the success of its safety culture pursuant to § 270.103(v).

##### Section 270.102 Consultation Requirements

This section proposes to implement section 103(g)(1) of RSIA, which states that a railroad required to establish an SSP must “consult with, employ good faith and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, on the contents of the safety risk reduction program.” 49 U.S.C. 20156(g)(1). This section would also implement section 103(g)(2) of RSIA, which further provides that if a “railroad carrier and its directly affected employees, including any nonprofit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, cannot reach consensus on the proposed contents of the plan, then directly affected employees and such organizations may file a statement with the Secretary explaining their views on the plan on which consensus was not reached.” 49 U.S.C. 20156(g)(2). The RSIA requires FRA to consider these views during review and approval of a railroad's SSP plan.

RSAC did not provide recommended language for this section. Rather, FRA worked with the System Safety Task Group to receive input regarding how the consultation process should be addressed, with the understanding that the language would be provided in this NPRM for review and comment. Therefore, FRA seeks comment on the approach proposed in this rule regarding the consultation requirement set forth in section 103(g) of RSIA.

Paragraph (a)(1) of this section proposes to implement section 103(g)(1) of RSIA by requiring a railroad to consult with its directly affected employees on the contents of its SSP plan. As part of that consultation, a railroad must utilize good faith and best efforts to reach agreement with its directly affected employees on the contents of its plan.

Proposed paragraph (a)(2) specifies that the term directly affected employees includes any non-profit employee labor organization representing a class or craft of the railroad's directly affected employees. This section makes it clear that a railroad that consults with a non-profit employee labor organization is considered to have consulted with the directly affected employees represented by that organization.

Proposed paragraph (a)(3) requires a railroad to meet with its directly

affected employees no later than [180 days after the effective date of the final rule] to discuss the consultation process. This meeting will be the railroad's and directly affected employee's opportunity to schedule, plan, and discuss the consultation process. FRA does not expect a railroad to discuss any substantive material until § 270.105 becomes applicable. Rather, this meeting should be more administrative in nature so that both parties understand the consultation process as they go forward and that they may engage in substantive discussions as soon as possible after the applicability date of § 270.105. This will also be an opportunity to educate the directly affected employees on system safety and how it may affect them. The railroad will be required to provide notice to the directly affected employees no less than 60 days before the meeting is scheduled.

Proposed paragraph (a)(4) directs readers to appendix B of this part for additional guidance on how a railroad might comply with the consultation requirements of this section. This appendix is discussed later in this preamble.

Paragraph (b) proposes to require a railroad to submit, together with its SSP plan, a consultation statement. The purpose of this consultation statement would be twofold: (1) To help FRA determine whether the railroad has complied with § 270.102(a) by, in good faith, consulting and using its best efforts to reach agreement with its directly affected employees on the contents of its SSP plan; and (2) to ensure that the directly affected employees with which the railroad has consulted were aware of the railroad's submission of its SSP plan to FRA for review. The consultation statement must contain specific information described in proposed paragraphs (b)(1) through (b)(4) of this section.

Paragraph (b)(1) proposes to require that the consultation statement contain a detailed description of the process the railroad utilized to consult with its directly affected employees. This description should contain information such as (but not limited to) the following: (1) How many meetings the railroad held with its directly affected employees; (2) what materials the railroad provided its directly affected employees regarding the draft SSP plan; and (3) how input from directly affected employees was received and handled during the consultation process.

If the railroad is unable to reach agreement with its directly affected employees on the contents of its SSP plan, paragraph (b)(2) proposes to

require that the consultation statement identify any areas of non-agreement and provide the railroad's explanation for why it believed agreement was not reached. A railroad could specify, in this portion of the statement, whether it was able to reach agreement on the contents of its SSP plan with certain directly affected employees, but not others.

If the SSP plan would affect a provision of a collective bargaining agreement between the railroad and a non-profit employee labor organization, paragraph (b)(3) would require the consultation statement to identify any such provision and explain how the railroad's SSP plan would affect it.

Under proposed paragraph (b)(4), the consultation statement must include a service list containing the names and contact information for the international/national president and general chairperson of any non-profit employee labor organization representing directly affected employees; any labor representative who participated in the consultation process; and any directly affected employee who significantly participated in the consultation process independently of a non-profit labor organization. This paragraph would also require a railroad (at the same time it submits its proposed SSP plan and consultation statement to FRA) to provide individuals identified in the service list a copy of the SSP plan and consultation statement. This service list would help FRA determine whether the railroad had complied with the § 270.102(a) requirement to consult with its directly affected employees. Requiring the railroad to provide individuals identified in the service list with a copy of its submitted plan and consultation statement would also notify those individuals that they now have 60 days under § 270.102(c)(2) (discussed below) to submit a statement to FRA if they are not able to come to reach agreement with the railroad on the contents of the SSP plan.

Proposed paragraph (c)(1) would implement section 103(g)(2) of RSIA by providing that, if a railroad and its directly affected employees cannot reach agreement on the proposed contents of an SSP plan, then a directly affected employee may file a statement with the FRA Associate Administrator for Railroad Safety/Chief Safety Officer explaining his or her views on the plan on which agreement was not reached. See 49 U.S.C. 20156(g)(2). The FRA Associate Administrator for Railroad Safety/Chief Safety Officer will consider any such views during the plan review and approval process.

Proposed paragraph (c)(2) specifies that a railroad's directly affected employees have 60 days following the railroad's submission of its proposed SSP plan to submit the statement described in paragraph (c)(1) of this section. FRA believes 60 days would provide directly affected employees sufficient time to review a railroad's proposed SSP plan and to draft and submit to FRA a statement if they were not able to come to agreement with the railroad on the contents of that plan. In order to provide directly affected employees the opportunity to submit a statement, FRA would not approve or disapprove a railroad's proposed SSP plan before the conclusion of this 60-day period.

Proposed paragraph (d) would require that a railroad's SSP plan include a description of the process the railroad will use to consult with its directly affected employees on any substantive amendments to the railroad's SSP plan. As with its initial SSP plan, a railroad must use good faith and best efforts to reach agreement with directly affected employees on any substantive amendments to that plan. Requiring a railroad to detail that process in its plan would facilitate the consultation by establishing a known path to be followed. A railroad that did not follow this process when substantively amending its SSP plan could then be subject to penalties for failing to comply with the provisions of its plan. This requirement would not apply to non-substantive amendments (e.g., amendments updating names and addresses of railroad personnel). If a railroad is uncertain as to whether a proposed amendment is substantive or non-substantive, it could contact FRA for guidance.

#### Section 270.103 SSP plan

As mentioned previously, a railroad would be required to create a written SSP plan to fully implement and support its SSP. Proposed § 270.103 sets forth all of the required elements of the railroad's SSP plan.

Paragraph (a) proposes that a railroad's SSP plan must contain the minimum elements set forth in § 270.103. As provided in § 270.201, a railroad's SSP plan must be submitted to and approved by the FRA Associate Administrator for Railroad Safety/Chief Safety Officer. The FRA Associate Administrator for Railroad Safety/Chief Safety Officer approval of the SSP plan would be considered approval of the railroad's SSP as required by RSIA. See 49 U.S.C. 20156(a)(3).

In certain scenarios, a railroad providing passenger service will not be

the railroad that owns the track on which the railroad is providing passenger service. Rather, the railroad that owns the track will be hosting the railroad that is providing the passenger train service. For a railroad providing passenger train service to effectively identify, evaluate, and manage the hazards and resulting risks on the system over which it operates as required by this part, the railroad would need to evaluate all aspects of the operation. As such, proposed paragraph (a)(2) of this section addresses the coordination that must occur between a railroad providing passenger service and a railroad hosting that passenger train service. If certain aspects of the operation are not under the control of the railroad providing passenger service but are controlled by the railroad hosting the operation, the two railroads will need to communicate so those aspects can be adequately addressed by the railroad's SSP. Furthermore, if the SSP plan contains elements that are applicable to the railroad hosting the passenger service, then the two railroads will need to coordinate those portions so that the identified hazard and resulting risk is mitigated or eliminated. A passenger railroad may have multiple railroads hosting its passenger train service on its system and will need to coordinate with each railroad. If the railroad hosting the passenger train service does not cooperate with the railroad providing the passenger train service to coordinate the applicable parts of the SSP, under proposed § 270.9, the railroad hosting the passenger train service may be subject to penalties because they may cause the railroad providing the passenger service to violate the requirements of this part.

In proposed paragraph (b), each SSP plan would have a policy statement that endorses the railroad's SSP. This policy statement should define, as clearly as possible, the railroad's authority for the establishment and implementation of the SSP. The policy statement would be required to be signed by the chief official of the railroad. This signature would indicate that the top level of management at the railroad endorses the SSP.

Paragraph (c) proposes to require a railroad to set forth a statement in its SSP plan that describes the purpose and scope of the railroad's SSP. The statement would be required to have, at a minimum, three elements.

First, the statement would describe the safety philosophy and safety culture of the railroad. Proposed § 270.101(b) requires a railroad to design its SSP so that it promotes and supports a positive safety culture. In order for the railroad

to properly design its SSP so that it complies promotes and supports a positive safety culture, it would first need to define what exactly is its safety culture and philosophy. Once its safety culture is defined, the railroad would have to describe how it measures the success of its safety culture pursuant to paragraph (v) of this section.

Second, the railroad shall describe the railroad's management's responsibilities within the SSP. This description would make clear who within the railroad's management are responsible for which aspects of the SSP.

Finally, the railroad would be required to describe how host railroads, contractors, shared track/corridor operators, and any other entity or person that provides significant safety-related services would, as appropriate, support and participate in the railroad's SSP. It is essential that these entities have defined roles in the railroad's program. As addressed in proposed § 270.103(a)(2), each railroad that hosts passenger train service for a railroad subject to this part would need to communicate with the railroad that provides or operates such passenger service and coordinate the portions of the SSP plan applicable to the railroad hosting the passenger train service. This section requires the railroad that provides passenger service to describe how it plans on satisfying § 270.103(a)(2).

Proposed paragraph (d) addresses the importance of goals in an SSP. The central goal of an SSP is to manage risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities. FRA believes one way to achieve this central goal is for a railroad to set forth goals that are designed in such a way that when the railroad achieves these goals, the central goal is achieved as well. APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads served as the model for the guidelines set forth in paragraph (d).

Paragraph (d) would require a railroad to include as part of its SSP plan a statement that defines the system safety goals. The statement would also describe the clear strategies on how these goals will be achieved. By setting forth the strategies by which it will achieve the goals, the railroad would have the opportunity to provide its vision on how it would ultimately reduce the numbers and rates of railroad accidents, incidents, injuries and fatalities. The statement would also describe what the railroad's management's responsibilities are to achieve the system safety goals. By stating the railroad management's

responsibilities to achieve the stated goals, the railroad and FRA would know who, and at what level within management, is responsible for ensuring that the stated goals are achieved.

Rather than setting forth specific requirements that these goals must satisfy, FRA proposes general requirements. This would allow railroads the flexibility to establish goals specific to their operations. The general parameters of these goals are that they should be—

- Long-term so that they are relevant to the railroad's SSP throughout the life of the railroad. This does not mean that goals cannot have relevance in the short-term. Rather, goals must have significance beyond the short-term and continue to contribute to the SSP.

- Meaningful so that they are not so broad that they cannot be attributed to specific aspects of the railroad's operations. The desired results must be specific and must have a meaningful impact on safety.

- Measurable so that they are designed in such a way that it is easily determined whether each goal is achieved or at least progress is being made to achieve the goal.

- Consistent with the overall goal(s) of the SSP, in that they must be focused on the identification of hazards and the elimination or mitigation of the resulting risks.

Proposed paragraph (e) requires a railroad to set forth a statement in its SSP plan describing the characteristics of the railroad system. Generally, this description should be sufficient to allow persons who are not familiar with the railroad's operations and railroad operations in general to understand the railroad's system and its basic operations. Specifically, this statement would describe the following:

- The history of the railroad, including when and how the railroad was established, the history of service delivery, and the major milestones in the railroad's history;

- The railroad operations (including any host operations), including the role, responsibilities, and organization of the railroad operating departments;

- The physical characteristics of the railroad, including the number miles of track the railroad operates, the number of stations the railroad services, the number and types of grade crossings the railroad operates over, and on which segments the railroad shares track with other railroads;

- The scope of the service the railroad provides, including the number of passengers, the number of routes, and the days and hours when service is

provided. The railroad may also provide a system map;

- The maintenance activities performed by the railroad, including the role, responsibilities, and organization of the railroad's various maintenance departments and the type of maintenance required by the railroad's operations and facilities;
- Identification of the railroad's physical plant, including the size, location, and function of the railroad's physical assets, such as maintenance facilities, offices, stations, vehicles, signals, and structures for all modes; and
- Any other aspects of the railroad pertinent to the railroad's operations.

Proposed paragraph (e)(2) would also require a railroad to identify in its SSP plan the entities and persons that provide significant safety-related services. The term "significant safety-related services" is intended to be understood broadly to give a railroad the flexibility to evaluate the services other entities provide to the railroad and the degree that these services are safety-related. FRA recognizes that not all railroad operations are the same; thus, not all entities and persons that provide significant safety-related services to a railroad will be the same. During its review of a railroad's SSP plan, FRA would determine whether the entities and persons the railroad has described as providing or utilizing significant safety-related services sufficiently describe such services. FRA would work with the railroad to make the determination. FRA seeks comment on whether to require a railroad to identify entities that not only provide significant safety-related services but also utilize significant safety-related services. A railroad would have significant discretion to identify which entities utilize significant safety-related services.

Paragraph (f) proposes to require a railroad to set forth a statement in its SSP plan that describes the management/organizational structure of the railroad. This statement would include: a chart or other visual representation of the organizational structure of the railroad; a description of how the safety responsibilities are distributed within the railroad organization; clear identification of the lines of authority used by the railroad to manage safety issues; and a description of the relationships and individual responsibilities in an SSP between the railroad, host railroad(s), contract operator(s), shared track/corridor operator(s), and other entities that provide significant safety-related services. Under paragraph (f)(1), the

chart or other visual representation of the organizational structure of the railroad would not need to be overly detailed. Rather, it must identify the divisions within the railroad, the key management positions within each division, and titles of the officials in those positions.

When identifying the divisions within a railroad under paragraph (f)(2), it is important for the railroad to identify how the safety responsibilities are distributed within these divisions. A railroad may have one division that handles safety matters or there may be multiple divisions and each division has separate and distinct responsibilities for handling safety matters. Regardless how the railroad distributes the responsibility to manage safety issues, it is important that the railroad identifies and describes how safety is being managed on its system.

Under paragraph (f)(3), the railroad would also need to clearly identify which of the management positions within the division(s) are responsible for managing the safety issues within the railroad. Identification of these lines of authority would allow FRA to determine who within the organization and at what level is responsible for managing the safety issues. While FRA recognizes that safety is everybody's responsibility within the railroad organization, the management personnel responsible for managing the safety issues would need to be identified.

Paragraph (f)(4) would require the railroad to describe the relationship and responsibilities between it and certain other entities and persons. These entities include: host railroads, contract operators, shared track/corridor operators, and other entities or persons that provide significant safety-related services. Describing the relationship and responsibilities between the railroad and the host railroads, contract operators, and shared track/corridor operators should be relatively easy because the railroads most likely have entered into contracts with these entities that outline this information. Regarding the relationships and responsibilities between the railroad and other entities or persons that provide significant safety-related services that must be identified under paragraph (e)(2) of this section, the rule would provide the railroads the flexibility to determine who provides significant safety-related services. FRA intends to provide such flexibility in paragraph (f)(4) when a railroad must identify the relationships among these entities or persons. The description should be detailed enough so that FRA can understand the basis of the

relationship and the responsibilities of each entity or person based on that relationship.

Paragraph (f)(4) would also require the railroad to describe the roles and responsibilities in the railroad's SSP for each host railroad, contract operator, shared track/corridor operator, and other entity or person that provides significant safety-related services. The railroad would simply have to provide a statement detailing what the roles of these entities specifically are in the railroad's SSP. Since these entities play a key role in the safe operation of the railroad, they would, presumably, have a role in the railroad's SSP.

Proposed paragraph (g) requires a railroad's SSP plan to include a plan that describes how the railroad intends to implement its SSP. This is a general requirement and FRA does not expect the railroad to provide a discussion of how it would implement every single aspect of its SSP. Rather, the implementation plan must, at a minimum, describe roles and responsibilities of each position or job function (including those held by employees, contractors who provide significant safety-related services, and other entities or persons that provide significant safety-related services) that has significant responsibilities to implement the SSP. The plan must also identify the milestones necessary to be reached to properly implement the SSP. The positions or job functions that would be described are those that are responsible for implementing the major elements of the SSP, to the extent that the individuals filling these positions/job functions have clear and concrete roles and responsibilities. Every single individual who participates in the railroad's SSP does not need to be described in the implementation plan; rather, it is only those individuals who have significant responsibilities for implementing the railroad's SSP. The phrase "significant responsibilities" is intended to be broadly understood to provide the railroads the flexibility to determine, based on their individual operations, what may be considered "significant responsibilities."

In its SSP plan a railroad would also set forth the milestones that should be reached so that it properly implements its SSP. Aside from requiring the SSP be fully implemented within 36 months of approval, FRA does not provide specific milestones that the railroad must achieve. Each railroad's SSP would be different; therefore, the milestones that must be achieved to properly implement an SSP would be different. A railroad would have the flexibility to determine, based on its own SSP and instead of

rigid requirements, realistic benchmarks that need to be achieved to properly implement its SSP. FRA plans on working with the railroads to determine what these milestones should be. These milestones are not permanent; FRA understands that there are unforeseeable circumstances that can cause a railroad to adjust the implementation of its SSP and subsequently adjust the milestones. The important element is that the railroad sets forth milestones so that there are standards that can be used to determine the progress of the railroad's implementation of its SSP.

Proposed paragraph (h)(1) requires a railroad's SSP plan to identify and describe the processes and procedures used for maintenance and repair of its infrastructure and equipment directly affecting railroad safety. The phrase "infrastructure and equipment directly affecting railroad safety" is intended to be broadly understood in order to provide the railroad the opportunity to take a realistic survey of its particular operations and make the determination of which infrastructure and equipment directly affects the safety of that railroad. However, as guidance, a list of the types of infrastructure and equipment that are considered to directly affect railroad safety is provided. This list includes: fixed facilities and equipment, rolling stock, signal and train control systems, track and right-of-way, and traction power distribution systems. Once the railroad has determined what infrastructure and equipment directly affect railroad safety, it would then identify and describe the processes and procedures used for the maintenance and repair of that infrastructure and equipment. This section would not require the railroad to establish processes and procedures for maintenance and repair, however, because the railroad most certainly should already have such a process in place. The safety of a railroad's operations depends greatly upon the condition of its infrastructure and equipment. Therefore, these maintenance and repair processes and procedures should and are expected to already be in place.

Under proposed paragraph (h)(2), each description of the process used for maintenance and repair of infrastructure and equipment directly affecting safety would also include the processes and procedures used to conduct testing and inspections of the infrastructure and equipment. Multiple FRA regulations require a railroad to conduct testing and inspection of infrastructure and equipment and, in paragraph (h)(2), FRA is interested in the processes and procedures that the railroad has

developed to meet these regulatory standards. For example, pursuant to part 234, a railroad must inspect, test, and repair warning systems at grade crossings. Under proposed paragraph (h)(2), the railroad would describe the internal procedures it developed to educate its employees on the proper way to conduct the inspection, testing and repair of grade crossing warning systems. Typically, railroads have a manual or manuals that describing the maintenance and testing procedures and processes used to conduct testing and inspections of the infrastructure and equipment. In most cases, simply referencing the current processes and procedures in the SSP plan would satisfy this paragraph, rather than providing the entire manual(s). If FRA reviews a manual, FRA would determine if the manual is current, if it is readily available to the employees who are performing the functions it addresses, and if these employees are trained on it.

While FRA is always concerned with the safety of railroad employees performing their duties, employee safety in maintenance and servicing areas generally falls within the jurisdiction of the United States Department of Labor's Occupational Safety and Health Administration (OSHA). It is not FRA's intent in this rule to displace OSHA's jurisdiction with regard to the safety of employees while performing inspections, tests, and maintenance, except where FRA has already addressed workplace safety issues, such as blue signal protection in 49 CFR part 218. In other rules, FRA has included a provision that makes it clear that FRA does not intend to displace OSHA's jurisdiction over certain subject matters. *See, e.g.,* 49 CFR 238.107(c). FRA seeks comment whether such a clarifying statement is necessary for any such subject matter that this proposed part may affect.

Proposed paragraph (i) requires a railroad's SSP plan to set forth a statement describing both the railroad's processes and procedures for developing, maintaining, and ensuring compliance with the railroad's rules and procedures directly affecting railroad safety and the railroad's processes for complying with railroad safety laws and regulations. This statement would describe how the railroad not only develops, maintains, and complies with its own safety rules, but also how the railroad complies with applicable safety laws and regulations. The statement would include identification of the railroad's operating and safety rules and procedures that are subject to review under Chapter II, Subtitle B of Title 49

of the Code of Federal Regulations, i.e., all of FRA's railroad safety regulations.

The railroad would identify the techniques used to assess the compliance of its employees with applicable railroad safety laws and regulations and the railroad's operating and safety rules and maintenance procedures. Both Federal railroad safety laws and regulations and railroad operating and safety rules and maintenance procedures are effective at increasing the safety of the railroad's operations only if the railroad and its employees comply with such rules and procedures. By ensuring compliance with such rules and procedures, the overall safety of the railroad is improved.

The railroad would also identify the techniques used to assess the effectiveness of the railroad's supervision relating to the compliance with applicable railroad safety laws and regulations and the railroad's operating and safety rules and maintenance procedures. If the railroad's supervision relating to compliance with these rules and procedures is effective, the employees' compliance should also be effective, thus improving the overall safety of the railroad.

Paragraph (j) proposes to require that a railroad's SSP plan describe the railroad's plan on how the necessary employees will be trained on the SSP. This SSP training plan would describe the procedures in which employees who are responsible for implementing and supporting the program, contractors who provide significant safety-related services, and any other entity or person that provides significant safety-related services would be trained on the railroad's SSP. A railroad's SSP can be successful only if those who are responsible for implementing and supporting the program understand the requirements and goals of the program. To this end, a railroad would train those responsible for implementing and supporting the railroad's SSP on the elements of the program so that they have the knowledge and skills to fulfill their responsibilities under the program.

For each position or job function that has been identified under proposed paragraph (g)(1) as having significant responsibility for implementing a railroad's SSP, the railroad's training plan would describe the frequency and the content of the training on the SSP that the position receives. If the railroad does not identify a position or job function under paragraph (g)(1) as having significant responsibilities to implement the SSP but the position or job function is safety related or has a significant impact on safety, personnel

in these positions or performing these job functions would be required to receive basic training on the system safety concepts and the system safety implications of their position or job function. Even though the personnel may not have responsibilities to implement the railroad's SSP, they would have an impact on the program because their position or job function is safety-related or has a significant impact on safety, or both. It is important that all persons who may have an impact on the success of a railroad's SSP understand the requirements of the program so they can work together to achieve the goals of the program.

A railroad could conduct its SSP training by interactive computer-based training, video conferencing, formal classroom training, or some combination of all three. Paragraph (j) is not intended to limit the forms of training; rather, it is intended to provide the railroads the flexibility to conduct training using methods other than traditional classroom training. SSP training could also be combined with a railroad's regular safety or rules training and in some cases SSP training could be included in field "tool box" safety training sessions. The railroad would describe the process it would use to maintain and update the SSP training records. The railroad would also describe the process that it would use to ensure that it is complying with the requirements of the training plans as required by this part.

Proposed paragraph (k) requires that a railroad's SSP plan describe the processes used by the railroad to manage emergencies that may arise within its system. Part of this description should include the processes the railroad uses to comply with the applicable emergency equipment standards contained in part 238 of this chapter and the passenger train emergency preparedness requirements contained in part 239 of this chapter.

Proposed paragraph (l) requires that the railroad's SSP plan describe the programs that it has established that protect the safety of its employees and contractors. The railroad would describe: (1) The processes that have been established to help ensure the safety of employees and contractors while working on or in close proximity to the railroad's property as described pursuant to paragraph (e) of this section; (2) processes to help ensure that employees and contractors understand the requirements established by the railroad pursuant to paragraph (g)(1) of this section; and (3) fitness-for-duty programs, including standards for the

control of alcohol and drug use contained in part 219 of this chapter, fatigue management programs under this part, and medical monitoring programs.

Employees and contractors of the railroad are exposed to many hazards and risks while on railroad property. A railroad's SSP would be required to take into consideration the safety of these persons and the programs and processes it has already in place to address the hazards they face and resulting risks. While FRA is always concerned with the safety of employees in performing their duties, employee safety in maintenance and servicing areas generally falls within the jurisdiction of OSHA. As discussed earlier, it is not FRA's intent in this rule to displace OSHA's jurisdiction with regard to the safety of employees while performing inspections, tests, and maintenance, except where FRA has already addressed workplace safety issues, such as for blue signal protection. As noted, in other rules, FRA has included a provision that makes it clear that FRA does not intend to displace OSHA's jurisdiction over certain subject matters. FRA seeks comment whether such a clarifying statement is necessary for any such subject matter that this proposed part may affect.

Proposed paragraph (m) requires that a railroad's SSP plan describe the railroad's public safety outreach program that provides safety information to the railroad's passengers and the general public. A safety outreach program provides the necessary safety information to the railroad's passengers and to the public at large so that they minimize their exposure to the hazards and resulting risks on the railroad. A railroad's passengers would potentially play an important role in the success of the railroad's SSP. The more information passengers have regarding the railroad's safety programs, the more they would contribute to the success of the railroad's SSP.

Proposed paragraph (n) requires that a railroad's SSP plan to describe the processes that the railroad uses to receive notification of accidents, investigate and report those accidents, and develop, implement, and track any corrective actions found necessary to address the investigations' finding. These processes should already be in place because they are necessary to comply with the requirements of part 225 of this chapter. Accidents can reveal hazards and risks on the railroad's system, which the railroad can then address as part of its SSP.

Proposed paragraph (o) requires a railroad's SSP plan to describe the processes that the railroad has or would put in place to collect, maintain, analyze, and distribute safety data in support of the SSP. These processes are important because they will provide the railroad with the information necessary to determine the effectiveness of its SSP.

Proposed paragraph (p) requires a railroad's SSP plan to describe the process it employs to address safety concerns and hazards during the safety-related contract procurement process. This applies to safety-related contracts so that the railroad can ensure that safety concerns and hazards that may result from the procurement are addressed as necessary.

The main components of an SSP are the risk-based hazard management program and the risk-based hazard analysis. The railroad would use the risk-based hazard management program to describe the various methods, processes, and procedures it will employ to properly and effectively identify, analyze, and mitigate or eliminate hazards and resulting risks. The risk-based hazard analysis is where the railroad will actually identify, analyze and determine the specific actions it will take to mitigate or eliminate hazards and the resulting risks. Paragraphs (q) and (r) set forth the proposed elements of the railroad's risk-based hazard management program and risk-based hazard analysis. Both of these proposed paragraphs implement sections 103(c) through (f) of RSIA. 49 U.S.C. 20156(c)-(f).

The risk-based hazard management program will be a fully implemented program within the railroad's SSP. Proposed paragraph (q) requires a railroad to describe various methods, processes, and procedures that, when implemented, will identify, analyze, and mitigate or eliminate hazards and the resulting risks on the railroad's system. Proposed paragraph (q) embodies FRA's intent to provide railroads with the flexibility to tailor its SSP to its specific operations. Paragraph (q) does not set forth rigid requirements of a risk-based hazard management program. Rather, more general guidelines are provided and the railroad is able to apply these general guidelines to its specific operations.

Paragraph (q)(1) would require a railroad to identify the positions within the railroad who will be responsible for administering the risk-based hazard management program. These positions would be responsible for developing and implementing the risk-based hazard management program. Rather than identifying the specific individuals, the

railroad would identify the positions that are responsible for administering the risk-based hazard management program so that the SSP will not have to be updated each time an individual changes position.

Paragraph (q)(2) would require a railroad to identify the stakeholders who will participate in the hazard management program. This means the railroad will identify all of the entities who will be affected and may play a role in the risk-based hazard management program.

Paragraph (q)(3) would require the railroad to identify the structure and participants in any hazard management teams or safety committees that the railroad may establish to support the risk-based hazard management program. By establishing these teams or committees, the railroad can extensively analyze hazards and risks and thoroughly consider the specific actions to effectively mitigate or eliminate the hazards and risks.

Paragraph (q)(4) would require the railroad to describe the process for setting goals for the risk-based hazard management program and how the performance against the goals will be performed. Similar to the SSP, establishing clear and concise goals will play an important role in the success of a railroad's risk-based hazard management program. The goals should be tailored so that the central goal of the risk-based hazard management program is supported.

Paragraph (q)(5) would require the railroad to describe the process used in the risk-based hazard analysis to identify hazards on the railroad's system. The railroad would determine the methods it would use in the risk-based hazard analysis in proposed paragraph (r) of this section, to identify hazards on various aspects of its system. This would be the railroad's opportunity to consider any new or novel techniques or methods to identify hazards that best suit that railroad's operations. FRA plans on working with railroads, along with providing guidance, to explore the various methods and techniques it may use.

Paragraph (q)(6) would require the railroad to describe the processes or procedures that will be used in the risk-based hazard analysis to analyze hazards and support the risk-based hazard management program. In proposed paragraph (q)(5), the railroad would describe the process it will use to identify hazards, in proposed paragraph (q)(6), the railroad will describe the processes and procedures it will use to analyze the identified hazard. By analyzing the hazards, the

railroad gains the necessary knowledge to effectively identify the resulting risk.

Paragraph (q)(7) would require the railroad to describe the methods used in the risk-based hazard analysis to determine the severity and frequency of the hazard and the resulting risk. A railroad will want to identify the most severe hazards with the greatest amount of risk so that it may prioritize the mitigation or elimination of that hazard and risk. By developing a method that would effectively identify the severity and frequency of hazards and the resulting risks, the railroad will be able to effectively prioritize the mitigation or elimination of the hazard and resulting risks.

Paragraph (q)(8) would require a railroad to describe the methods used in the risk-based hazard analysis to identify actions that mitigate or eliminate hazards and corresponding risks. Here the railroad would identify the methods or techniques it will use to determine which actions it would need to take to mitigate or eliminate the identified hazards and risks. As with identifying the hazards and resulting risks, this would be the railroad's opportunity to consider any new or novel methods to mitigate or eliminate hazards and the resulting risks that best suits that railroad's operations. FRA recognizes that not all hazards and resulting risks can be eliminated or even mitigated, due to costs, feasibility, or other reasons. However, FRA would expect the railroads to consider all reasonable actions that may mitigate or eliminate hazards and the resulting risks and to implement those actions that are best suited for that railroad's operations.

Paragraph (q)(9) would require the railroad to describe how decisions affecting the safety of the rail system will be made relative to the risk-based hazard management program. Railroads make numerous decisions every day that affect the safety of the rail system. Paragraph (q)(9) would require a railroad to describe how those decisions will be made when they relate to the risk-based hazard management program.

Paragraph (q)(10) would require the railroad to describe the methods used in the risk-based hazard management program to support continuous safety improvement throughout the life of the rail system. As with the SSP, the railroad will describe the methods that it has implemented as part of the risk-based hazard management program that will support continuous safety improvement.

Paragraph (q)(11) would require the railroad to describe the methods used to maintain records of the identified hazards and risks throughout the life of

the rail system. In this proposed paragraph the railroad will describe how it plans to maintain the records of the results of the risk-based hazard analysis. While the railroad will not provide these records in its SSP plan submission to FRA, the railroad would be required to make the results of the risk-based hazard analysis available upon request to representatives of FRA pursuant to proposed § 270.201(a)(2).

Once FRA has approved a railroad's SSP plan pursuant to proposed § 270.201(b), the railroad would be required to conduct a risk-based hazard analysis. Proposed paragraph (r)(1) is the RSIA-mandated "risk analysis" that a railroad must conduct. As discussed earlier, RSIA requires a railroad, as part of its development of a railroad safety risk reduction program (e.g., an SSP), to "identify and analyze the aspects of its railroad, including operating rules and practices, infrastructure, equipment, employee levels and schedules, safety culture, management structure, employee training, and other matters, including those not covered by railroad safety regulations or other Federal regulations, that impact railroad safety." 49 U.S.C. 20156(c). Proposed paragraph (r)(1) follows the language of RSIA; however, in the list of the aspects of the railroad system that must be analyzed, paragraph (r)(1) does not include "safety culture." Safety culture, which proposed paragraph (c)(1) of this section would require the railroad to describe, is not something that a railroad can necessarily "identify and analyze" as readily as the other aspects listed. A railroad would have to describe how it measures the success of its safety culture pursuant to § 270.103(v). Proposed paragraph (r)(1) would also require the railroad to analyze any new technology identified in proposed paragraph (t) of this section. Absent safety culture and including new technology, paragraph (r)(1) would require a railroad to analyze: operating rules and practices, infrastructure, equipment, employee levels and schedules, management structure, employee training, employee fatigue as identified in paragraph (s) of this section, new technology as identified in paragraph (t) of this section, and other aspects that have an impact on railroad safety not covered by railroad safety regulations or other Federal regulations. The railroad's operating rules and practices, infrastructure, equipment, employee levels and schedules, management structure, and employee training, would already be identified by the railroad pursuant to this part and would be part of the SSP plan so the

analysis and identification of hazards and resulting risks should be rather straightforward. See proposed paragraphs (e), (f), and (h) through (j) of this section. Employee fatigue is addressed further in proposed paragraph (t). The railroad would determine which aspects have an impact on railroad safety that are not covered by railroad safety regulations or other Federal regulations. When analyzing the various aspects, the railroad will apply the risk-based hazard analysis methodology previously identified in proposed paragraph (q)(5)–(7).

Once the railroad has analyzed the various aspects of its operations and identified hazards and the resulting risks, the railroad would be required to manage these risks. This proposed requirement is derived directly from RSIA, which requires a railroad, as part of its SSP, to have a risk mitigation plan that mitigates the aspects that increase risks to railroad safety and enhances the aspects that decrease the risks to railroad safety. 49 U.S.C. 20156(d). In proposed paragraph (r)(2), the railroad will use the methods described in proposed paragraph (q)(8) to identify and implement specific actions to mitigate or eliminate the hazards and risks identified by proposed paragraph (r)(1).

A risk-based hazard analysis is not a one-time event. The railroad operates in a dynamic environment and certain changes in that environment may expose new hazards and risks that a previous risk-based hazard analysis did not identify. Proposed paragraph (r)(3) identifies the changes that FRA believes are significant enough to require that a railroad conduct a new risk-based hazard analysis. A railroad would be required to conduct a risk-based hazard analysis when there are significant operational changes, system extensions, system modifications, or other circumstances that have a direct impact on railroad safety.

As part of its SSP plan, paragraph (s) would require a railroad to set forth a technology implementation plan. See 49 U.S.C. 20156(d)(2). To establish a technology implementation plan, a railroad would first conduct a technology analysis. A technology analysis would evaluate current, new, or novel technologies that may mitigate or eliminate hazards and the resulting risks identified in the risk-based hazard analysis conducted pursuant to proposed paragraph (r) of this section. As part of its evaluation, a railroad would consider the safety impact, feasibility, and the cost and benefits of implementing the technologies to

mitigate or eliminate hazards and the resulting risks. RSIA mandates that a railroad consider certain technologies as part of its technology analysis. These technologies are: processor-based technologies, positive train control systems, electronically-controlled pneumatic brakes, rail integrity inspection systems, rail integrity warning systems, switch position monitors and indicators, trespasser prevention technology, and highway-rail grade crossing warning and protection technology.

FRA is not proposing a specific formula that a railroad must use to determine whether it should implement any of the technology analyzed in the technology analysis. Rather, the railroad would consider the safety impact, feasibility, and the cost and benefits of these technologies and based on the railroad's specific operations, decide whether to implement any of the technologies. Technology has proved to be an invaluable tool to manage hazards across all modes of transportation, and a robust SSP would certainly include risk mitigation technology.

If a railroad decides to implement any of the technologies identified in the technology analysis, the railroad would be required to set forth a prioritized implementation schedule for the development, adoption, implementation, and maintenance of those technologies over a 10-year period. By establishing this implementation schedule, the railroad would be able to describe its plan on how it would apply technology on its system to mitigate or eliminate the identified hazards and resulting risks.

Paragraph (s)(3) would state that, except as required by 49 CFR part 236, subpart I (Positive Train Control Systems), if a railroad decides to implement a PTC system as part of its technology implementation plan, the railroad shall set forth and comply with a schedule that would implement the system no later than December 31, 2018, as required by the RSIA. See 49 U.S.C. 20156(e)(4)(B). However, this paragraph would not, in itself, require a railroad to implement a PTC system. In addition, FRA specifically seeks public comment on whether a railroad electing to implement a PTC system would find it difficult to meet the December 31, 2018 implementation deadline. If so, what measures could be taken to assist a railroad struggling to meet the deadline and achieve the safety purposes of the statute?

As part of its SSP, RSIA requires a railroad to establish a fatigue management plan. 49 U.S.C. 20156(d)(2). Section 103(f) of RSIA sets

forth the various requirements of a fatigue management plan. 49 U.S.C. 20156(f). On December 8, 2011, RSAC voted to establish a Fatigue Management Plans Working Group (FMP Working Group). The purpose of the group is to provide “advice regarding the development of implementing regulations for Fatigue Management Plans and their deployment under the Rail Safety Improvement Act of 2008”. *Railroad Safety Advisory Committee Task Statement: Fatigue Management Plans*, Task No.: 11–03, Dec. 8, 2011. (A copy of this statement is included in the public docket for this SSP rulemaking.) Specifically, the FMP Working Group is tasked to: “review the mandates and objectives of the [RSIA] related to the development of Fatigue Management Plans, determine how medical conditions that affect alertness and fatigue will be incorporated into Fatigue Management Plans, review available data on existing alertness strategies, consider the role of innovative scheduling practices in the reduction of employee fatigue, and review the existing data on fatigue countermeasures.” *Id.* FRA contemplates that the FMP Working Group will develop proposed rule text for approval by the RSAC and submission to FRA that will prescribe recommended requirements of the Fatigue Management Plan. FRA will consider any RSAC recommendation in developing proposed changes to the SSP rule.

Proposed paragraph (u) sets forth the proposed requirements for ensuring that safety issues are addressed whenever there are certain changes to the railroad's operations. Paragraph (u)(1) proposes to require each railroad to establish and set forth a statement in its SSP plan that describes the processes and procedures used by the railroad to manage significant operational changes, system extensions, system modifications, or other circumstances that will have a direct impact on railroad safety. Since these changes have a direct impact on safety, it is important that the railroad has a process that manages these changes so that safety is not compromised. The term “significant changes that will have a direct impact on railroad safety” is intended to be broadly understood; however, the other changes listed (significant operational changes, system extensions, system modifications) are the type of changes that would necessitate a process/procedure to properly manage them.

Proposed paragraph (u)(2) would require each railroad to establish in its SSP plan a configuration management

program. The term configuration management is defined in § 270.5 as “a process that ensures that the configurations of all property, equipment, and system design elements are accurately documented.” Accordingly, the railroad’s configuration management program shall: (1) State who within the railroad has authority to make configuration changes; (2) establish processes to make configuration changes to the railroad’s system; and (3) establish processes to ensure that all departments of the railroad affected by the configuration changes are formally notified and approve of the change.

Proposed paragraph (u)(3) requires a railroad to establish and describe in its SSP plan the process it uses to certify that safety concerns and hazards are adequately addressed prior to the initiation of operations and major projects to extend, rehabilitate, or modify an existing system or repair vehicles and equipment. By certifying that safety concerns have been addressed before the railroad initiates operations and major projects to extend, rehabilitate, or modify an existing system or replace vehicles and equipment, the railroad minimizes the negative impact on safety that any of these activities may have.

As discussed previously, an SSP can only be effective at mitigating or eliminating hazards and risks if the railroad has a robust and positive safety culture. Pursuant to proposed § 270.101(b), a railroad would design its SSP so that it promotes and supports a positive safety culture, pursuant to proposed § 270.103(c)(1), a railroad will identify in its SSP plan its safety culture, and pursuant to proposed § 270.103(v) a railroad will describe in its SSP plan how it measures the success of its safety culture. A railroad cannot have a robust safety culture unless it actively promotes it and determines whether it is successful.

#### Section 270.105 Discovery and Admission as Evidence of Certain Information

As discussed in the Background section, FRA’s Study concluded that it is in the public interest to protect certain information generated by railroads from discovery or admission into evidence in litigation. Section 109 of RSIA provides FRA with the authority to promulgate a regulation if FRA determines that it is in the public interest, including public safety and the legal rights of persons injured in railroad accidents, to prescribe a rule that addresses the results of the Study.

Following the issuance of the Study, the RSAC met and reached consensus on recommendations for this rulemaking, including a recommendation on the discovery and admissibility issue. RSAC recommended that FRA issue a rule that would protect documents generated solely for the purpose of developing, implementing, or evaluating an SSP from (1) discovery, or admissibility into evidence, or considered for other purposes in a Federal or State court proceeding for damages involving property damage, personal injury, or wrongful death; and (2) State discovery rules and sunshine laws which could be used to require the disclosure of such information.

In § 270.105, Discovery and admission as evidence of certain information, FRA proposes discovery and admissibility protections that are based on the Study’s results and the RSAC recommendations. FRA modeled this proposed section after 23 U.S.C. 409. In section 409, Congress enacted statutory protections for certain information compiled or collected pursuant to Federal highway safety or construction programs. *See* 23 U.S.C. 409. Section 409 protects both data compilations and raw data. A litigant may rely on section 409 to withhold certain documents from a discovery request, in seeking a protective order, or as the basis to object to a line of questioning during a trial or deposition. Section 409 extends protection to information that may never have been in any Federal entity’s possession.

Section 409 was enacted by Congress in response to concerns raised by the States that compliance with the Federal road hazard reporting requirements could reveal certain information that would increase the State’s risk of liability. Without confidentiality protections, States feared that their “efforts to identify roads eligible for aid under the Program would increase the risk of liability for accidents that took place at hazardous locations before improvements could be made.” *Pierce County v. Guillen*, 537 U.S. 129, 133–34 (2003) (citing H.R. Doc. No. 94–366, p. 36 (1976)).

The constitutionality and validity of section 409 has been affirmed by the Supreme Court of the United States. *See Pierce County v. Guillen*. In *Guillen*, the Court considered the application of section 409 to documents created pursuant to the Hazard Elimination Program, which is a Federal highway program that provides funding to State and local governments to improve the most dangerous sections of their roads. *Id.* at 133. To be eligible for the

program, the State or local government must (1) maintain a systematic engineering survey of all roads, with descriptions of all obstacles, hazards, and other dangerous conditions; and (2) create a prioritized plan for improving those conditions. *Id.*

The Court held that section 409 protects information actually compiled or collected by any government entity for the purpose of participating in a Federal highway program, but does not protect information that was originally compiled or collected for purposes unrelated to the Federal highway program, even if the information was at some point used for the Federal highway program. *Guillen* at 144. The Court took into consideration Congress’s desire to make clear that the Hazard Elimination Program “was not intended to be an effort-free tool in litigation against state and local governments.” *Id.* at 146. However, the Court also noted that the text of section 409 “evinces no intent to make plaintiffs worse off than they would have been had section 152 [Hazard Management Program] funding never existed.” *Id.* The Court also held that section 409 was a valid exercise of Congress’s powers under the Commerce Clause because section 409 “can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce.” *Id.*

A comparison of the text of section 409 with section 109, which was added to the U.S. Code by the RSIA, shows that Congress used similar language in both provisions. Given the similar language and concept of the two statutes, and the Supreme Court’s expressed acknowledgement of the constitutionality of section 409, FRA views section 409 as an appropriate model for proposed § 270.105.

FRA proposes that under certain circumstances information (including plans, reports, documents, surveys, schedules, lists, or data) would not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding for damages. This information may not be used in such litigation for any purpose when it is compiled or collected solely for the purpose of developing, implementing, or evaluating an SSP, including the railroad’s analysis of its safety risks conducted pursuant to proposed § 270.103(r)(1) and its identification of the mitigation measures with which it would address those risks pursuant to proposed § 270.103(r)(2). Proposed § 270.105(a) applies to information that may not be in the Federal government’s

possession; rather, it may be information the railroad has as part of its SSP but would not be required to provide to the Federal government under this part.

The RSIA identifies reports, surveys, schedules, lists, and data as the forms of information that should be included as part of FRA's Study. 49 U.S.C. 20119(a). However, FRA does not necessarily view this as an exclusive list. In the statute, Congress directed FRA to consider the need for protecting information that includes a railroad's analysis of its safety risks and its statement of the mitigation measures with which it would address those risks. Therefore, FRA deems it necessary to include "documents" and "plans" in this proposed provision to effectuate Congress's directive in section 109 of RSIA. Notwithstanding, FRA does not propose protecting all documents plans that are part of an SSP. Rather, as proposed in § 270.105(a), the document has to be "compiled or collected solely for purpose of developing, implementing, or evaluating a System Safety Program under this part." The meaning of "compiled or collected solely for purpose of developing, implementing, or evaluating a System Safety Program under this part" is discussed below.

As discussed previously, the proposed regulation would require a railroad to implement its SSP through an SSP plan. While the railroad will not provide in the SSP plan that it submits to FRA the results of the risk-based hazard analysis and the specific elimination or mitigation measures it will be implementing, its own SSP plan may contain this information while it's in possession of the railroad. Therefore, to adequately protect this type of information, the term "plan" is added to cover a railroad's SSP Plan and any elimination or mitigation plans.

It is important to note that these proposed protections will only extend to plans, reports, documents, surveys, schedules, lists, or data that are "compiled or collected solely for purpose of developing, implementing, or evaluating a System Safety Program." The term "compiled and collected" is taken directly from the RSIA. FRA recognizes that railroads may be reluctant to compile or collect extensive and detailed information regarding the safety hazards and resulting risks on their system if this information could potentially be used against them in litigation. The term "compiles" refers to information that was generated by the railroad for the purposes of an SSP; whereas the term "collected" refers to information that was not necessarily

generated for the purposes of the SSP, but was assembled in a collection for use by the SSP. It is important to note that the collection is protected; however, each separate piece of information that was not originally compiled for use by the SSP remains subject to discovery and admission into evidence subject to any other applicable provision of law or regulation.

The information has to be compiled or collected solely for the purpose of developing, implementing, or evaluating an SSP. The use of the term "solely" means that the original purpose of compiling or collecting the information was exclusively for the railroad's SSP. A railroad cannot compile or collect the information for one purpose and then try to use proposed paragraph (a) to protect that information because it simply uses that information for its SSP. The railroad's original and primary purpose of compiling or collecting the information must be for developing, implementing, or evaluating its SSP in order for the protections to be extended to that information. Further, if the railroad is required by another provision of law or regulation to collect the information, the protections of proposed paragraph (a) do not extend to that information because it is not being compiled or collected solely for the purpose of developing, implementing, or evaluating an SSP.

The information must be compiled or collected solely for the purpose of developing, implementing, or evaluating an SSP. These three terms are taken directly from RSIA. They cover the necessary uses of the information compiled or collected solely for the SSP. To develop an SSP, a railroad will need to conduct a risk-based hazard analysis to evaluate and identify the safety hazards and resulting risks on its system. This type of information is essential and is information that a railroad does not necessarily already have. In order for the railroad to conduct a robust risk-based hazard analysis to develop its SSP, the protections from discovery and admissibility are extended to the SSP development stage. Based on the information generated by the risk-based hazard analysis, the railroad would implement measures to mitigate or eliminate the risks identified. To properly implement these measures, the railroad will need the information regarding the hazards and risks on the railroads system identified during the development stage. Therefore, the protection of this information is extended to the implementation stage. Finally, the railroad would be required to evaluate whether the measures it

implements to mitigate or eliminate the hazards and risks identified by the risk-based hazard analysis are effective. To do so, it will need to review the information developed by the risk-based hazard analysis and the methods it used to implement the elimination/mitigation measures. The use of this information in the evaluation of the railroad's SSP is protected.

The information covered by this proposed section shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding that involves a claim for damages involving personal injury, wrongful death, or property damage. The protections apply to discovery, admission into evidence, or consideration for other purposes. The first two situations come directly from RSIA; however, FRA determined that for the protections to be effective they must also apply to any other situation where a litigant might try to use the information in a Federal or State court proceeding that involves a claim for damages involving personal injury, wrongful death, or property damage. For example, under proposed § 270.105, a litigant would be prohibited from admitting into evidence a railroad's risk-based hazard analysis; however, without the additional language, the railroad's risk-based hazard analysis could be used by a party for the purpose of refreshing the recollection of a witness or by an expert witness to support an opinion. The additional language, "or considered for other purposes," ensures that the protected information remains out of a proceeding completely. The protections would be useless if a litigant is able to use the information in the proceeding for another purpose. To encourage railroads to perform the necessary vigorous risk analysis and to implement truly effective elimination or mitigation measures, the protections should be extended to any use in a proceeding.

FRA further notes that this proposed section applies to Federal or State court proceedings that involve a claim for damages involving personal injury, wrongful death, or property damage. This means, for example, if a proceeding has a claim for personal injury and a claim for property damage, the protections are extended to that entire proceeding; therefore a litigant cannot use any of the information protected by this section as it applies to either the personal injury or property damage claim. Section 109 of RSIA required the Study to consider proceedings that involve a claim for damages involving personal injury or wrongful death; however, in order to effectuate

Congress's intent behind section 103 of RSIA, that railroads engage in a robust and candid hazard analysis and develop meaningful mitigation measures, FRA has determined that it is necessary for the protections to be extended to proceedings that involve a claim solely for property damage. The typical railroad accident resulting in injury or death also involves some form of property damage. Without protecting proceedings that involve a claim for property damage, a litigant could bring two separate claims arising from the same incident in two separate proceedings, the first for property damages and the second one for personal injury or wrongful death and be able to conduct discovery regarding the railroad's risk analysis and to introduce this analysis in the property damage proceeding but not in the personal injury or wrongful death proceeding. This means that a railroad's risk analysis could be used against the railroad in a proceeding for damages. If this is the case, a railroad will be hesitant to engage in a robust and candid hazard analysis and develop meaningful mitigation measures. Such an approach would be nonsensical and would completely frustrate Congress's intent in providing FRA the ability to protect that information which is necessary to ensure that open and complete risk assessments are performed and appropriate mitigation measures are implemented. Therefore, in order to be consistent with Congressional intent behind section 103 of RSIA, FRA has determined to extend the protections in § 270.105 to proceedings that involve a claim for property damage. Furthermore, RSAC, which includes railroads and rail labor organizations, recommended to FRA that the protections be extended in this way to proceedings that involve a claim for property damage.

Proposed paragraph (b) would ensure that the proposed protections set forth in paragraph (a) do not extend to information compiled or collected for a purpose other than that specifically identified in paragraph (a). This type of information shall continue to be discoverable and admissible into evidence if it was discoverable and admissible prior to the existence of this section. This includes information compiled or collected for a purpose other than that specifically identified in paragraph (a) that either: (1) Existed prior to the effective date of this part; (2) existed prior to the effective date of this part and continues to be compiled or collected; or (3) is compiled and collected after the effective date of this

part. Proposed paragraph (b) affirms the intent behind the use of the term "solely" in paragraph (a), in that a railroad could not compile or collect information for a different purpose and then expect to use paragraph (a) to protect that information just because the information is also used in its SSP. If the information was originally compiled or collected for a purpose unrelated to the railroad's SSP, then it is unprotected and would continue to be unprotected.

Examples of the types of information that proposed paragraph (b) applies to may be records related to prior incidents/accidents and reports prepared in the normal course of business (such as inspection reports). Generally, this type of information is often discoverable, may be admissible in Federal and State proceedings, and should remain discoverable and admissible where it is relevant and not unduly prejudicial to a party after the implementation of this part. However, FRA recognizes that evidentiary decisions are based on the facts of each particular case; therefore, FRA does not intend this to be a definitive and authoritative list. Rather, FRA merely provides these as examples of the types of information that paragraph (a) is not intended to protect.

Proposed paragraph (c) clarifies that a litigant cannot rely on State discovery rules, evidentiary rules, or sunshine laws that could be used to require the disclosure of information that is protected by paragraph (a). This provision is necessary to ensure the effectiveness of the Federal protections established in paragraph (a) in situations where there is a conflict with State discovery rules or sunshine laws. The concept that Federal law takes precedence where there is a direct conflict between State and Federal law should not be controversial as it derives from the constitutional principal that "the Laws of the United States \* \* \* shall be the supreme Law of the Land." U.S. Const., Art. VI. Additionally, FRA notes that 49 U.S.C. 20106 is applicable to this section, as FRA's Study concluded that a rule "limiting the use of information collected as part of a railroad safety risk reduction program in discovery or litigation" furthers the public interest by "ensuring safety through effective railroad safety risk reduction program plans." See Study at 64. FRA concurs in this conclusion. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad

safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the "essentially local safety or security hazard" exception to section 20106.

As discussed in the Background section, FRA is currently developing, with the assistance of the RSAC, a separate risk reduction rule that would implement the requirements of sections 103 and 109 of the RSIA for Class I freight railroads and railroads with an inadequate safety performance. Section 109 of RSIA mandates that the effective date of a rule prescribed pursuant to that section must be one year after the publication of that rule. Therefore, proposed § 270.105 will not become effective until one year after the publication of the final rule for this proposed part. FRA believes that the public interest considerations for the protections in § 270.105 are the same for the forthcoming risk reduction rule for the Class I freight railroads and railroads with an inadequate safety performance. Therefore, FRA intends that proposed paragraph (d) extend the protections and the exceptions to those protections to the forthcoming risk reduction rule. The effect of this proposal is that the protections for the forthcoming risk reduction rule will be applicable one year after the publication of the final rule for this proposed part and not the final rule for the risk reduction rule. FRA seeks comments regarding this approach.

#### *Subpart C—Review, Approval, and Retention of System Safety Program Plans*

RSIA requires a railroad to submit its SSP, including any of the required plans, to the Administrator (as delegate of the Secretary) for review and approval. 49 U.S.C. 20156(a)(1)(B). Subpart C, Review, Approval, and Retention of System Safety Program Plans, addresses these RSIA requirements.

#### *Section 270.201 Filing and Approval*

This proposed section sets forth the requirements for the filing of an SSP plan and FRA's approval process.

Proposed paragraph (a)(1) requires that each railroad required to establish and fully implement an SSP submit one copy of its SSP plan to the FRA Associate Administrator for Railroad Safety/Chief Safety Officer no later than 395 days after the effective date of the final rule or not less than 90 days prior to commencing operations, whichever is later. FRA seeks comment on whether electronic submission of an SSP plan

should be permitted and, if so, what type of process FRA should use to accept such submissions.

The railroad would not include the results of its risk-based hazard analysis in its SSP plan that it submits to FRA pursuant to proposed paragraph (a)(1) of this section. The SSP plan should only include the methods used to conduct its risk-based hazard analysis as described in proposed paragraph (q). However, since the risk-based hazard analysis is a vital element of an SSP, FRA would work with the railroads to ensure that this analysis is robust and addresses all the necessary aspects of the railroad's operations. To achieve this goal, FRA, its representatives, and States participating under part 212 of this chapter would have access to the railroad's risk-based hazard analysis pursuant to proposed paragraph (a)(2).

As part of its submission, the railroad will provide certain additional information. Primarily, under paragraph (a)(3), the SSP plan submission shall include the signature, name, title, address, and telephone number of the chief official responsible for safety and who bears primary managerial authority for implementing the SSP for the submitting railroad. The SSP plan shall also include the contact information for the primary person managing the SSP and the senior representatives of contract operators, shared track/corridor operators, and others who provide significant safety-related services. The contact information for the primary person managing the SSP is necessary so that FRA knows who to contact regarding any issues with the railroad's SSP. The contact information for the senior representatives of contract operators, shared track/corridor operators, and others who provide significant safety-related services is necessary so that FRA is aware of which entities will be involved in implementing and supporting the railroad's SSP.

Proposed paragraph (a)(4) references the requirements of proposed § 270.102(b), which generally requires a railroad to submit with its SSP plan a consultation statement describing how it consulted with its directly affected employees on the contents of its SSP. When the railroad provides the consultation statement to FRA, proposed § 270.102(b)(4) also requires that the railroad provide a copy of the statement to certain directly affected employees identified in a service list. The directly affected employees can then file a statement within 60 days after the railroad filed its consultation statement, as discussed in proposed § 270.102(c)(1).

Under paragraph (a)(5), the chief official responsible for safety and who bears primary managerial authority for implementing the railroad's SSP shall certify that the contents of the railroad's SSP plan are accurate and that the railroad will implement the contents of the program as approved by § 270.201(b).

Paragraph (b) sets forth the proposed FRA approval process for a railroad's SSP plan. Within 90 days of receipt of an SSP plan, or within 90 days of receipt of each SSP plan submitted prior to the commencement of railroad operations, FRA will review the proposed SSP plan to determine if the elements prescribed in this part are sufficiently addressed in the railroad's submission. This review will also consider any statement submitted by directly affected employees pursuant to proposed § 270.102. This process will involve continuous communication between FRA and the railroad. As with drafting the plan, FRA intends to work with the railroads when reviewing the plan. Furthermore, FRA plans on issuing a guide that will provide additional guidance on this process.

Once FRA determines whether a railroad's SSP plan complies with the requirements of this part, FRA will notify, in writing, the primary contact person of each affected railroad whether the railroad's SSP plan is approved or not. If FRA does not approve a plan, it will inform the railroad of the specific points in which the plan is deficient. FRA will also provide the notification to each individual identified in the service list accompanying the consultation statement required under proposed § 270.102(b). Once the railroad has received notification that the plan is not approved and the specific points in which the plan is deficient, the railroad has 60 days to correct all of the deficiencies and resubmit the plan to FRA.

Proposed paragraph (c) addresses the process a railroad will follow whenever it amends its SSP. When a railroad amends its SSP plan it shall submit the amended SSP plan to FRA not less than 60 days prior to the proposed effective date of the amendment(s). The railroad shall file the amended SSP plan with a cover letter outlining the proposed changes to the original, approved SSP plan. The cover letter should provide enough information so that FRA knows what is being added or removed from the original approved SSP. The railroad would also be required to follow the process it described pursuant to proposed § 270.102(d) regarding the consultation with directly affected employees concerning the amendment

to the SSP plan. The railroad would describe in the cover letter the process it used to consult the directly affected employees on the amendments.

FRA recognizes that some amendments may be safety-critical and that the railroad may not be able to submit the amended SSP plan to FRA 60 days prior to the proposed effective date of the amendments. In these instances, the railroad shall submit the amended SSP plan to FRA as soon as possible. The railroad shall provide an explanation why the amendment is safety critical and describe the effects of the amendment.

FRA will review the proposed amended SSP plan within 45 days of receipt. FRA will then notify the primary contact person whether the proposed SSP plan has been approved by FRA. If the amended plan is not approved, FRA will provide the specific points in which the proposed amendment to the plan is deficient. If FRA does not notify the railroad whether the amended plan is approved or not by the proposed effective date of the amendment(s) to the plan, the railroad may implement the amendment(s) to the plan, subject to FRA's decision. If a proposed amendment to the SSP plan is not approved by FRA, the affected railroad shall correct any deficiencies identified by FRA. The railroad shall provide FRA with a corrected copy of the amended SSP plan no later than 60 days following receipt of FRA's written notice that any proposed amendment was not approved.

Paragraph (d) proposes to allow FRA to reopen consideration of a plan or amendment after initial approval of the plan or amendment. An example of a type of situation in which FRA may reopen review is if FRA determines that the railroad is not complying with its plan/amendment or information has been made available that was not available when FRA originally reviewed the plan or amendment. The determination of whether to reopen consideration will be made solely within FRA's discretion on made on a case-by-case basis.

#### Section 270.203 Retention of SSP plan

This section sets forth the proposed requirements related to a railroad's retention of its SSP plan. A railroad will be required to retain at its system and various division headquarters a copy of its SSP plan and a copy of any amendments to the plan. The railroad must make the plan and any amendments available to representatives of FRA and States participating under part 212 of this chapter for inspection

and copying during normal business hours.

*Subpart D—System Safety Program Internal Assessments and External Auditing*

Subpart D sets forth the proposed requirements related to a railroad's internal SSP assessment and FRA's external audit of the railroad's SSP.

**Section 270.301 General**

To determine whether an SSP is successful, it will need to be evaluated by both the railroad and FRA on a periodic basis. This proposed section sets forth the general requirement that a railroad's SSP and its implementation will be assessed internally by the railroad and audited externally by the FRA or FRA's designee.

**Section 270.303 Internal system safety program assessment**

This section sets forth the proposed requirements related to the railroad's internal SSP assessment. Once FRA approves a railroad's SSP plan, the railroad shall conduct an annual assessment the extent to which: (1) The SSP is fully implemented; (2) the railroad's compliance with the implemented elements of the approved SSP plan; and (3) the railroad has achieved the goals set forth in proposed § 270.103(d). This internal assessment is intended to provide the railroad with an overall survey of the progress of its SSP implementation and the areas in which improvement is necessary.

As part of its SSP plan, the railroad will describe the processes used to: (1) Conduct internal SSP assessments; (2) report the findings of the internal SSP assessments internally; (3) develop, track, and review recommendations as a result of the internal SSP assessments; (4) develop improvement plans based on the internal SSP assessments that, at a minimum, identify who is responsible for carrying out the necessary tasks to address assessment findings and specify a schedule of target dates with milestones to implement the improvements that address the assessment findings; (5) manage revisions and updates to the SSP plan based on the internal SSP assessments; and (6) comply with the reporting requirements set forth in proposed § 270.201. By describing these processes, the railroad will detail how it plans to assess its SSP and how it will improve it if necessary. Since this is an internal assessment, a railroad will tailor the processes to its specific operations, and FRA will work with the railroad to determine the best method to

internally measure the success of the railroad's SSP.

Within 60 days of completing its internal assessment, the railroad will submit a copy of its internal assessment report. This report will include the SSP assessment and the status of internal assessment findings and improvement plans. The railroad will also outline the specific improvement plans for achieving full implementation of its SSP and the milestones it has set forth. The railroad's chief official responsible for safety shall certify the results of the railroad's internal SSP plan assessment.

**Section 270.305 External safety audit**

This section sets forth the proposed process FRA will utilize when it conducts audits of a railroad's SSP. These audits will evaluate the railroad's compliance with the elements required by this part in the railroad's approved SSP plan. Because the railroad's SSP plan and any amendments would have already been approved by FRA pursuant to proposed § 270.201(b) and (c), this section is intended to permit FRA to focus on the extent to which the railroad is complying with its own plan.

Similar to the SSP plan review process, FRA does not intend the audit to be conducted in a vacuum. Rather, during the audit, FRA will maintain communication with the railroad and attempt to resolve any issues before completion of the audit. Once the audit is completed, FRA will provide the railroad with written notification of the audit results. These results will identify any areas where the railroad is not properly complying with its SSP, any areas that need to be addressed by the SSP but are not, or any other areas in which FRA believes the railroad and its plan are not in compliance with this part.

If the results of the audit require the railroad to take any corrective action, the railroad is provided 60 days to submit an improvement plan, for FRA approval, to address the audit findings. The improvement plan will identify who is responsible for carrying out the necessary tasks to address the audit findings and specify target dates and milestones to implement the improvements that address the audit findings. Specification of milestones is important because it will allow the railroad to determine the appropriate progress of the improvements while allowing FRA to gauge the railroad's compliance with its improvement plan.

If FRA does not approve a railroad's improvement plan, FRA will notify the railroad of the specific deficiencies in the improvement plan. The railroad will then amend the improvement plan to

correct the deficiencies identified by FRA and provide FRA a copy of the amended improvement plan no later than 30 days after the railroad received notice from FRA that its improvement plan was not approved. This process is similar to the process provided when FRA does not initially approve a railroad's SSP. The railroad shall provide a report to FRA and States participating under part 212 of this chapter for review upon request regarding the status of the implementation of the improvements set forth in the improvement plan established pursuant to paragraph (b)(1) of this section.

*Appendix B to Part 270—Federal Railroad Administration Guidance on the System Safety Program Consultation Process*

Appendix B would contain guidance on how a railroad could comply with § 270.102, which states that a railroad must in good faith consult with and use its best efforts to reach agreement with all of its directly affected employees on the contents of the SSP plan. The appendix begins with a general discussion of the terms "good faith" and "best efforts," explaining that they are separate terms and that each has a specific and distinct meaning. For example, the good faith obligation is concerned with a railroad's state of mind during the consultation process, and the best efforts obligation is concerned with the specific efforts made by the railroad in an attempt to reach agreement with its directly affected employees. The appendix also explains that FRA will determine a railroad's compliance with the § 270.102 requirements on a case-by-case basis and outlines the potential consequences for a railroad that fails to consult with its directly affected employees in good faith and using best efforts.

The appendix also contains specific guidance on the process a railroad may use to consult with its directly affected employees. This guidance would not establish prescriptive requirements with which a railroad must comply, but would provide a road map for how a railroad may conduct the consultation process. The guidance also distinguishes between employees who are represented by a non-profit employee labor organization and employees who are not, as the processes a railroad may use to consult with represented and non-represented employees could differ significantly. Overall, however, the appendix stresses that there are many compliant ways in which a railroad may choose to consult with its directly affected employees and

that FRA believes, therefore, that it is important to maintain a flexible approach to the § 270.102 consultation requirements, so a railroad and its directly affected employees may consult in the manner best suited to their specific circumstances.

**VII. Regulatory Impact**

*A. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures*

This NPRM has been evaluated in accordance with existing policies and procedures, and determined to be non-significant under both Executive Orders 12866 and 13563 and DOT policies and procedures. 44 FR 11034, Feb. 26, 1979. FRA has prepared and placed in the docket a regulatory impact analysis (RIA) addressing the economic impact of this NPRM.

This NPRM directly responds to the Congressional mandate in section 103 of RSIA that FRA, by delegation from the Secretary, require each railroad that provides intercity rail passenger or commuter rail passenger transportation to establish a railroad safety risk reduction program. 49 U.S.C. 20156(a)(1). The proposal also implements section 109 of RSIA which authorizes FRA, by delegation from the Secretary, to issue a regulation protecting from discovery and admissibility into evidence in litigation documents generated for the purpose of developing, implementing, or evaluating a SSP. FRA believes that all of the

requirements of the proposed rule are directly or implicitly required by RSIA and will promote railroad safety.

Most of the passenger railroads affected by this proposal already participate in APTA's system safety program and are currently participating in the APTA audit program. Railroads that are still negotiating contracts or not participating directly with APTA have developed, or are in the process of developing an APTA system safety program. There is one railroad that does not currently have or is developing an APTA system safety program, a small event commuter railroad in Iowa. That railroad has a very simple system, and FRA believes that the costs to develop its SSP pursuant to the proposed rule will be relatively low. Since the majority of intercity passenger or commuter railroads already have APTA system safety programs, there will not be a significant burden for these railroads to implement the regulatory requirements set forth in this proposed rule. Thus, the economic impact of the proposed rule is generally incremental in nature for documentation of existing information and inclusion of certain elements not already addressed by railroads in their programs. Regarding new start intercity passenger or commuter railroads, FRA currently and will continue to provide technical assistance to these types of railroads for the development and implementation of system safety programs and conduct of preliminary hazard analyses in the

design phase leading to operations implementation.

For purposes of this analysis, FRA has analyzed the impact on the 30 existing passenger and railroads and projected costs for startup railroads. Total estimated twenty-year costs associated with implementation of the proposed rule, for existing passenger railroads, range from \$1.8 million (discounted at 7%) to \$2.5 million (discounted at 3%).

FRA believes that there will be new, startup, passenger railroads, that will be formed during the twenty-year analysis period. FRA is aware of two passenger railroads that intend to commence operations in the near future. FRA assumed that one of these railroads would begin developing its SSP in Year 2, and that the other would begin developing its SSP in Year 3. FRA further assumed that one additional passenger railroad would be formed and begin developing its SSP every other year after that, in Years 5, 7, 9, 11, 13, 15, 17 and 19. Total estimated twenty-year costs associated with implementation of the proposed rule, for startup passenger railroads, range from \$270 thousand (discounted at 7%) to \$437 thousand (discounted at 3%).

Total estimated twenty-year costs associated with implementation of the proposed rule, for existing passenger railroads and startup passenger railroads, range from \$2.0 million (discounted at 7%) to \$3.0 million (discounted at 3%).

TABLE 1—ESTIMATED COSTS OF THE NPRM

|             | Current dollar value | Discounted value 7 percent | Discounted value 3 percent |
|-------------|----------------------|----------------------------|----------------------------|
| Total ..... | \$4,123,164.26       | \$2,022,847.85             | \$2,968,788.59             |

Properly implemented SSPs are successful in optimizing the returns on railroad safety investments. Railroads can use them to proactively identify potential hazards and resulting risks at an early stage thus minimizing associated casualties and property damage or avoiding them altogether. Railroads can also use them to identify a wide array of potential safety issues and solutions, which in turn allows them to simultaneously evaluate various alternatives for improving overall safety with resources available. This results in more cost effective investments. In addition, system safety planning helps railroads maintain safety gains over time. Without an SSP plan to guide them, railroads could adopt countermeasures to safety problems that

become less effective over time as the focus shifts to other issues. With SSP plans, those safety gains are likely to continue for longer time periods. SSP plans can also be instrumental in reducing casualties resulting from hazards that are not well addressed through conventional safety programs, such as slips, trips and falls, or risks that occur because safety equipment is not used correctly, or routinely.

During the course of daily operations, hazards are routinely discovered. Railroads must decide which hazards to address and how, with the limited resources available for this purpose. Without an SSP plan in place, the decision process might become arbitrary. In the absence of the protections against discovery in legal proceedings for damages provided by

the proposed rule, railroads might also be reluctant to keep detailed records of known hazards. With an SSP plan in place, railroads are able to identify and implement the most cost-effective measures to reduce casualties.

It is difficult, if not impossible, to completely segregate railroad expenses that go to enhance safety from other expenses. Railroad operations and maintenance activities have inherent safety-critical elements. Thus, every capital expenditure is likely to have a safety component, whether for equipment, right-of-way, signal or infrastructure. SSPs can increase the safety return on any investment related to the operation and maintenance of the railroad. FRA believes a very conservative estimate of all safety-related expenditures by all passenger

railroads affected by the proposed rule is \$11.6 billion per year. In the first twenty years of the proposed rule, SSP plans can increase the cost effectiveness of investments totaling between \$92 billion (discounted at 7%) and \$139 billion (discounted at 3%).

Anecdotally, FRA is aware of a situation where noise walls had to be relocated after they were installed, because the walls were placed where they blocked sight lines for both motorists and train crews at a highway-rail grade crossing. If it cost \$100,000 to move such a wall; if railroads avoided moving just five such walls per year or implementing other similar corrective actions, for a total savings of \$500,000 per year, the rule would pay for itself. FRA believes that it is reasonable to expect far more savings in total when considering there are 30 existing passenger rail operators impacted. The impact on the effectiveness of investments by startup railroads would likely be greater than for existing railroads, as more of their expenses are for new infrastructure or other systems that can have safety designed in from the start at little or no marginal cost.

Another way to look at the benefits that might accrue from SSPs is to look at total passenger operation related accident costs. Over the time period 2001–2010, on average passenger railroads had 3,723.2 accidents per year. These accidents resulted in 207 fatalities; 3,543 other casualties; and \$21.1 million in damage to railroad track and equipment. Of course, these accidents also caused damage to other

property, delays on both railroads and highways, response costs and many other costs. In other analyses, FRA has found that the total societal cost of a serious accident is at least 2.33 times the fatality costs.<sup>1</sup> Such accident costs include fatality costs, injury costs, delay costs, response costs, damage to equipment, damage to track and structures, and equipment clearing, although there may be other societal costs not accounted for. Accidents that are serious enough to result in fatalities can result in such costs. Further, some accidents, such as grade crossing accidents, can be quite severe and result in very serious injuries even without a fatality. Although there is not a fatality, these types of accidents do result in societal costs. The total societal costs of serious accidents include the total societal costs of fatal accidents plus the total societal costs of other serious accidents. Therefore, the combined total societal costs of all kinds of serious accidents are greater than the total societal costs of fatal accidents. FRA believes multiplying societal costs of fatalities by a factor of 2.33 to derive total societal cost of serious accidents is a conservative approach to estimating such costs. In this case, if the fatality costs are \$6.2 million per fatality, and the average number of fatalities is 207, then the societal cost of fatalities is \$1,283.4 million per year, and the total societal cost of serious accidents related to passenger operations is \$2,990.3 million per year.

Again, FRA has relevant anecdotal evidence that accident reduction

benefits are achievable. One railroad installed track switches near an overhead highway bridge, yet the cost of locating the switches at a safer location would have been negligible. Derailments are much more likely at switch points than at most other locations on tracks. If a train were to derail into a bridge, as happened in Eschede Germany on June 3, 1998, the results would be catastrophic, on the order of the passenger accident occurring at Chatsworth, CA, on September 12, 2008. FRA estimates that the total societal cost of the Chatsworth accident was at least \$380 million. If the probability of such a severe accident were reduced by 2 percent per year, the benefit, \$7.6 million per year, would pay for the proposed rule many times over. FRA believes that an SSP will identify many of these avoidable risks at no cost. Again, the impact on the potential accidents of startup railroads can be greater, because those startup railroads can build safety in from the start, using their SSPs.

FRA analyzed the percentage of the potential accident reduction benefit pools that would have to be saved in order for the proposed rule to have accident reduction benefits at least equal to costs. The results are presented in the Table 2 below, which represents the percentage improvements in investment efficiency or accident costs for existing passenger railroads that would be necessary for this proposal to break even based on the estimated costs. FRA believes that such savings are more than attainable.

TABLE 2—ESTIMATED TWENTY-YEAR COSTS AS PERCENT OF BENEFIT POOLS

| <i>Benefit Pool</i>       | Current dollar value % | Discounted value 7% | Discounted value 3% |
|---------------------------|------------------------|---------------------|---------------------|
| Railroad Investment ..... | 0.0018                 | 0.0019              | 0.0018              |
| Railroad Accidents .....  | 0.0068                 | 0.0074              | 0.0070              |

Further, FRA believes that an SSP can result in cost savings as a result of avoiding casualties from other types of accidents and incidents. Some of the basic hazards and resulting risks that an SSP can assist in mitigating or eliminating include ones that may be the cause of or contribute to slips, trips and falls. The potential risks of such hazards include falling from a bridge or scaffold because the required safety equipment was not worn, or slipping, falling or stumbling due to irregular surfaces, or because of oil, grease, or

other slippery substance. Included here would also be the avoidance of injuries that could be caused by not wearing or improperly using safety equipment while performing regular maintenance tasks or operating power equipment. There are also potential risks that passengers, employees and others could also be exposed to due to holes or irregular surfaces on platforms or stairs. FRA believes that railroads will mitigate or eliminate many of these hazards and resulting risks through an SSP, but the process of eliminating or mitigating

these risks will require additional costs, and it is impossible at present to estimate precisely the kinds of measures that may be adopted and their costs as well as benefits. Nonetheless, FRA believes that such measures will not be undertaken unless the benefits exceed the costs and the funding is available.

In conclusion, FRA is confident that the accident reduction and cost effectiveness benefits together would justify the \$2.0 million (discounted at 7%) to \$3.0 million (discounted at 3%)

<sup>1</sup> DOT/FRA—Positive Train Control Systems, Final Rule, Regulatory Impact Analysis, Document

FRA 2008–0132–0060, <http://www.regulations.gov/#/documentDetail;D=FRA-2008-0132-0060>.

implementation cost over the first twenty years of the proposed rule.

*B. Regulatory Flexibility Act and Executive Order 13272; Initial Regulatory Flexibility Analysis.*

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an initial regulatory flexibility analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA is publishing this IRFA to aid the public in commenting on the potential small business impacts of the requirements in this NPRM. FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of the proposals in this NPRM. FRA will consider all information and comments received in the public comment process when making a determination regarding the economic impact on small entities in the final rule.

FRA estimates that the total cost for the proposed rule will be \$4.1 million (undiscounted)—\$2.0 million (discounted at 7 percent), or \$3.0 million (discounted at 3 percent), for the railroad industry over a 20-year period. Based on information currently available, FRA estimates that 1 percent of the total railroad costs associated with implementing the proposed rule would be borne by small entities. FRA generally uses conservative assumptions in its costing of rules.

There are two railroads that would be considered small entities for purposes of this analysis, and together they comprise about 7 percent of the railroads impacted directly by this proposed regulation. Thus, a substantial number of small entities in this sector may be impacted. In order to get a better understanding of the total costs for the railroad industry (which forms the basis for the estimates in this IRFA), or more cost detail on any specific requirement, please see the Regulatory Impact Analysis (RIA) that FRA has placed in the docket for this rulemaking.

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

- A description of the reasons why action by the agency is being considered.

- A succinct statement of the objectives of, and the legal basis for, the proposed rule.

- A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule will apply.

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

- Identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

1. Reasons for Considering Agency Action

FRA has proposed part 270 in order to comply with sections 103 and 109 of RSIA. RSIA mandates that FRA, by delegation from the Secretary, shall require each railroad that provides intercity rail passenger or commuter rail passenger transportation to establish a railroad safety risk reduction program. 49 U.S.C. 20156(a)(1). This proposed rule sets forth the requirements for a safety risk reduction program for a railroad that provides intercity rail passenger or commuter rail passenger transportation.

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

The purpose of this proposed rule is to improve railroad safety through structured, proactive processes and procedures developed and implemented by railroad operators. The proposed rule will require a railroad to establish a program that systematically evaluates railroad safety hazards on its system and manages those risks in order to reduce the numbers and rates of railroad accidents, incidents, injuries, and fatalities.

The proposed rule prescribes minimum Federal safety standards for the preparation, adoption, and implementation of railroad system safety programs. The proposed rule does not restrict railroads from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

FRA proposes to add part 270 to title 49 of the Code of Federal Regulations. Part 270 will satisfy the RSIA requirement of a railroad safety risk reduction program for a railroad providing intercity rail passenger or commuter rail passenger service. 49 U.S.C. 20156(a)(1). It will also include

protection from admission or discovery of certain information generated solely for the purpose of developing, implementing, or evaluating a system safety program under part 270, or a railroad safety risk reduction program required by FRA for Class I railroads, railroads with inadequate safety performance, or any other railroad. 49 U.S.C. 20119.

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

The “universe” of the entities considered in an IRFA generally includes only those small entities that can reasonably expect to be directly regulated by this proposed action. Small passenger railroads are the only types of small entities that may be affected directly by this proposed rule.

“Small entity” is defined in 5 U.S.C. 601(3) as having the same meaning as “small business concern” under section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) likewise includes within the definition of “small entities” not-for-profit enterprises that are independently owned and operated, and are not dominant in their field of operation.

The U.S. Small Business Administration (SBA) stipulates in its size standards that the largest a railroad business firm that is “for profit” may be and still be classified as a “small entity” is 1,500 employees for “Line Haul Operating Railroads” and 500 employees for “Switching and Terminal Establishments.” 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 may adopt their own size standards 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 proposing to use this definition for this rulemaking. Any comments received pertinent to its use will be addressed in the final rule.

#### Passenger Railroads

Commuter and intercity passenger railroads would have to comply with all provisions of Part 270; however, the amount of effort to comply with the proposed rule is commensurate with the size of the entity.

There are two intercity passenger railroads, Amtrak and the Alaska Railroad. Neither can be considered a small entity. Amtrak is a Class I railroad and the Alaska Railroad is a Class II railroad. The Alaska Railroad is owned by the State of Alaska, which has a population well in excess of 50,000.

There are 28 commuter or other short-haul passenger railroad operations in the U.S. Most of these railroads are part of larger transit organizations that receive Federal funds and serve major metropolitan areas with populations greater than 50,000. However, two of these railroads do not fall in this category and are considered small entities: Saratoga & North Creek Railway (SNC), and the Hawkeye Express, which is operated by the Iowa Northern Railway Company (IANR). All other passenger railroad operations in the United States are part of larger governmental entities whose service jurisdictions exceed 50,000 in population.

In 2011 Hawkeye Express transported approximately 5,000 passengers per game over a 7-mile round-trip distance to and from University of Iowa (University) football games. Iowa Northern has approximately 100 employees and is primarily a freight operation totaling 184,385 freight train miles in 2010. The service is on a contractual arrangement with the University, a State of Iowa institution. (The population of Iowa City, Iowa, is approximately 69,000.) Iowa Northern owns and operates the 6 bi-level passenger cars used for this small passenger operation which runs on average 7 days over a calendar year. FRA expects that any costs imposed on the railroad by this regulation will likely be passed on to the University as part of the transportation cost, and requests comment on this assumption.

SNC began operation in the summer of 2011 and currently provides daily rail service over a 57-mile line between Saratoga Springs and North Creek, New

York. The SNC, a Class III railroad, is a limited liability company, wholly owned by San Luis & Rio Grande Railroad (SLRG). SLRG is a Class III rail carrier and a subsidiary of Permian Basin Railways, Inc. (Permian), which in turn is owned by Iowa Pacific Holdings, LLC (IPH). The SNC primarily transports visitors to Saratoga Springs, tourists seeking to sightsee along the Hudson River, and travelers connecting to and from Amtrak service. The railroad operates year round, with standard coach passenger trains. Additional service activity includes seasonal ski trains, and specials such as "Thomas The Train." This railroad operates under a five-year contract with the local government, and is restarting freight operations as well. The railroad has about 25 employees. SNC has already developed and is starting to utilize an SSP plan which follows the APTA model of SSP plan features and processes.

FRA has assisted and plans to continue to assist "new start" passenger railroads, including small business entities, in the development of their SSPs, starting at the design and planning phase through implementation. FRA will also provide guidance to those railroads so that the scope and content of their SSPs is proportionate to their size and nature of their operation.

The cost burden to the two small entities will be considerably less on average than that of the other 28 railroads. FRA estimates impacts on these two railroads could range on average between \$1,375 and \$3,150 per annum to comply with the regulation, depending on the existing level of compliance and discount rate (or \$14,568 to \$62,382 over 20 years per entity, again depending on the existing level of compliance and discount rate.)

Since one of these railroads provides service under contract to a State institution, it may be able to pass some or all of the compliance cost on to that institution. The small entity itself may not be significantly impacted. As indicated above, FRA will assist an entity like the Hawkeye Express in preparing its program and plan if it is not already preparing an SSP. FRA envisions the SSP plan of such an entity as a very concise and brief document. FRA seeks comment on these findings and conclusions.

#### Contractors

Some passenger railroads use contractors to perform many different functions on their railroads. For some of these railroads, contractors perform safety-related functions, such as

operating trains. For the purpose of assessing the impact of an SSP, contractors fall into two groups; larger contractors who perform primary operating and maintenance functions for the passenger railroads and smaller contractors who perform ancillary functions to the primary operations. Larger contractors are typically large private companies such as Herzog, or part of an international conglomerate such as Keolis or Veolia, with substantial multidisciplinary workforces, and are able to perform most all operating functions the passenger railroad requires. Smaller contractors may perform duties such as snow clearing on station platforms, brush clearing, painting stations, etc.

Safety related policy, work rules, guidelines, and regulations are imparted to the small contractors today as part of their contractual obligations and qualification to work on the passenger railroad property. FRA sees minimal additional burden to imparting the same type of information under each passenger railroad's SSP. A very small administrative burden may result.

No provisions of the proposed rule would directly require any contractors (small or large) to do anything unless they are also intercity passenger or commuter railroads.

FRA seeks comment on these findings and conclusions.

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

There are reporting, recordkeeping, and compliance costs associated with the proposed regulation. This NPRM proposes what almost all passenger railroads have for the most part been doing voluntarily for some time. FRA believes that the added burden due to these proposed requirements is marginal. The total 20-year cost of this proposed rulemaking is \$4.1 million (undiscounted), of which FRA estimates 2.9 percent or less will be attributable to small entities. FRA estimates that the approximate total burden for small railroads for the 20-year period could range between \$33,384 and \$120,217, depending on discount rates and extent of costs relative to larger railroads. FRA believes this would not be a substantial burden. For a thorough presentation of cost estimates, please refer to the RIA, which has been placed in the docket for this rulemaking. FRA expects that most of the skills necessary to comply with

the proposed regulation would be possessed by professional hazard assessment personnel, and record-keeping and reporting personnel.

The following section outlines potential additional burden on small railroads for each subpart of the proposed rule:

#### Subpart A—General

The policy, purpose, and definitions outlined in subpart A do not impose any direct burdens on small railroads.

#### Subpart B—System Safety Program Requirements

This subpart of the proposed rule will have a more or less proportional effect on small and large entities. This portion of the proposed rule will create approximately 36 percent of the total burden for small entities. The proposed requirements in this subpart describe what must be developed and placed in the SSP plan to properly implement the SSP. More specifically it requires the development of the risk-based hazard analysis and risk-based hazard management program, technology plans, and fatigue management plans.

#### Subpart C—Review, Approval, and Retention of System Safety Program Plans

This subpart of the proposed rule will create approximately 14 percent of the total burden for small entities. This activity is for the initial delivery and review of the SSP plan, as well as delivery of any ongoing amendments.

#### Subpart D—System Safety Program Internal Assessments and External Auditing

This subpart of the proposed rule will create approximately 50 percent of the total burden for small entities. This is for the ongoing cost for the small railroads to perform an internal assessment and report on internal audits on an annual basis as well as host an external audit by FRA or its designees every three years.

RSIA mandates that FRA, as delegated by Secretary, require each railroad carrier that provides intercity rail passenger or commuter rail passenger transportation develop a railroad safety risk reduction program. FRA has no discretion with respect to applicability. All but one passenger railroad currently voluntarily has such programs in place. Thus, for most of these railroads the additional burden would likely only stem from describing such procedures, processes, and programs required by the proposed regulation. FRA estimates one of these railroads would have to develop a program to comply with the proposed

regulation. However, the burden for this one railroad would be mitigated because FRA specialists would provide assistance in the development of the program.

#### *Market and Competition Considerations.*

The small railroad segment of the passenger railroad industry essentially faces no intra-modal competition. The two railroads under consideration would only be competing with individual automobile traffic and serve in large part as a service offering to get drivers out of their automobiles and off congested roadways. One of the two entities provides a service at a sporting event to assist attendees to travel to the stadium from distant parking lots. The other small entity provides passenger train service to tourist and other destinations. FRA is not aware of any bus service that currently exists that competes with either of these railroads. FRA requests comments and input on current or planned future existence of any such service or competition.

The railroad industry has several significant barriers to entry, such as the need to own the right-of-way and the high capital expenditure needed to purchase a fleet, track, and equipment. As such, small railroads usually have monopolies over the small and segmented markets in which they operate. Thus, while this rule may have an economic impact on all passenger railroads, it should not have an impact on the intra-modal competitive position of small railroads.

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

FRA is not aware of any relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule; the proposed regulation in fact supports most other safety regulations for railroad operations.

The FTA first implemented requirements similar to an SSP in 49 CFR part 659 in 1995. However, FTA's part 659 program applies only to rapid transit systems or portions thereof not subject to FRA's rules. 49 CFR 659.3 and 659.5. Therefore, the requirements of FTA's part 659 would not overlap with any of the requirements proposed in this SSP regulation. However, APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads is based on FTA's part 659, so many of the elements in APTA's system safety program are based on FTA's part 659 program. FRA has always had a close working relationship with FTA

and the implementation of the part 659 program and proposes to use many of the same concepts from the 659 program in this SSP rulemaking. FRA has noted where the elements in the proposed SSP rule are directly from or are based on elements from FTA's part 659.

FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of the proposals in this NPRM. FRA will consider all comments received in the public comment process when making a final determination regarding the economic impact on small entities.

#### *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 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, or 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 proposes to add part 270, System Safety Program. FRA is not aware of any State having regulations similar to proposed part 270. However, 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, repealed and codified at 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 addition, as previously discussed, 49 U.S.C.

20119(b) authorizes FRA to issue a rule governing the discovery and use of risk analysis information in litigation.

In sum, FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under 49 U.S.C. 20106 and 20119. 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 |
|---|---------------------|---------------------------------------|---------------------------|---------------------------|
| 270.7: Waiver Petitions   | 30 railroads        | 2 petitions                           | 8 hours                   | 16                        |
| 270.102(a): Consultation Requirements—RR Consultation with Its Directly Affected Employees on System Safety Program Plan (SSPP) | 28 railroads        | 4 consults                            | 4 hours                   | 16                        |
| (b) RR Consultation Statements  | 30 railroads        | 30 statements                         | 20 minutes                | 10                        |
| Copies of Consultations Statements by RR to Service List Individuals.   | 30 railroads        | 30 copies                             | 1 minute                  | 1                         |
| 270.103: System Safety Program Plan (SSPP)—Comprehensive Written SSPP Meeting All of This Section’s Requirements                | 30 railroads        | 30 SSPPs                              | 40 hours                  | 1,200                     |
| System Safety Training by RR of Employees/Contractors/Others.   | 30 railroads        | 450 trained individuals               | 2 hours                   | 900                       |
| Records of System Safety Trained Employees/Contractors/Others.  | 30 railroads        | 450 records                           | 2 minutes                 | 15                        |
| Furnishing of RR Results of Risk-Based Hazard Analyses Upon FRA/Participating Part 212 States.                                  | 30 railroads        | 10 results of analyses                | 20 hours                  | 200                       |
| Furnishing of Descriptions of Railroad’s Specific Risk Mitigation Methods That Address Hazards Upon FRA Request.                | 30 railroads        | 10 description of mitigation methods. | 10 hours                  | 100                       |
| Furnishing of Results of Railroad’s Technology Analysis Upon FRA/Participating Part 212 States’ Request.                        | 30 railroads        | 30 results of technology analyses.    | 40 hours                  | 1,200                     |
| 270.201: SSPPs Found Deficient by FRA and Requiring Amendment   | 30 railroads        | 4 amended SSPPs                       | 40 hours                  | 160                       |
| Review of Amended SSPPs Found Deficient and Requiring Amendment.  | 30 railroads        | 1 amended SSPP                        | 40 hours                  | 40                        |
| Reopened Review of Initial SSPP Approval for Cause Stated.  | 30 railroads        | 2 amended SSPPs                       | 40 hours                  | 80                        |
| 270.203: Retention of SSPPs   | 30 railroads        | 30 copies                             | 10 minutes                | 5                         |
| Retained Copies of SSPPs.   | 30 railroads        | 30 assessments                        | 40 hours                  | 1,200                     |
| 270.303: Annual Internal SSPP Assessments Conducted by RRs  | 30 railroads        | 30 certifications                     | 8 hours                   | 240                       |
| Certification of Results of RR Internal Assessment by Chief Safety Official.  | 30 railroads        | 6 plans                               | 40 hours                  | 240                       |
| 270.305: External Safety Audit  | 30 railroads        | 6 plans                               | 40 hours                  | 240                       |
| RR Submission of Improvement Plans in Response to Results of FRA Audit.   | 30 railroads        | 2 amended plans                       | 24 hours                  | 48                        |
| Improvement Plans Found Deficient by FRA and Requiring Amendment.   | 30 railroads        | 2 reports                             | 4 hours                   | 8                         |
| RR Status Report to FRA of Implementation of Improvements Set Forth in the Improvement Plan.                                    | 30 railroads        | 2 documents                           | 30 minutes                | 1                         |
| Appendix B—Additional Documents Provided to FRA Upon Request  | 30 railroads        | 2 documents                           | 30 minutes                | 1                         |

| CFR Section/Subject                                 | Respondent universe | Total annual responses | Average time per response | Total annual burden hours |
|---|---------------------|------------------------|---------------------------|---------------------------|
| Consultation with Non-Represented Employees by RRs. | 2 railroads .....   | 2 consults .....       | 8 hours .....             | 16                        |

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, Records Management Officer, 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 email to Mr. Brogan or Ms. Toone at the following address: [Robert.Brogan@dot.gov](mailto:Robert.Brogan@dot.gov); [Kimberly.Toone@dot.gov](mailto: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**.

#### G. 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.

#### H. 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 \$143,100,000 to account for inflation. This proposed rule would not result in the expenditure of more than \$143,100,000 by the public sector in any one year, and thus preparation of such a statement is not required.

#### I. 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.

#### J. 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.dot.gov/privacy.html>.

#### List of Subjects in 49 CFR Part 270

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

#### The Proposal

In consideration of the foregoing, FRA proposes to add part 270 to Chapter II, Subtitle B of Title 49, Code of Federal Regulations, to read as follows:

### PART 270—SYSTEM SAFETY PROGRAM

#### Subpart A—General

Sec.

- 270.1 Purpose and scope.
- 270.3 Application.
- 270.5 Definitions.
- 270.7 Waivers.
- 270.9 Penalties and responsibility for compliance.

#### Subpart B—System Safety Program Requirements

- 270.101 System safety program; general.
- 270.102 Consultation requirements.
- 270.103 System safety program plan
- 270.105 Discovery and admission as evidence of certain information.

#### Subpart C—Review, Approval, and Retention of System Safety Program Plans

- 270.201 Filing and approval.
- 270.203 Retention of system safety program plan.

#### Subpart D—System Safety Program Internal Assessments and External Auditing

- 270.301 General.
- 270.303 Internal system safety program assessment.
- 270.305 External safety audit.
- Appendix A to Part 270—Schedule of Civil Penalties [Reserved]
- Appendix B to Part 270—Federal Railroad Administration Guidance on the System Safety Program Consultation Process

**Authority:** 49 U.S.C. 20103, 20106–20107, 20118–20119, 20156, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

#### Subpart A—General

##### § 270.1 Purpose and scope.

(a) The purpose of this part is to improve railroad safety through structured, proactive processes and procedures developed and implemented by railroads. This part requires certain railroads to establish a system safety

program that systematically evaluates railroad safety hazards on their systems and manages those risks in order to reduce the numbers and rates of railroad accidents, incidents, injuries, and fatalities.

(b) This part prescribes minimum Federal safety standards for the preparation, adoption, and implementation of railroad system safety programs. This part does not restrict railroads from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

(c) This part prescribes the protection of information generated solely for the purpose of developing, implementing, or evaluating a system safety program under this part or a railroad safety risk reduction program required by this chapter for Class I railroads and railroads with inadequate safety performance.

##### § 270.3 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to all—

(1) Railroads that operate intercity or commuter passenger train service on the general railroad system of transportation; and

(2) Railroads that provide commuter or other short-haul rail passenger train service in a metropolitan or suburban area (as described by 49 U.S.C. 20102(2)), including public authorities operating passenger train service.

(b) This part does not apply to:

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

(2) Tourist, scenic, historic, or excursion operations, whether on or off the general railroad system of transportation;

(3) Operation of private cars, including business/office cars and circus trains; or

(4) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (i.e., plant railroads, as defined in § 270.5).

##### § 270.5 Definitions.

As used in this part—

*Administrator* means the Federal Railroad Administrator or his or her delegate.

*Configuration management* means a process that ensures that the configurations of all property, equipment, and system design elements are accurately documented.

*FRA* means the Federal Railroad Administration.

*Fully implemented* means that all elements of a system safety program as described in the SSP plan are established and applied to the safety management of the railroad.

*Hazard* means any real or potential condition (as identified in the railroad's risk-based hazard analysis) that can cause injury, illness, or death; damage to or loss of a system, equipment, or property; or damage to the environment.

*Passenger* means a person, excluding an on-duty employee, who is on board, boarding, or alighting from a rail vehicle for the purpose of travel.

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

*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, is not considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

*Positive train control system* means a system designed to prevent train-to-train collisions, overspeed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position, as described in subpart I of part 236 of this chapter.

*Rail vehicle* means railroad rolling stock, including, but not limited to passenger and maintenance vehicles.

*Railroad* means—

(1) Any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including—

(i) Commuter or other short-haul rail passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

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

(2) A person or organization that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person.

*Risk* means the combination of the probability (or frequency of occurrence) and the consequence (or severity) of a hazard.

*SSP plan* means system safety program plan.

*System safety* means the application of management and engineering principles, and techniques to optimize all aspects of safety, within the constraints of operational effectiveness, time, and cost, throughout all phases of a system life cycle.

*Tourist, scenic, historic, or excursion operations* means railroad operations that carry passengers, often using antiquated equipment, with the conveyance of the passengers to a particular destination not being the principal purpose. Train movements of new passenger equipment for demonstration purposes are not tourist, scenic, historic, or excursion operations.

#### **§ 270.7 Waivers.**

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

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

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

#### **§ 270.9 Penalties and responsibility for compliance.**

(a) Any person who violates any requirement of this part or causes the violation of any such requirement is

subject to a civil penalty of at least \$650 and not more than \$25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violation has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$105,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. Any person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311 (formerly codified in 45 U.S.C. 438(e)). Appendix A contains a schedule of civil penalty amounts used in connection with this part.

(b) Although the requirements of this part are stated in terms of the duty of a railroad, when any person, including a contractor or subcontractor to a railroad, performs any function covered by this part, that person (whether or not a railroad) shall perform that function in accordance with this part.

#### **Subpart B—System Safety Program Requirements**

##### **§ 270.101 System safety program; general.**

(a) Each railroad subject to this part shall establish and fully implement a system safety program that continually and systematically evaluates railroad safety hazards on its system and manages the resulting risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities. A system safety program shall include a risk-based hazard management program and risk-based hazard analysis designed to proactively identify hazards and mitigate the resulting risks. The system safety program shall be fully implemented and supported by a written SSP plan described in § 270.103.

(b) A railroad's SSP shall be designed so that it promotes and supports a positive safety culture at the railroad.

##### **§ 270.102 Consultation requirements.**

(a) *General duty.* (1) Each railroad required to establish a system safety program under this part shall in good faith consult with, and use its best efforts to reach agreement with, all of its directly affected employees on the contents of the SSP plan.

(2) For purposes of this part, the term directly affected employees includes any non-profit employee labor organization representing a class or craft of directly affected employees of the railroad. A railroad that consults with

such a non-profit employee labor organization is considered to have consulted with the directly affected employees represented by that organization.

(3) A railroad shall meet no later than (180 days after the effective date of the final rule) with its directly affected employees to discuss the consultation process. The railroad shall notify the directly affected employees of this meeting no less than 60 days before it is scheduled.

(4) Appendix B to this part contains guidance on how a railroad might comply with the requirements of this section.

(b) *Railroad consultation statements.* A railroad required to submit an SSP plan under § 270.201 must also submit, together with that plan, a consultation statement that includes the following information:

(1) A detailed description of the process the railroad utilized to consult with its directly affected employees;

(2) If the railroad was not able to reach agreement with its directly affected employees on the contents of its SSP plan, identification of any known areas of non-agreement and an explanation why it believes agreement was not reached;

(3) If the SSP plan would affect a provision of a collective bargaining agreement between the railroad and a non-profit employee labor organization, identification of any such provision and an explanation how the SSP plan would affect it; and

(4) A service list containing the names and contact information for the international/national president and general chairperson of any non-profit employee labor organization representing a class or craft of the railroad's directly affected employees; any labor organization representative who participated in the consultation process; and any directly affected employee who significantly participated in the consultation process independently of a non-profit employee labor organization. When a railroad submits its SSP plan and consultation statement to FRA, it must also send a copy of these documents to all individuals identified in the service list.

(c) *Statements from directly affected employees.* (1) If a railroad and its directly affected employees cannot reach agreement on the proposed contents of an SSP plan, then directly affected employees may file a statement with the FRA Associate Administrator for Railroad Safety/Chief Safety Officer explaining their views on the plan on which agreement was not reached. The FRA Associate Administrator for

Railroad Safety/Chief Safety Officer shall consider any such views during the plan review and approval process.

(2) A railroad's directly affected employees have 60 days following the railroad's submission of a proposed SSP plan to submit the statement described in paragraph (c)(1) of this section.

(d) *Consultation requirements for system safety program plan amendments.* As required by § 270.201(c)(1)(i), a railroad's SSP plan must include a description of the process the railroad will use to consult with its directly affected employees on any subsequent substantive amendments to the railroad's system safety program. The requirements of this paragraph do not apply to non-substantive amendments (e.g., amendments that update names and addresses of railroad personnel).

#### **§ 270.103 System safety program plan.**

(a) *General.* (1) Each railroad subject to this part shall adopt and fully implement a system safety program through a written SSP plan that, at a minimum, contains the elements in this section. This SSP plan shall be approved by FRA under the process specified in § 270.201.

(2) Each railroad subject to this part shall communicate with each railroad that hosts passenger train service for that railroad and coordinate the portions of the SSP plan applicable to the railroad hosting the passenger train service.

(b) *System safety program policy statement.* Each railroad shall set forth in its SSP plan a policy statement that endorses the railroad's system safety program. This policy statement shall:

(1) Define the railroad's authority for establishment and implementation of the system safety program; and

(2) Be signed by the chief official at the railroad.

(c) *Purpose and scope of system safety program.* Each railroad shall set forth in its SSP plan a statement defining the purpose and scope of the system safety program. The purpose and scope statement shall describe:

(1) The safety philosophy and safety culture of the railroad;

(2) The railroad's management responsibilities within the system safety program; and

(3) How host railroads, contractor operators, shared track/corridor operators, contractors who provide significant safety-related services, and any other entity or person that provides significant safety-related services as identified by the railroad pursuant to paragraph (e)(2) of this section will, as

appropriate, support and participate in the railroad's system safety program.

(d) *System safety program goals.* Each railroad shall set forth in its SSP plan a statement defining the goals for the railroad's system safety program. This statement shall describe clear strategies on how the goals will be achieved and what management's responsibilities are to achieve them. At a minimum, the goals shall be:

(1) Long-term;

(2) Meaningful;

(3) Measurable; and

(4) Focused on the identification of hazards and the mitigation or elimination of the resulting risks.

(e) *Railroad system description.* (1) Each railroad shall set forth in its SSP plan a statement describing the railroad's system. The description shall include: a history of the railroad's operations, including any host operations; the physical characteristics of the railroad; the scope of service; the railroad's maintenance; and identification of the physical plant and any other pertinent aspects of the railroad's system.

(2) Each railroad shall identify the persons that provide significant safety-related services to the railroad.

(f) *Railroad management and organizational structure.* Each railroad shall set forth a statement in its SSP plan that describes the management/organizational structure of the railroad. This statement shall include:

(1) A chart or other visual representation of the organizational structure of the railroad;

(2) A description of how safety responsibilities are distributed within the railroad organization;

(3) Clear identification of the lines of authority used by the railroad to manage safety issues; and

(4) A description of the relationships and responsibilities between the railroad, host railroads, contract operators, shared track/corridor operators, and other entities or persons that provide significant safety-related services. The statement shall set forth the roles and responsibilities in the railroad's system safety program for each host railroad, contract operator, shared track/corridor operator, or other entity or person that provides significant safety-related services.

(g) *System safety program implementation plan.* Each railroad shall set forth a plan in its SSP plan that describes how the system safety program will be implemented on that railroad. This plan shall include a description of the:

(1) Roles and responsibilities of each position or job function that has

significant responsibility for implementing the system safety program, including those held by employees, contractors who provide significant safety-related services, and other entities or persons that provide significant safety-related services; and

(2) Milestones necessary to be reached to fully implement the program.

(h) *Maintenance, inspection and repair program.* (1) Each railroad shall identify and describe in its SSP plan the processes and procedures used for maintenance and repair of infrastructure and equipment directly affecting railroad safety. Examples of infrastructure and equipment that directly affect railroad safety include: fixed facilities and equipment, rolling stock, signal and train control systems, track and right-of-way, and traction power distribution systems.

(2) Each description of the processes and procedures used for maintenance and repair of infrastructure and equipment directly affecting safety shall include the processes and procedures used to conduct testing and inspections of the infrastructure and equipment.

(i) *Rules compliance and procedures review.* Each railroad shall set forth a statement describing the processes and procedures used by the railroad to develop, maintain, and comply with the railroad's rules and procedures directly affecting railroad safety and to comply with the applicable railroad safety laws and regulations found in this chapter. The statement shall include:

(1) Identification of the railroad's operating and safety rules and procedures that are subject to review under this chapter;

(2) Techniques used to assess the compliance of the railroad's employees with the railroad's operating and safety rules and maintenance procedures, and applicable FRA regulations; and

(3) Techniques used to assess the effectiveness of the railroad's supervision relating to the compliance with the railroad's operating and safety rules and maintenance procedures, and applicable railroad safety laws and regulations.

(j) *System safety program employee/contractor training.* (1) Each railroad shall set forth a statement in its SSP plan that describes the railroad's system safety program training plan. A system safety program training plan shall set forth the procedures in which employees who are responsible for implementing and supporting the SSP, contractors who provide significant safety-related services, and any other entity or person that provides significant safety-related services will be trained on the railroad's system safety

program. A system safety program training plan shall help ensure that all personnel who are responsible for implementing and supporting the system safety program understand the goals of the program, are familiar with the elements of the railroad's program, and have the requisite knowledge and skills to fulfill their responsibilities under the program. The railroad shall keep a record of training conducted under this part and update that record as necessary.

(2) For each position or job function identified pursuant to paragraph (g)(1) of this section, the training plan shall describe the frequency and content of the system safety program training the position receives.

(3) If a position or job function is not identified under paragraph (g)(1) of this section as having significant responsibilities to implement and support the system safety program but the position or job function is safety related or has a significant impact on safety, personnel in those positions or performing those job functions shall receive training in basic system safety concepts and the system safety implications of their position or job function.

(4) Training under this subpart may be conducted by interactive computer-based training, video conferencing, or formal classroom training.

(5) The system safety program training plan shall set forth the process used to maintain and update the necessary training records required by this part.

(6) The system safety program training plan shall set forth the process used by the railroad to ensure that it is complying with the training requirements set forth in the training plan.

(k) *Emergency management.* Each railroad shall set forth a statement in its SSP plan that describes the processes used by the railroad to manage emergencies that may arise within its system including, but not limited to, the processes to comply with applicable emergency equipment standards contained in part 238 of this chapter and the passenger train emergency preparedness requirements contained in part 239 of this chapter.

(l) *Workplace safety.* Each railroad shall set forth a statement in its SSP plan that describes the programs established by the railroad that protect the safety of the railroad's employees and contractors. The statement shall describe any:

(1) Processes that help ensure the safety of employees and contractors while working on or in close proximity

to the railroad's property as described in paragraph (e) of this section;

(2) Processes that help ensure the employees and contractors understand the requirements established by the railroad pursuant to paragraph (g)(1) of this section; and

(3) Fitness-for-duty programs, including standards for the control of alcohol and drug use contained in part 219 of this chapter, fatigue management programs established by this part, and medical monitoring programs.

(m) *Public safety outreach program.* Each railroad shall establish and set forth a statement in its SSP plan that describes its public safety outreach program that provides safety information to railroad passengers and the general public.

(n) *Accident reporting and investigation.* Each railroad shall set forth a statement in its SSP plan that describes the processes that the railroad uses to receive notification of accidents, investigate and report those accidents, and develop, implement, and track any corrective actions found necessary to address the investigation's finding(s).

(o) *Safety data acquisition.* Each railroad shall set forth a statement in its SSP plan that describes the processes used to collect, maintain, analyze, and distribute safety data in support of the system safety program.

(p) *Contract procurement requirements.* Each railroad shall set forth a statement in its SSP plan that describes the process to help ensure that safety concerns and hazards are adequately addressed during the safety-related contract procurement process.

(q) *Risk-based hazard management program.* Each railroad shall establish a risk-based hazard management program as part of the railroad's system safety program. The risk-based hazard management program shall be fully described in the SSP plan. The description of the risk-based hazard management program shall include:

(1) The identity of the individual(s) responsible for administering the risk-based hazard management program;

(2) The identities of stakeholders who will participate in the risk-based hazard management program;

(3) The structure and participants in any hazard management teams or safety committees that a railroad may establish to support the risk-based hazard management program;

(4) The process for setting goals for the risk-based hazard management program and how performance against the goals will be reported;

(5) The processes used in the risk-based hazard analysis to identify hazards on the railroad's system;

(6) The processes or procedures that will be used in the risk-based hazard analysis to analyze hazards and support the risk-based hazard management program;

(7) The methods used in the risk-based hazard analysis to determine the severity and frequency of hazards and to calculate the resulting risk;

(8) The methods used in the risk-based hazard analysis to identify actions that mitigate or eliminate hazards and corresponding risks.

(9) How decisions affecting safety of the rail system will be made relative to the risk-based hazard management program;

(10) The methods used in the risk-based hazard management program to support continuous safety improvement throughout the life of the rail system.

(11) The method used to maintain records of identified hazards and risks and mitigations throughout the life of the rail system.

(r) *Risk-based hazard analysis.* (1) Once FRA approves a railroad's SSP pursuant to § 270.201(b), the railroad shall apply the risk-based hazard analysis methodology identified in paragraph (q)(5) through (7) of this section to identify and analyze hazards on the railroad system and to determine the resulting risks. At a minimum, the aspects of the railroad system that should be analyzed include: operating rules and practices, infrastructure, equipment, employee levels and schedules, management structure, employee training, employee fatigue as identified in paragraph (s) of this section, new technology as identified in paragraph (t) of this section, and other aspects that have an impact on railroad safety not covered by railroad safety regulations or other Federal regulations.

(2) A risk-based hazard analysis shall identify and implement specific actions using the methods described in paragraph (q)(8) of this section that will mitigate or eliminate the hazards and resulting risks identified by paragraph (r)(1) of this section.

(3) A railroad shall also conduct a risk-based hazard analysis pursuant to paragraphs (r)(1) and (2) of this section when there are significant operational changes, system extensions, system modifications, or other circumstances that have a direct impact on railroad safety.

(s) *Technology analysis and implementation plan.* (1) A railroad shall conduct a technology analysis that evaluates current, new, or novel technologies that may mitigate or eliminate hazards and the resulting risks identified in the risk-based hazard analysis process. The railroad shall

analyze the safety impact, feasibility, and cost and benefits of implementing technologies that will mitigate or eliminate hazards and the resulting risks. At a minimum, the technologies a railroad shall consider as part of its technology analysis are: processor-based technologies, positive train control systems, electronically-controlled pneumatic brakes, rail integrity inspection systems, rail integrity warning systems, switch position monitors and indicators, trespasser prevention technology, and highway-rail grade crossing warning and protection technology. The railroad shall make the results of the technology analysis conducted pursuant to this paragraph available upon request to representatives of FRA upon request and States participating under part 212 of this chapter.

(2) A railroad shall establish a technology implementation plan as part of its SSP plan that contains the results of the technology analysis conducted pursuant to paragraph (s)(1) of this section. If a railroad decides to implement any of the technologies identified in the technology analysis based on the technology's safety impact, feasibility, or costs and benefits, the technology implementation plan shall describe the railroad's plan and a prioritized implementation schedule for the development, adoption, implementation and maintenance of those technologies over a 10-year period.

(3) Except as required by subpart I of part 236 of this chapter, if a railroad decides to implement positive train control systems as part of its technology implementation plan, the railroad shall set forth and comply with a schedule for implementation of the positive train control system no later than December 31, 2018.

(t) *Fatigue management plan.* A railroad shall set forth in its SSP plan a Fatigue Management Plan no later than (three years after the effective date of the final rule).

(u) *Safety Assurance—(1) Change management.* Each railroad shall establish and set forth a statement in its SSP plan describing processes and procedures used by the railroad to manage significant operational changes, system extensions, system modifications, or other significant changes that will have a direct impact on railroad safety.

(2) *Configuration management.* Each railroad shall establish a configuration management program and describe the program in its SSP plan. The configuration management program shall—

(i) State who within the railroad has authority to make configuration changes;

(ii) Establish processes to make configuration changes to the railroad's system; and

(iii) Establish processes to ensure that all departments of the railroad affected by the configuration changes are formally notified and approve of the change.

(3) *Safety certification.* Each railroad shall establish and set forth a statement in its SSP plan that describes the certification process used by the railroad to help ensure that safety concerns and hazards are adequately addressed prior to the initiation of operations and major projects to extend, rehabilitate, or modify an existing system or replace vehicles and equipment.

(v) *Safety culture.* A railroad shall set forth a statement in its SSP plan that describes how it measures the success of its safety culture identified in paragraph (c)(1) of this section.

#### **§ 270.105 Discovery and admission as evidence of certain information.**

(a) Any information (including plans, reports, documents, surveys, schedules, lists, or data) compiled or collected solely for the purpose of developing, implementing, or evaluating a system safety program under this part, including a railroad carrier's analysis of its safety risks conducted pursuant to § 270.103(r)(1) and its statement of the mitigation measures with which it would address those risks created pursuant to § 270.103(r)(2), shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceedings for damages involving personal injury, wrongful death, or property damage.

(b) This section does not affect the discovery, admissibility, or consideration for other purposes of information (including plans, reports, documents, surveys, schedules, lists, or data) compiled or collected for a purpose other than that specifically identified in paragraph (a) of this section. Such information shall continue to be discoverable and admissible into evidence if it was discoverable and admissible prior to the existence of this section. This includes such information that either:

(1) Existed prior to (365 days from the publication of the final rule);

(2) Existed prior to (365 days from the publication of the final rule) and that continues to be compiled or collected; or

(3) Is compiled or collected after (365 days from the publication of the final rule).

(c) State discovery rules and sunshine laws that could be used to require the disclosure of information protected by paragraph (a) of this section are preempted.

(d) Paragraphs (a) through (c) of this section shall apply to any railroad safety risk reduction programs required by this chapter for Class I railroads, railroads with inadequate safety performance, or any other railroad.

### **Subpart C—Review, Approval, and Retention of System Safety Program Plans**

#### **§ 270.201 Filing and approval.**

(a) *Filing.* (1) Each railroad to which this part applies shall submit one copy of its SSP plan to the FRA Associate Administrator for Railroad Safety/Chief Safety Officer at Mail Stop 25, 1200 New Jersey Avenue SE., Washington, DC 20590, not more than (395 days after the effective date of the final rule) or not less than 90 days prior to commencing operations, whichever is later.

(2) The railroad shall not include in its SSP plan the risk-based hazard analysis conducted pursuant to § 270.103(r). The railroad shall make the results of any risk-based hazard analysis available upon request to representatives of FRA and States participating under part 212 of this chapter.

(3) The SSP plan shall include the signature, name, title, address, and telephone number of the chief safety officer who bears primary managerial authority for implementing the program for the submitting railroad. The system safety plan shall also include the name and contact information for:

(i) The primary person responsible for managing the system safety program, and

(ii) The senior representatives of host railroads, contract operators, shared track/corridor operators, and others who provide significant safety-related services.

(4) As required by § 270.102(b), each railroad must submit with its SSP plan a consultation statement describing how it consulted with its directly affected employees on the contents of its system safety program. Directly affected employees may also file a statement in accordance with § 270.102(c).

(5) The chief official responsible for safety and who bears primary managerial authority for implementing the program for the submitting railroad shall certify that the contents of the SSP plan are accurate and that the railroad

will implement the contents of the program as approved by FRA pursuant to paragraph (b) of this section.

(b) *Approval.* (1) Within 90 days of receipt of a SSP plan, or within 90 days of receipt of each SSP plan submitted prior to the commencement of railroad operations, FRA will review the proposed SSP plan to determine if the elements prescribed in this part are sufficiently addressed in the railroad's submission. This review will also consider any statement submitted by directly affected employees pursuant to § 270.102.

(2) FRA will notify the primary contact person of each affected railroad in writing whether the proposed plan has been approved by FRA, and if not approved, the specific points in which the plan is deficient. FRA will also provide this notification to each individual identified in the service list accompanying the consultation statement required under § 270.102(b).

(3) If a proposed system safety plan is not approved by FRA, the affected railroad shall amend the proposed plan to correct all deficiencies identified by FRA and provide FRA with a corrected copy of the SSP plan not later than 60 days following receipt of FRA's written notice that the proposed SSP plan was not approved.

(c) *Review of Amendments.* (1)(i) Railroads shall submit amendment(s) to the SSP plan to FRA not less than 60 days prior to the proposed effective date of the amendment(s). The railroad shall file the amended SSP plan with a cover letter outlining the changes made to the original approved SSP plan by the proposed amendment(s). The cover letter shall also describe the process it used pursuant to § 270.102(d) to consult with directly affected employees on the amendment(s).

(ii) If the amendment(s) is safety-critical and the railroad is unable to submit the amended SSP plan to FRA 60 days prior to the proposed effective date of the amendment(s), the railroad shall submit the amended SSP plan to FRA as soon as possible thereafter.

(2)(i) FRA will review the proposed amended SSP plan within 45 days of receipt. FRA will then notify the primary contact person of each affected railroad whether the proposed amended plan has been approved by FRA, and if not approved, the specific points in which the proposed amendment(s) to the SSP plan is deficient.

(ii) If FRA has not notified the railroad by the proposed effective date of the amendment(s) whether the proposed amended plan has been approved or not, the railroad may

implement the amendment(s), subject to FRA's decision.

(iii) If a proposed SSP amendment is not approved by FRA, the affected railroad shall correct all deficiencies identified by FRA. The railroad shall provide FRA with a corrected copy of the amended SSP plan no later than 60 days following receipt of FRA's written notice that the proposed amendment was not approved.

(d) *Reopened Review.* Following initial approval of a plan, or amendment, FRA may reopen consideration of the plan, or amendment, for cause stated.

#### **§ 270.203 Retention of system safety program plan.**

Each railroad to which this part applies shall retain at its system headquarters and at any division headquarters, one copy of the SSP plan required by this part and one copy of each subsequent amendment to that plan. These records shall be made available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying during normal business hours.

### **Subpart D—System Safety Program Internal Assessments and External Auditing**

#### **§ 270.301 General.**

The system safety program and its implementation shall be assessed internally by the railroad and audited externally by the FRA or FRA's designee.

#### **§ 270.303 Internal system safety program assessment.**

(a) Following FRA's initial approval of the railroad's SSP plan pursuant to § 270.201, the railroad shall annually conduct an assessment of the extent to which:

- (1) The system safety program is fully implemented;
- (2) The railroad is in compliance with the implemented elements of the approved system safety program; and
- (3) The railroad has achieved the goals set forth in § 270.103(d).

(b) As part of its system safety plan, the railroad shall set forth a statement describing the processes used to:

- (1) Conduct internal system safety program assessments;
- (2) Internally report the findings of the internal system safety program assessments;
- (3) Develop, track, and review recommendations as a result of the internal system safety program assessment;
- (4) Develop improvement plans based on the internal system safety program

assessments. Improvement plans shall, at a minimum, identify who is responsible for carrying out the necessary tasks to address assessment findings and specify a schedule of target dates with milestones to implement the improvements that address the assessment findings;

(5) Manage revisions and updates to the SSP plan based on the internal system safety program assessments; and

(6) Comply with the reporting requirements set forth in § 270.201.

(c)(1) Within 60 days of completing its internal SSP plan assessment pursuant to paragraph (a) of this section, the railroad shall:

(i) Submit to FRA a copy of the railroad's internal assessment report that includes a system safety program assessment and the status of internal assessment findings and improvement plans; and

(ii) Outline the specific improvement plans for achieving full implementation of the SSP plan, as well as achieving the goals of the plan.

(2) The railroad's chief official responsible for safety shall certify the results of the railroad's internal SSP plan assessment.

#### **§ 270.305 External safety audit**

(a) FRA may conduct, or cause to be conducted, external audits of a railroad's system safety program. Each audit will evaluate the railroad's compliance with the elements required by this part in the railroad's approved SSP plan. FRA shall provide the railroad written notification of the results of any audit.

(b)(1) Within 60 days of FRA's written notification of the results of the audit, the railroad shall submit to FRA for approval, if necessary, improvement plans to address all audit findings. Improvement plans submitted shall, at a minimum, identify who is responsible for carrying out the necessary tasks to address audit findings and specify target dates and milestones to implement the improvements that address the audit findings.

(2) If FRA does not approve the railroad's improvement plan, FRA will notify the railroad of the specific deficiencies in the improvement plan. The affected railroad shall amend the proposed plan to correct the deficiencies identified by FRA and provide FRA with a corrected copy of the improvement plan no later than 30 days following receipt of FRA's written notice that the proposed plan was not approved.

(3) Upon request, the railroad shall provide to FRA and States participating under part 212 of this chapter for review

a report regarding the status of the implementation of the improvements set forth in the improvement plan established pursuant to paragraph (b)(1) of this section.

#### **Appendix A to Part 270—Schedule of Civil Penalties [Reserved]**

#### **Appendix B to Part 270—Federal Railroad Administration Guidance on the System Safety Program Consultation Process**

A railroad required to develop a system safety program under this part must in good faith consult with and use its best efforts to reach agreement with its directly affected employees on the contents of the SSP plan. See § 270.102(a). This appendix discusses the meaning of the terms “good faith” and “best efforts,” and provides guidance on how a railroad could comply with the requirement to consult with directly affected employees on the contents of its SSP plan. Specific guidance will be provided for employees who are represented by a non-profit employee labor organization and employees who are not represented by any such organization.

#### **The Meaning of “Good Faith” and “Best Efforts”**

“Good faith” and “best efforts” are not interchangeable terms representing a vague standard for the § 270.102 consultation process. Rather, each term has a specific and distinct meaning. When consulting with directly affected employees, therefore, a railroad must independently meet the standards for both the good faith and best efforts obligations. A railroad that does not meet the standard for one or the other will not be in compliance with the consultation requirements of § 270.102.

The good faith obligation requires a railroad to consult with employees in a manner that is honest, fair, and reasonable, and to genuinely pursue agreement on the contents of an SSP plan. If a railroad consults with its employees merely in a perfunctory manner, without genuinely pursuing agreement, it will not have met the good faith requirement. A railroad may also fail to meet its good faith obligation if it merely attempts to use the SSP plan to unilaterally modify a provision of a collective bargaining agreement between the railroad and a non-profit employee labor organization.

On the other hand, “best efforts” establishes a higher standard than that imposed by the good faith obligation, and describes the diligent attempts that a railroad must pursue to reach agreement with its employees on the contents of its system safety program. While the good faith obligation is concerned with the railroad’s state of mind during the consultation process, the best efforts obligation is concerned with the specific efforts made by the railroad in an attempt to reach agreement. This would include considerations such as whether a railroad had held sufficient meetings with its employees, or whether the railroad had made an effort to respond to feedback provided by employees during the consultation process. For example, a railroad

would not meet the best efforts obligation if it did not initiate the consultation process in a timely manner, and thereby failed to provide employees sufficient time to engage in the consultation process. A railroad may, however, wish to hold off substantive consultations regarding the contents of its SSP until one year after the effective date of the rule in order to ensure that information generated as part of the process is protected from discovery and admissibility into evidence under § 270.105 of the rule. Generally, best efforts are measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take. Therefore, the standard imposed by the best efforts obligation may vary with different railroads, depending on a railroad’s size, resources, and number of employees.

When reviewing SSP plans, FRA will determine on a case-by-case basis whether a railroad has met its § 270.102 good faith and best efforts obligations. This determination will be based upon the consultation statement submitted by the railroad pursuant to § 270.102(b) and any statements submitted by employees pursuant to § 270.102(c). If FRA finds that these statements do not provide sufficient information to determine whether a railroad used good faith and best efforts to reach agreement, FRA may investigate further and contact the railroad or its employees to request additional information. If FRA determines that a railroad did not use good faith and best efforts, FRA may disapprove the SSP plan submitted by the railroad and direct the railroad to comply with the consultation requirements of § 270.102. Pursuant to § 270.201(b)(3), if FRA does not approve the SSP plan, the railroad will have 60 days, following receipt of FRA’s written notice that the plan was not approved, to correct any deficiency identified. In such cases, the identified deficiency would be that the railroad did not use good faith and best efforts to consult and reach agreement with its directly affected employees. If a railroad then does not submit to FRA within 60 days a SSP plan meeting the consultation requirements of § 270.102, the railroad could be subject to penalties for failure to comply with § 270.201(b)(3).

#### **Guidance on How a Railroad May Consult With Directly Affected Employees**

Because the standard imposed by the best efforts obligation will vary depending upon the railroad, there may be countless ways for various railroads to comply with the consultation requirements of § 270.102. Therefore, FRA believes it is important to maintain a flexible approach to the § 270.102 consultation requirements, in order to give a railroad and its directly affected employees the freedom to consult in a manner best suited to their specific circumstances.

FRA is nevertheless providing guidance in this appendix as to how a railroad may proceed when consulting (utilizing good faith and best efforts) with employees in an attempt to reach agreement on the contents of an SSP plan. FRA believes this guidance may be useful as a starting point for railroads that are uncertain about how to comply with

the § 270.102 consultation requirements. This guidance distinguishes between employees who are represented by a non-profit employee labor organization and employees who are not, as the processes a railroad may use to consult with represented and non-represented employees could differ significantly.

This guidance does not establish prescriptive requirements with which a railroad must comply, but merely outlines a consultation process a railroad may choose to follow. A railroad’s consultation statement could indicate that the railroad followed the guidance in this appendix as evidence that it utilized good faith and best efforts to reach agreement with its employees on the contents of a SSP plan.

#### *Employees Represented by a Non-Profit Employee Labor Organization*

As provided in § 270.102(a)(2), a railroad consulting with the representatives of a non-profit employee labor organization on the contents of a SSP plan will be considered to have consulted with the directly affected employees represented by that organization.

A railroad could utilize the following process as a roadmap for using good faith and best efforts when consulting with represented employees in an attempt to reach agreement on the contents of an SSP plan.

- Pursuant to § 270.102(a)(3), a railroad must meet with representatives from a non-profit employee labor organization (representing a class or craft of the railroad’s directly affected employees) within 180 days of the effective date of the final rule to begin the process of consulting on the contents of the railroad’s SSP plan. A railroad must provide notice at least 60 days before the scheduled meeting.
- During the time between the initial meeting and the applicability date of § 270.105 the parties may meet to discuss administrative details of the consultation process as necessary.
- Within 60 after the applicability date of § 270.105 a railroad should have a meeting with the directed affected employees to discuss substantive issues with the SSP.
- Within 90 days after the applicability date of § 270.105, a railroad would file its SSP plan with FRA.
- As provided by § 270.102(c), if agreement on the contents of a SSP plan could not be reached, a labor organization (representing a class or craft of the railroad’s directly affected employees) could file a statement with the FRA Associate Administrator for Railroad Safety/Chief Safety Officer explaining its views on the plan on which agreement was not reached.

#### *Employees Who Are Not Represented by a Non-Profit Employee Labor Organization*

FRA recognizes that some (or all) of a railroad’s directly affected employees may not be represented by a non-profit employee labor organization. For such non-represented employees, the consultation process described for represented employees may not be appropriate or sufficient. For example, FRA believes that a railroad with non-represented employees must make a concerted effort to ensure that its non-

represented employees are aware that they are able to participate in the development of the railroad's SSP plan. FRA therefore is providing the following guidance regarding how a railroad may utilize good faith and best efforts when consulting with non-represented employees on the contents of its SSP plan.

- Within 60 days of the effective date of the final rule, a railroad should notify non-represented employees that—

- (1) The railroad is required to consult in good faith with, and use its best efforts to reach agreement with, all directly affected employees on the proposed contents of its SSP plan;

- (2) Non-represented employees are invited to participate in the consultation process (and include instructions on how to engage in this process); and

- (3) If a railroad is unable to reach agreement with its directly affected employees on the contents of the proposed SSP plan, an employee may file a statement with the FRA Associate Administrator for

Railroad Safety/Chief Safety Officer explaining his or her views on the plan on which agreement was not reached.

- This initial notification (and all subsequent communications, as necessary or appropriate) could be provided to non-represented employees in the following ways:

- (1) Electronically, such as by email or an announcement on the railroad's Web site;

- (2) By posting the notification in a location easily accessible and visible to non-represented employees; or

- (3) By providing all non-represented employees a hard copy of the notification. A railroad could use any or all of these methods of communication, so long as the notification complies with the railroad's obligation to utilize best efforts in the consultation process.

- Following the initial notification (and before the railroad submits its SSP plan to FRA), a railroad should provide non-represented employees a draft proposal of its SSP plan. This draft proposal should solicit

additional input from non-represented employees, and the railroad should provide non-represented employees 60 days to submit comments to the railroad on the draft.

- Following this 60-day comment period and any changes to the draft SSP plan made as a result, the railroad should submit the proposed SSP plan to FRA, as required by this part.

- As provided by § 270.102(c), if agreement on the contents of an SSP plan cannot be reached, then a non-represented employee may file a statement with the FRA Associate Administrator for Railroad Safety/Chief Safety Officer explaining his or her views on the plan on which agreement was not reached.

Issued in Washington, DC, on August 17, 2012.

**Joseph C. Szabo,**

*Administrator, Federal Railroad Administration.*

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