

§ 40.163 How does the MRO report drug test results?

\* \* \* \* \*

(c) \* \* \*

(10) The DOT Agency, if noted on the CCF.

\* \* \* \* \*

■ 10. In § 40.187, paragraph (f) is revised to read as follows:

§ 40.187 What does the MRO do with split specimen laboratory results?

\* \* \* \* \*

(f) For all split specimen results, as the MRO you must in Step 7 of Copy 2 of the CCF:

(1) Report split specimen test results by checking the "Reconfirmed" box and/or the "Failed to Reconfirm" box, or the "Test Cancelled" box, as appropriate.

(2), Enter your name, sign, and date.

(3) Send a legible copy of Copy 2 of the CCF (or a signed and dated letter, see § 40.163) to the employer and keep a copy for your records. Transmit the document as provided in § 40.167.

■ 11. In § 40.191, paragraph (d)(2) is revised, to read as follows:

§ 40.191 What is a refusal to take a DOT drug test, and what are the consequences?

\* \* \* \* \*

(d) \* \* \*

(2) As the MRO, you must note the refusal by checking the "Refusal to Test" box in Step 6 on Copy 2 of the CCF, checking whether the specimen was adulterated or substituted and, if adulterated, noting the adulterant/reason. If there was another reason for the refusal, check "Other" in Step 6 on Copy 2 of the CCF, and note the reason next to the "Other" box and on the "Remarks" lines, as needed. You must then sign and date the CCF.

\* \* \* \* \*

■ 12. In § 40.193, paragraph (d)(2)(i) is revised, to read as follows:

§ 40.193 What happens when an employee does not provide a sufficient amount of urine for a drug test?

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(i) Check the "Refusal to Test" box and "Other" box in Step 6 on Copy 2 of the CCF and note the reason next to the "Other" box and on the "Remarks" lines, as needed.

\* \* \* \* \*

■ 13. In § 40.203, paragraphs (d)(2) and (d)(3) are revised, to read as follows:

§ 40.203 What problems cause a drug test to be cancelled unless they are corrected?

\* \* \* \* \*

(d) \* \* \*

(2) The certifying scientist's signature is omitted on Copy 1 of the CCF for a positive, adulterated, substituted, or invalid test result.

(3) The collector uses a non-Federal form or an expired CCF for the test. This flaw may be corrected through the procedure set forth in § 40.205(b)(2), provided that the collection testing process has been conducted in accordance with the procedures of this part in an HHS-certified laboratory. During the period of October 1, 2010–September 30, 2011, you are not required to cancel a test because of the use of an expired CCF. Beginning October 1, 2011, if the problem is not corrected, you must cancel the test.

■ 14. In § 40.209, paragraphs (b)(1) and (b)(9) are revised, to read as follows:

§ 40.209 What procedural problems do not result in the cancellation of a test and do not require corrective action?

\* \* \* \* \*

(b) \* \* \*

(1) A minor administrative mistake (e.g., the omission of the employee's middle initial, a transposition of numbers in the employee's social security number, the omission of the DOT Agency in Step 1–D of the CCF.)

\* \* \* \* \*

(9) Personal identifying information is inadvertently contained on the CCF (e.g., the employee signs his or her name on Copy 1); or

\* \* \* \* \*

■ 15. In § 40.355, paragraph (l) is revised, to read as follows:

§ 40.355 What limitations apply to the activities of service agents?

\* \* \* \* \*

(l) In transmitting documents to laboratories, you must ensure that you send to the laboratory that conducts testing only Copy 1 of the CCF. You must not transmit other copies of the CCF or any ATFs to the laboratory.

\* \* \* \* \*

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 236

[Docket No. FRA–2008–0132, Notice No. 4]

RIN 2130–AC03

Positive Train Control Systems

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

ACTION: Final rule amendments.

SUMMARY: FRA is issuing amendments to the final rule regarding the development, testing, implementation, and use of Positive Train Control (PTC) systems for railroads as mandated by the Rail Safety Improvement Act of 2008. With publication of the final rule on January 15, 2010, FRA sought further comment on certain specific issues. These amendments are being made partially in response to the applicable comments filed and to further clarify certain provisions of the final rule.

DATES: The amendments to the final rule are effective November 26, 2010.

FOR FURTHER INFORMATION CONTACT:

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I. Introduction and Background

Partially as a consequence and severity of certain very public accidents, coupled with a series of other less publicized accidents, Congress passed the Rail Safety Improvement Act of 2008 § 104, Public Law 110–432, 122 Stat.

4854 (Oct. 16, 2008) (codified at 9 U.S.C. 20157) [hereinafter "RSIA08"]. The RSIA08 was signed into law by President George W. Bush on October 16, 2008, marking a public policy decision that, despite the implementation costs, railroad employee and general public safety warranted mandatory and accelerated installation and operation of Positive Train Control (PTC) systems.

On January 15, 2010, FRA issued regulations ("final rule") implementing the PTC requirements under RSIA08. The final rule, among other things, contained the process for submission of statutorily required PTC Implementation Plans for FRA review and approval. The final rule also established 2008 as a statistical baseline for determining which track segments must be outfitted and operated with PTC systems, a process to request modification of that baseline, and standards for approval of such requests.

While that document is a final rule, FRA identified specific provisions for which it would consider making changes and sought comments on those provisions. FRA indicated that it would only consider comments falling within the scope of those provisions.

Following the issuance of the final rule, FRA received several comments. In this document, FRA responds to those comments that fell within the scope of the comments requested and amends the final rule accordingly.

## II. Scope of Further Comments Sought

While the final rule became effective on March 16, 2010, FRA believed that certain issues warranted further discussion. Accordingly, FRA sought comments limited to increasing the clarity, certainty, and transparency of the criteria governing the removal from a PTC Implementation Plan (PTCIP) (and therefore from the requirement to install PTC) of any track segments on which PTC systems have yet to be installed for which a railroad seeks relief from the requirement to install PTC. FRA continues to consider this issue separate and distinct from the discontinuance of any already installed or existing PTC systems, which is governed under § 236.1021, part 236 of title 49, and the "Signal Inspection Act" (codified at 49 U.S.C. 20501–20505). FRA indicated that any comments should be limited to the scope of those issues to which FRA requested further comment.

As explained in the preamble to the final rule, 2008 traffic data will be used as an initial baseline in each PTCIP to determine the breadth and scope of PTC system implementation. In recognition

of the fact that traffic patterns are likely to change to some degree before December 31, 2015, the final rule also provides a means of adjusting the track segments on which PTC must be installed where adjustments are appropriately justified. These issues relate to a railroad's potential request to scale back the breadth and scope of that baseline contemporaneously or subsequently to PTCIP submission and prior to actual PTC system implementation. Since those issues should not affect the PTCIP required to be filed by the April 16, 2010, statutory deadline, FRA believed that time was available for some further consideration.

In § 236.1005(b)(4)(i)(A)(2), the final rule provided three tests that must be satisfied to remove a line due to cessation of poison by inhalation (PIH, also commonly referred to as toxic by inhalation or TIH) materials traffic over the track segment; each of these tests will be discussed in greater detail but are summarized here. First, § 236.1005(b)(4)(i)(A)(2)(i), provides that the requesting railroad must show that the line segment will be free from local PIH materials traffic. Second, under § 236.1005(b)(4)(i)(A)(2)(ii), the requesting railroad must submit a routing analysis that assumes that the line segment and all of the carrier's practicable alternative routes that the carrier considers using to transport the PIH materials traffic are equipped with PTC. The analysis must show that any rerouting of PIH materials traffic from the subject track segment is justified based upon the route analysis submitted or that an alternative route is substantially as safe and secure as the track segment in question. FRA sought comments on how the elements of a route analysis should be weighed by FRA when determining whether rerouting as provided under this paragraph is sufficiently justified.

Third, under § 236.1005(b)(4)(i)(A)(2)(iii) the requesting railroad must establish that the remaining risk arising from rail operations on the track segment is less than the average equivalent risk per route mile on line segments required to be equipped with PTC because of gross tonnage and the presence of PIH materials traffic. FRA sought comment on how to measure the appropriate level of risk established. No railroad had supplied data supporting further track exceptions from PTC system installation consistent with statutory and safety requirements. Thus, in the final rule, FRA requested additional data to support commenters' positions. FRA also sought comment and information on ways that it might consider risk

mitigations other than by a compensating extension of PTC or PTC technologies. Section 236.1005(b)(4)(i)(A)(2)(iii) also provides that if the railroad would otherwise be required to install PTC on a line segment under paragraph (iii), that the railroad would be able to make a compensating extension of PTC on a different line segment rather than installing PTC on the line segment.

In § 236.1005(b)(4)(ii), the final rule provides an exception to PTC system implementation where there is a *de minimis* risk of release of PIH materials on the line segment. While in the proposed rule FRA sought means to reduce the railroads' burdens associated with this rule, no specific *de minimis* exception was proposed. AAR mentioned this possibility in its comment filed during the final rule's comment period and offered to work with FRA on this issue in supplementary comments filed after that comment period. FRA believes that the *de minimis* exception provided in the final rule fell within the scope of the issues set forth in the proposed rule. However, since none of the parties has had an opportunity to comment on this specific exception as provided in this final rule, FRA sought comments on the extent of the *de minimis* exception.

## III. Further Comments Filed and FRA's Response

In the comment period following issuance of the final rule, documents were filed by Association for American Railroads (AAR), Fred Millar, Invensys Rail Corporation (Invensys), the Metropolitan Transportation Authority of New York (NYMTA), the National Transportation Safety Board (NTSB), and the Rail Interoperability Group (RIG). However, the four comments filed by Fred Millar, Invensys, NYMTA, and RIG were squarely outside of the scope of further comments requested. For instance, Mr. Millar's comments regarding what should be done under the PHMSA rail routing rule are outside the scope of this rulemaking and do not require a change in the PTC final rule. Accordingly, FRA has elected to treat those four comments as Petitions for Reconsideration. FRA also received three formal Petitions for Reconsideration from AAR, Siemens Industry, Inc., and the Chlorine Institute. FRA will respond to all Petitions for Reconsideration, including those comments FRA is treating as Petitions for Reconsideration, in a separate document that will be mailed to the Petitioners and made part of the public docket in this proceeding.

The purpose of this document is to respond to comments that are within the scope of FRA's request for comments contained in the final rule. As previously noted, these issues include the pre-installation removal of track segments from PTCIPs and the *de minimis* exception.

#### *A. Removal From PTCIP of Track Segments Not Yet Implemented With PTC Systems*

Section 236.1005(b)(4) of the final rule provided for exclusions or removal of track segments from the PTC baseline. Paragraph (b)(4) provides that a railroad may request FRA review of the requirement to install PTC on a track segment where a PTC system is otherwise required by the rule, but has not yet been installed, based upon changes in rail traffic such as reductions in total traffic volume or cessation of passenger or PIH materials service. More specifically, paragraph (b)(4)(i)(A)(2) provides that in the case of cessation of PIH materials traffic over a track segment, and absent special circumstances, FRA will approve an exclusion of a line from the PTCIP (determined on the basis of 2008 traffic levels) upon a showing by the railroad that:

(i) There is no remaining local PIH traffic expected on the track segment;

(ii) Either any rerouting of PIH traffic from the subject track segment is justified based upon the route analysis submitted, which shall assume that each alternative route will be equipped with PTC, and shall take into consideration any significant interline routing impacts; or the next preferred alternative route in the analysis is shown to be substantially as safe and secure as the route employing the track segment in question and demonstrated considerations of practicability indicate consolidation of the traffic on that next preferred alternative route; and

(iii) After cessation of PIH traffic on the subject line, the remaining risk associated with PTC-preventable accidents per route mile on the track segment will not exceed the average comparable risk per route mile on Class I lines in the United States required to be equipped with PTC because of gross tonnage and the presence of PIH traffic. If the subject risk is greater than the average risk on those PIH lines, and if the railroad making the application for removal of the track segment from the PTCIP offers no compensating extension of PTC or PTC technologies from the minimum required to be equipped, FRA may deny the request.

NTSB filed comments expressing its belief that the final rule as written provides enough flexibility to railroads either at the time of initial filing or through a request for amendment to subsequently address changes in traffic patterns. NTSB noted that in the final

rule FRA delineated the requirements it will consider before approving any exclusion. According to NTSB, it appears that both the railroads and FRA have an understanding of the term "consistent with safety and in the public interest" for conventional signal systems covered by subparts A through F of part 236. Railroads routinely submit block signal applications in accordance with part 235, "Instructions Governing Applications for Approval of a Discontinuance or Material Modification of a Signal System or Relief From the Requirements of Part 236," to modify or retire these conventional signal systems. FRA also has demonstrated use of its discretionary authority to review these Block Signal Applications and to either approve or deny them. The NTSB believes that any justified adjustments to the track segments on which PTC must be installed are an extension of FRA's use of its discretionary authority to review and consider any amendments to ensure they meet the requirements of this rule and are consistent with safety and in the public interest.

AAR also filed comments regarding the exclusions provided by paragraph (b)(4). These comments fall into three subcategories.

First, AAR contested FRA's multiple uses of the phrase "absent special circumstances." After consideration of AAR's concerns, FRA has decided to remove this language from the rule.

Second, AAR challenged paragraph (b)(4)(i)(A)(2)(ii), which provides that where the request involves prior or planned rerouting of PIH materials traffic, the railroad must provide a supporting route analysis that takes into consideration the requirements of the Pipeline and Hazardous Materials Safety Administration (PHMSA) Rail Route Analysis Rule, 49 CFR § 172.820 (PHMSA rail routing rule). The paragraph also assumes that the subject route and each practicable alternative route that the carrier considers using to transport the PIH materials traffic is PTC equipped. FRA has decided to clarify § 236.1005 and the relationship between the PHMSA rail routing rule and the PTC final rule. FRA has also slightly modified the substance of paragraph (b)(4)(i)(A)(2)(ii) in response to AAR's comments and has moved the text to a new § 236.1020.

Finally, AAR disputes the residual risk analysis requirements under paragraph (b)(4)(i)(A)(2)(iii) of § 236.1005. FRA has slightly modified the substance of this paragraph in response to AAR's comments and has also moved this text to the new § 236.1020, and has delayed the

effective date of the residual risk analysis requirement under paragraph (b)(4)(i)(A)(2)(iii), as revised herein, until an appropriate notice and comment period can be conducted on the risk analysis tool currently being developed by FRA.

#### 1. "Absent Special Circumstances" Language

Section 236.1005(b)(4)(i)(A)(1) of the final rule provides that, in the case of a requested exclusion based on cessation of passenger service or a decline in gross tonnage below 5 million gross tons as computed over a 2-year period, the removal will be approved absent "special circumstances." AAR recommended that FRA remove the special circumstances proviso to provide clarity, certainty, and transparency. While § 236.1005(b)(4)(i)(A)(1) gives an example of a special circumstance (anticipated traffic growth), AAR states that the regulations address traffic growth in § 236.1005(b)(3) and it is unnecessary to address traffic growth here. According to AAR, the "special circumstances" language is too vague to provide sufficient guidance to the regulated community and if FRA were to insist it is necessary to address traffic growth in § 236.1005(b)(4)(i)(A)(1), it can do so specifically.

In any event, AAR asserts that there should be no discretion in deciding whether to approve the withdrawal of a line segment from the PTCIP if the criteria in the PTC regulation are met. According to AAR, the "special circumstances" clauses are inconsistent with FRA's stated aim of clarity, certainty, and transparency and should be deleted.

FRA believes that there is merit in AAR's request and, in order to ensure consistency and certainty in decision making, FRA is removing the "special circumstances" language in paragraph (b)(4)(i)(A)(1). FRA can address special circumstances (such as an extreme grade approaching major interlocking or a moveable bridge location), if necessary, using its general authority to install signal and train control systems. *See* 49 U.S.C. 20502.

#### 2. Alternative Route Analysis and the PHMSA Rail Routing Rule

AAR recommends that paragraph (b)(4)(i)(A)(2)(ii) be deleted. AAR objects to the requirement that the railroads have to perform an analysis that assumes that the subject route and each practicable alternative route that the carrier considers for the movement of PIH materials are PTC equipped. AAR asserts that the criteria addressing the

cessation of PIH materials service are confusing and inconsistent with PHMSA rail routing rule. AAR notes that the PHMSA rail routing rule does not require an analysis assuming that all routes are equipped with PTC or the railroads to “take into consideration any significant interline routing impacts,” but only to “consider the use of interchange agreements with other rail carriers.” Moreover, AAR does not understand what “next” means, since there is no rank ordering of alternatives to be considered under PHMSA’s routing regulations, and how to quantify “as safe and secure,” which is not the same as the PHMSA criterion, which focuses on the “overall safety and security risk.” AAR is also confused by the last sentence, not understanding why a railroad would choose a route that is less practicable than an alternative and asks what evidence FRA would expect to see pursuant to this requirement.

AAR notes that the PHMSA rail routing rule requires railroads to analyze a line currently used to move PIH materials traffic (as well as other security-sensitive materials) and all practicable alternative routes, and to utilize the line posing the least overall safety and security risk. See 49 CFR 172.820. AAR indicates its belief that RSIA08 cannot be read to require PTC installation on routes used for PIH materials and routes that could be used for PIH materials if only a different routing analysis than that mandated by PHMSA rail routing rule were used.

AAR argues that a decision to require the installation of PTC based on FRA’s determination as to where TIH should be routed as opposed to the route chosen pursuant to the PHMSA routing analysis would, as a practical matter, place the two agencies in conflict. According to AAR, “[i]f under the PHMSA analysis of two routes one route was found to pose the least overall safety and security risk and FRA mandated PTC on the other route because its analysis of safety concerns disagreed with the PHMSA outcome, the two agencies would be in disagreement as to which route should be used for TIH.”

AAR also claims that this FRA requirement conflicts with RSIA08. AAR states that:

[i]f FRA decides that TIH should be routed on a line segment different than the line segment chosen pursuant to the PHMSA routing analysis and requires PTC on its favored route, FRA would be mandating PTC on both the route of its choice and the route actually used for TIH pursuant to the PHMSA routing analysis. Certainly, RSIA08 cannot be read to require installation of PTC on routes

used for TIH and routes that could be used for TIH if only a different routing analysis than that mandated by PHMSA were used.

AAR believes that any perceived deficiency in the rail routing rule should be remedied by amending that regulation, not engaging in a separate, conflicting analysis in the PTC regulation. Accordingly, AAR believes that FRA should delete § 236.1005(b)(4)(i)(A)(2)(ii).

AAR is incorrect in assuming that FRA does not intend the railroads to follow the requirements of the PHMSA rail routing rule in determining whether to reroute PIH materials traffic and FRA will make this explicit.

Routing analysis is useful for two entirely different purposes. Routing analysis under the PHMSA rule, which FRA participated in developing and has the responsibility to administer, governs current routing of PIH materials, certain explosives, and certain high level nuclear waste and is based upon an annual analysis that a carrier performs to select the routes that pose the least overall safety and security risks based on conditions as they exist at the time of the analysis and changes that may reasonably be anticipated to occur in the upcoming year. Nothing in the PTC final rule disturbs this regime in any way. Carriers will continue to do their analysis and route traffic as they are today, with the caveat described below.

However, there are two unbreakable policy links between this rulemaking and the operation of the PHMSA rule:

First, RSIA08 is clear that PTC must be installed on lines carrying PIH materials and at least 5 million gross tons of traffic. Thus, to the extent this rulemaking permits PTC to be installed on a distinct subset of the alternative routes available for overhead (non-local) transportation of PIH materials, those routes will *de facto* and *de jure* be the only routes available for PIH materials transportation on and after December 31, 2015—regardless of overriding safety or security concerns that might argue for alternative routing. There is nothing in the PHMSA rule that specifically requires PTC to be installed as a mitigation measure, and although railroads would be free to do so, that structure is not designed to deal with the full range of issues related to PTC (including other pertinent risks). It was the RSIA08, not the 9/11 Commission Implementation Act of 2004, Public Law 108–548, 118 Stat. 3638 (Dec. 17, 2004) (9/11 Commission Act), that addressed the requirement for PTC on PIH materials lines, and the PHMSA structure is not the place to address the RSIA08 mandate.

Second, even before this PTC rule is fully implemented it will begin to have an inevitable impact on some routing decisions. One of the 27 factors called out for analysis under the PHMSA rule is “method of operation.” As used in rail parlance, “method of operation” can be understood in either a very narrow sense to mean the source of movement authorities for train operations or in a broader sense to include all means by which train movements are authorized and controlled. It is the latter sense intended for purposes of the PHMSA rule.<sup>1</sup> PTC is part of the method of operation wherever installed. It is already installed on portions of the Northeast Corridor and on Amtrak’s Michigan line. When installed in a new territory, and when most lead locomotives operating over the territory have PTC onboard apparatus installed and operative, PTC will reduce the safety risk associated with transporting PIH commodities by something on the order of one-third. Thus, over time, installation of PTC will affect some routing choices even before the end of 2015.

The PTC final rule could have ignored these inevitable interrelationships. However, the responsible path was to recognize the interrelationships and try to craft an approach to PTC planning that took them fully into account. That is what FRA has attempted to do. In this response to comments, and with final rule amendments, we endeavor to assure that all parties fully understand what is intended and to ensure that the language we employ in rule text is as clear as we can make it.

FRA’s comments in the preamble to the final rule were not intended to criticize the PHMSA rail routing rule, but rather to illuminate the significance of the difference between the two rules and to point out that a decision under the PHMSA rail routing rule concerning where PIH materials traffic will be routed is not necessarily determinative concerning which routes will receive

<sup>1</sup> Thus, for example, in most non-signal territory we would say that the method of operation is by track warrants. In territory with automatic block signals, the method of operation is typically by track warrant supplemented by indications of the automatic block signal system. In territory equipped with a traffic control system, the method of operation is by indications of the signal system. In territory equipped with a traffic control system and cab signals (with or without train control or train stop), the method of operation is still by indications of the signal system while the cab signals could provide authority for movement between interlockings. On the Northeast Corridor today between New Haven and Boston, the method of operation is by indications of the traffic control system and cab signals, supplemented by automatic train control and the Advanced Civil Speed Enforcement System (which together make up a form of PTC).

PTC. The two decisions, though related, differ significantly. At the same time, FRA does not intend to “redo” under the PTC rule any decisions made under the PHMSA rail routing rule. Although they are complementary, the two rules are not the same and do not have the same purposes. Again, under the PHMSA rail routing rule, routing of PIH materials shipments is reconsidered annually based on the overall safety and security risks posed at the time. Under the PTC rule, there is an orderly process for moving from signal systems and traffic patterns extant in 2008 to installation and operation of PTC systems by December 31, 2015. The presence of PIH materials shipments is a criterion for requiring installation of PTC if the traffic volume level on the line is 5 million gross tons or more. However, as noted above, the railroad’s analysis under the PHMSA rail routing rule would not consider the positive safety effects of the installation of PTC unless the railroad intended to promptly install a PTC system on a particular line (risk mitigations planned for future years are not considered). By the same token, routing analysis conducted under the PTC rule will not affect current routings, since this could result in PIH materials traffic moving off of a line in 2010 despite the fact that PTC will not be installed until 2014 or 2015. Paragraph (b)(4)(i)(A)(2)(ii) attempts to bridge the timing differences between the two rules in a manner that achieves the goals of both rules while respecting the way each rule works. It appears that FRA did not succeed in doing so with the clarity intended, so FRA will clarify this provision.

FRA wishes to emphasize that the interrelationships between the PHMSA rule and this rulemaking are fundamental; not transient or topical. As PTC becomes fully effective on rail lines over the coming years, those routes will come to carry the overwhelming bulk of PIH materials traffic. If only a small network of PTC lines is built out on each railroad, impacts on PIH materials routing could be dramatic. Routing alternatives would diminish. Unlike today, when the great majority of the PIH materials traffic that takes the most direct route to destination with the least amount of switching and least exposure to derailment hazards, constricting PIH materials to a small PTC network has the potential to drive circuitous routings that could increase switching, introduce delays in transportation related to marshalling of trains, increase derailment and miscellaneous hazards, and even increase security risks due to routing through high threat urban areas.

The final rule limits these potential adverse consequences by asking that—for planning purposes only—the railroads submit alternative routing analysis to support any requests to drop lines from the 2008 base (a period during which, it is undisputed, that most of the subject PIH materials traffic was moving by the most direct and expeditious route).

AAR is also incorrect in its reading of RSIA08. Under RSIA08, FRA is given the authority—reconfirming its pre-existing authority—to require PTC to be installed on lines whether or not they carry PIH materials traffic; FRA will discuss its statutory authority further in the response to AAR’s comments to paragraph (b)(4)(i)(A)(2)(iii). As described in this document’s section-by-section analysis, FRA is clarifying the substance of this paragraph in response to AAR’s comments and has moved the text to a new § 236.1020.

### 3. Residual Risk Analysis

AAR also objected to and urges the deletion of § 236.1005(b)(4)(i)(A)(2)(iii), arguing that the RSIA08 directive is to address lines on which PIH materials or passengers are transported, and that a line with no PIH materials or passenger traffic poses no risk of the type that RSIA08 addresses through its PTC mandate. AAR does not believe there is a need for the industry to make the calculation required by paragraph (b)(4)(i)(A)(2)(iii). Accordingly, AAR believes that FRA should delete § 236.1005(b)(4)(i)(A)(2)(iii).

AAR believes that this requirement contrasts with § 236.1005(b)(4)(ii)(C), which contains a *de minimis* exception applicable where a railroad can show the risk of a PIH materials release to be negligible. According to AAR, it would appear that if the risk of a PIH materials release is negligible, that would be more significant under the RSIA08 than an analysis of the risk of PTC-preventable accidents. AAR asserts that if PIH materials were removed from a line segment, then the risk of a PIH materials release clearly would be negligible, thus providing no reason to require PTC. AAR believes that removal of PIH materials from a segment is the ultimate risk mitigation strategy.

If FRA were to retain § 236.1005(b)(4)(i)(A)(2)(iii), AAR asserts that its second sentence should be revised to plainly state that a railroad indeed has the discretion to make a compensating extension of PTC. Otherwise, according to AAR, that sentence implies, but does not clearly state, that if the analysis shows that the risk associated with the track segment exceeds the average comparable risk on

lines required to be equipped with PTC because of PIH, then the railroad can choose not to install PTC on the track segment if it makes a compensating extension of PTC elsewhere.

AAR also notes that risk comparison requirements should be clearer. For instance, AAR states that FRA needs to determine the time period over which risk is to be measured. Comparing risk per route mile requires certain knowledge of the applicable host railroad track segments, which is not available to all tenant railroads that may be filing for an exception here. The analysis only becomes more difficult when determining whether an accident is PTC-preventable, which must be made on a case-by-case basis.

We disagree. RSIA08 clearly gives FRA the authority to require PTC on lines other than those identified in § 20157(a)(1)(C) of the statute and the need for this requirement is discussed in the final rule. The fact that the PHMSA rail routing rule may result in some rerouting of PIH materials traffic does not mean that FRA should ignore the residual safety risks to train crews, roadway workers, and the public at large of train operations and the transportation of non-PIH hazardous materials on the line formerly used to move the PIH materials traffic. Congress obviously wanted to make sure that passenger and PIH materials lines were addressed in FRA’s PTC rule, and we did so in the final rule. But there is no reason to believe that the Congress was indifferent to the safety of employees or other members of the public or to communities whose water supplies might be polluted by non-PIH hazardous materials or spilled diesel fuel. Moreover, deaths of crew members from train collisions have exceeded deaths from release of PIH commodities over the past two decades. The public interest requires FRA to take this and other factors into consideration in determining whether to require the installation of PTC on lines from which PIH materials traffic is being removed, consistent with RSIA08 statutory authority. At a future date, FRA may also examine the appropriateness of requiring PTC to be installed on other rail lines not covered by the final rule.

AAR indicated that should FRA decide to retain paragraph (b)(4)(i)(A)(2)(iii), further clarification is needed as to how a railroad can compare the risk of PTC-preventable accidents on the line in question with the risk of PTC-preventable accidents on Class I lines in the U.S. required to be equipped with PTC because of the presence of PIH materials. AAR also requested that FRA plainly state that

where PTC would otherwise be required because the risk associated with the track segment exceeds the average comparable risk on lines required to be equipped with PTC, that the railroad has discretion to make a compensating extension of PTC elsewhere. The final rule amendments contained in this document provide that confirmation.

AAR correctly points out that details regarding the risk assessment technique used to make the comparison required under paragraph (b)(4)(i)(A)(2)(iii) need to be worked out and provided to the industry. The preamble to the final rule notes that this will be done, and FRA is working on risk evaluation methodology that was discussed at a meeting of the RSAC PTC Working Group conducted by webinar on March 24, 2010. As these amendments to the final rule were being prepared, FRA was working to place development of this methodology under contract, and the PTC Working Group was forming a task force to provide peer review for this effort. FRA expects to subsequently submit the methodology for notice and comment.

Given the limited time that has been available to arrive at this point in the regulatory process, a final risk assessment tool was not available by April 16, 2010, when each PTCIP was required to be filed. It is for this reason that FRA has decided to delay the effective date of paragraph (b)(4)(i)(A)(2)(iii), as revised, pending further notice. After the risk model is developed, AAR and other interested parties will be provided an opportunity for peer review of the methodology through the RSAC before the final agency decision-making process commences. FRA will solicit public comments on the model and will consider the public comments in deciding what final risk model should become effective, and will issue a notice announcing its decision. FRA contemplates that, when the provision goes into effect, FRA will determine the average risk value for lines with PIH materials required to be equipped with PTC and conduct the comparison utilizing the line segment data provided by the railroads for the subject lines. The risk evaluation methodology will also be made available to the railroads for their planning purposes (including proposal of any "risk swaps" that may be desirable, as further discussed below). A railroad may not remove a track segment from its PTCIP in accordance with § 236.1005(b)(4)(i) until the replacement for paragraph (b)(4)(i)(A)(2)(iii) contained in the new § 236.1020 becomes effective. However, under the new section, the line is not required to

be equipped with PTC until the request for removal has been ruled upon.

AAR is correct that if a railroad would otherwise be required to install PTC on a line segment under paragraph (b)(4)(i)(A)(2)(iii), that railroad would be able to make a compensating extension of PTC rather than installing PTC on the line segment. FRA is therefore amending paragraph (b)(4)(i)(A)(2)(iii) to make explicit that if the railroad is required to install PTC on the subject line under the paragraph, it can avoid having to install PTC on the line if it agrees to install PTC on a line segment that would not otherwise be required to be equipped under the rule and the railroad demonstrates that the increment of risk reduction is at least as great as would be achieved by equipping the segment sought to be removed from the PTCIP. FRA is moving the substance of the modified paragraph to a new § 236.1020.

#### *B. De Minimis Exception*

Paragraph (b)(4)(ii)(A) provides for exclusion or removal of track segments carrying less than 100 PIH materials cars per year (loaded or residue) from the PTC baseline where there is a *de minimis* PIH materials safety risk and the line segments are not used for intercity or commuter passenger service. Paragraphs (b)(4)(ii)(B) and (b)(4)(ii)(C) include further requirements for the *de minimis* exception. AAR has filed comments on both provisions.

Paragraph (b)(4)(ii)(B) provides that absent special circumstances related to specific hazards presented by operations of the line segment, FRA will approve a request for relief under this paragraph for a rail line segment:

- (1) Consisting exclusively of Class 1 or 2 track;
- (2) That carries less than 15 million gross tons annually;
- (3) Has a ruling grade of less than 1 percent; and
- (4) On which any train transporting a car containing PIH materials (including a residue car) is operated under conditions of temporal separation from other trains using the line segment.

The NTSB believes that a broad-based type of *de minimis* exception like the one proposed by AAR and its member railroads in response to the notice of proposed rulemaking (NPRM) preceding the final rule and based solely on the number of PIH material cars transported annually cannot be supported on a safety basis and would represent a departure from the intent of the statute. According to the NTSB, without proper federal oversight—including a detailed safety assessment of each affected railroad territory—unforeseen

circumstances might affect the safe operation of trains.

The NTSB believes that if a *de minimis* exception is allowed based solely on the number of PIH materials cars transported annually, some railroads might consider establishing annual PIH materials car limits on segments of track in order to be exempt from the requirements of implementing a PTC system on that segment. Therefore, the NTSB supports the exclusion criteria that FRA uses in this section to evaluate each request on a case-by-case basis for each segment of track to allow the FRA to apply its inherent discretionary authority to grant *de minimis* exceptions that are consistent with safety and in the public interest.

AAR states that FRA needs to modify the *de minimis* exception provided under § 236.1005(b)(4)(ii)(B). AAR notes that the preamble to the final rule at 75 FR 2,622 explains that this exception is limited to Class 1 and 2 track because, "[l]imiting maximum authorized train speed reduces the kinetic energy available in any accident, and the forces impinging on the tank should be sustainable." Accordingly, AAR asserts that the exception should not be limited to Class 1 and 2 track, but should instead apply to operations subject to a maximum speed of 25 miles per hour.

AAR suggests that FRA should use contemporaneous train speeds, rather than track class to define the limits of this portion of the *de minimis* exception. According to AAR, it would make the provision more "usable." But in order to have confidence that appropriate speed restrictions were imposed and complied with, PTC would be required. Crews operating on particular rail lines are qualified on the physical characteristics of those lines, including the prevailing maximum authorized speed. They are acclimated to observing those speeds. What AAR proposes is that, in order to limit collision speeds on lines where trains may operate at 49 miles per hour or more, speeds be temporarily reduced for any train carrying PIH materials. But that would require special designation of trains carrying PIH materials, special attention by dispatchers to imposition and removal of appropriate speed restrictions on other trains using the line segment, and rigorous compliance by crews with these speed restrictions. Those steps would introduce multiple new opportunities for human error, and PTC is largely about prevention of human errors. FRA does not find this suggestion practical or consistent with safety.

AAR also urges FRA to specify the showing required to remove a line from the PTCIP on the grounds that the risk of a TIH release is negligible. AAR points to § 236.1005(b)(4)(ii)(C), which provides that FRA will “consider” relief from the obligation to install PTC for line segments with annual traffic levels under 15 million gross tons (and under 100 TIH shipments) where the risk of a release of PIH materials is “negligible.” It is unclear to AAR what constitutes a “negligible” risk and what discretion FRA would exercise should there be a showing of negligible risk. AAR further requests that FRA set a quantitative threshold for negligible risk, and suggests “one in a million” as the criterion. AAR references standard MIL-STD-882C.

FRA notes that standard MIL-STD-882C is recognized in Appendix C to 49 CFR part 236 as an available standard for evaluating the safety of train control systems. The difficulties with using this type of criterion as a decisional criterion, as opposed to a convention in hazard analysis, are manifold. First, the actual metric is always unclear. We will assume that AAR may refer to release of a reportable quantity of a PIH material. The apparent suggestion is probability per route mile. However, it is unclear what should be the level of chance and the measurable time period (e.g., calendar hours, operating hours, PTC system life-cycle). Given that PIH materials releases are already infrequent events, and the potential for catastrophe from a single release is significant, it is also unclear how this criterion would relate to the judgments that the Congress has already made with respect to PIH materials transportation. AAR does not provide any reasoning or evidence sufficient to prove that the criterion is satisfied. AAR should be aware that the industry and FRA have experienced significant difficulty in developing tools for comparative risk assessment related to train control, which is the easier task in contrast with use of absolute risk criteria. Further, FRA is not persuaded that what is required here is the expenditure of large amounts of money to avoid a statutory mandate. Available funds should be expended to satisfy the mandate. FRA will, of course, welcome well-presented hazard analyses of a simple and direct sort (see FRA’s *Collision Analysis Guide*, available at <http://www.fra.dot.gov/us/content/1900>). At the end of the day, in this particular frame of reference, FRA will be looking to achieve confidence that the chance of an unintended release of PIH material is negligible (which, given emphatic congressional action in this

arena is best described as “improbable” in conventional risk assessment terminology), given the chances for severe mishaps on the particular line segment in question. Quantitative proofs are neither feasible nor required.

#### IV. Section-by-Section Analysis

##### *Section 236.100 Requirements for Positive Train Control Systems*

In the final rule, FRA attempted to describe in §§ 236.1005(b)(4)(i)(A)(2)(ii) and (iii) exactly what analysis was required and what standard would be applied if a railroad wished to remove from its PTCIP a line that carried PIH materials in 2008. FRA continues to believe that the language expresses what was intended unambiguously, as further amplified in the preamble. However, without question the provision compresses into a few words concepts that some have had difficulty in parsing; and that presents an important challenge. Clarity in expression is always a central objective in writing a rule. Accordingly, FRA has taken another run at this drafting problem; and, in doing so, has broken out both this and the next provision (dealing with residual risk) for separate treatment.

For the reasons stated above, FRA first removes from § 236.1005(b)(4)(i)(A)(1) the words “absent special circumstances as set forth in writing (e.g., because of anticipated traffic growth in the near future).”

FRA then removes the current text of (b)(4)(i)(A)(2) and inserts in its place a cross reference to a new section 236.1020. This new section follows the section on passenger “main line” exceptions, and it is intended that utilizing a separate section will provide flexibility to express the necessary concepts with greater clarity.

##### *Section 236.1011 PTC Implementation Plan Content Requirements*

While not part of the scope of the further comments requested, FRA would like to take this opportunity to make some minor, non-substantive, clarifying amendments.

First, FRA recognizes that there was a typographical error in § 236.1011(a)(6)(iv)(B). In that paragraph, there is a cross-reference to paragraph (a)(6)(iii)(A). While that cross-referenced paragraph existed in the proposed rule, it was moved to (a)(6)(iv)(A) in the final rule. The cross-reference should have been changed. We do so here.

##### *Section 236.1019 Main Line Track Exceptions*

Second, FRA would also like to clarify its intent regarding § 236.1019(c). With this language, FRA merely meant to remind regulated entities that observance of § 236.1019(c) does not diminish or obviate the applicability of § 236.0. FRA intended to state that a “limited operations exception” would not be considered for any segment of track that did not comport with the requirements of § 236.0. The qualifying language “(at speeds not exceeding those permitted under § 236.0 of this part)” was meant to highlight that the requirements § 236.0, based partially on speed limits, were still applicable.

FRA recognizes that the parenthetical language in that paragraph reading “(at speeds not exceeding those permitted under § 236.0 of this part)” may be confusing.

FRA intended to indicate that if a limited operations exception were provided under § 236.1019(c), thus allowing a railroad not to implement and operate a PTC system on a particular track segment, the railroad would still be required to implement and operate any other systems required by § 236.0. For instance, if a limited operations exception is approved and applied to a particular track segment where trains may operate at or in excess of 80 miles per hour, the railroad would be required to install, or more likely maintain, and operate an automatic cab signal, automatic train stop, or automatic train control system in accordance with § 236.0(d).

While FRA’s intent remains as stated above, FRA hereby amends § 236.1019(c) for the purposes of ensuring clarity. Thus, FRA will strike the aforementioned qualifying language so that the parenthetical text reads: “(operating in accordance with § 236.0 of this part)”.

##### *Section 236.1020 Exclusion of Track Segments for Implementation Due to Cessation of PIH Materials Service or Rerouting*

As noted above, FRA is adding a new section that specifically addresses exclusion of track segments due to cessation or rerouting of PIH materials. Section 236.1020 begins with paragraph (a), which explains that it sets forth the conditions under which track segments identified in the 2008 baseline described in § 236.1005(b)(2) may be removed from the PTCIP. A track segment qualified for removal may be removed after FRA approves a request contained in the PTCIP or a request for amendment (RFA) filed prior to

required installation of PTC on the subject track segment. This process would thus be available throughout the initial implementation period that extends to the end of 2015.

Paragraph (b) contains the three tests that must be satisfied to remove a line due to cessation of PIH materials transportation over the track segment. Paragraph (b)(1) deals with local traffic. In railroad parlance, local traffic is freight traffic that originates or terminates on the particular rail line or terminal. A railroad that wishes to remove a line segment under paragraph (b)(1) must first establish that the line is free of local PIH materials traffic or will be before the line would otherwise be required to be equipped. Where there are still local customers whose business involves production or use of PIH materials that could request service but are not expected to do so, the section explains that obtaining statements from those customers that they have no plan to do so should be sufficient. Railroads are not required to anticipate future requests for service. (The Chlorine Institute suggests that substantially the entire rail system should be equipped, so that shippers are not chilled from requesting service at new locations; however, there is already provision for requesting service at new locations, after which PTC must be installed if traffic levels meet the required threshold.)

Paragraph (b)(2) deals with “overhead” traffic, which in rail parlance is traffic that does not originate or terminate on the line in question. Here it must be shown that the traffic has been rerouted or will be rerouted in accordance with the PHMSA rule. However, exclusively for the purpose of analysis, the analysis must introduce the hypothetical condition that all of the carrier’s practicable alternative routes for moving the PIH materials traffic are assumed to be equipped with PTC. This is a valid assumption for purposes of this rulemaking, since PTC must be installed on all Class I railroad routes carrying PIH materials and more than 5 million gross tons of traffic according to RSIA08; FRA provided relief from this requirement for lines with *de minimis* PIH materials safety risk. The required analysis permits FRA to determine whether selective installation of PTC would create routing distortions under the PHMSA rule, which FRA administers and enforces. If installing PTC only on one or more alternative routes to the route under examination would result in or facilitate rerouting off the subject line to a more circuitous route—a route that might involve greater risk of derailment, greater exposure to collisions and secondary derailments at

highway-rail crossings, more switching (which increases the likelihood of accidents), a longer time in transportation, and even more traversing of high threat urban areas—then the rule would generally require that PTC be installed on the subject line. This approach would uphold the values of both the 9/11 Commission Act and the RSIA08 while ensuring that PTC is provided on a reasonable scale across the core of the national rail system. However, the paragraph also allows for exceptions where the overall safety and security risks on the track segment in question is substantially the same as that on the alternate route, assuming both to be equipped with PTC—i.e., where the difference is small. FRA also referred in the final rule to whether “demonstrated considerations of practicability indicate consolidation of the traffic on that next preferred alternative route.” FRA had intended this to be an open invitation for each railroad to state its case regarding issues of operational and engineering practicability (e.g., more effective use of key trains that are subject to the 50 miles per hour restriction in the PHMSA rail routing rule, cost considerations related to equipping of the subject line, etc.). However, on the railroads’ behalf, AAR asserted only that the provision is “confusing.” FRA is satisfied that AAR missed the point of the larger provision and thus lacked context within which to recognize and affirm language favorable to its members. FRA is hopeful that the global redrafting of the subject provisions, together with further explanation language with regard to this specific provision, is helpful in that regard.

Paragraph (b)(3) deals with line segments that pass the first two tests. This provision is included because PTC is not just directed at the reduction of risk from transportation of PIH materials and rail passengers. As evidenced by NTSB reports and recommendations, testimony before Congress on legislation leading to RSIA08, and the PTC core functions themselves, PTC confers safety benefits that include the following:

- Prevention of crew fatalities and injuries in train-to-train collisions;
- Protection of roadway workers within the limits of their authorities; and
- Protection of communities and natural resources from release of other hazardous materials in PTC-preventable accidents.

FRA reviewed PTC-preventable accidents over the period 2002–2008 and determined that 35 train crew fatalities occurred in the period, only

two of which resulted from PIH materials and only 1 of which occurred in a passenger train accident. This can be compared with 29 passenger fatalities in the same period (24 of them a Chatsworth, CA) and 10 fatalities from release of PIH materials (9 of which were at Graniteville, SC—the single most serious accident of its kind since at least 1978). For further comparison, the most deadly rail accident which involved hazardous materials was at Waverly, Tennessee, in 1978. The Waverly accident involved release and ignition of flammable compressed gas (not a PIH material) during a re-railing operation and illustrates the risk posed by hazardous materials other than PIH materials.

Accordingly, FRA is seeking to ensure that the core of the national rail network, which would be equipped with PTC under the absolute minimum mandate of the RSIA08 strictly construed, is at least seriously reviewed for installation of PTC. In that regard, FRA notes that the rule would satisfy the requirements of the statute and work perfectly well if the flexibility afforded the railroads by §§ 236.1005(b)(4)(i)(A)(2) and 236.1020 were not included in the rule. Those provisions are severable. Paragraph (b)(3) thus describes the showing that will be necessary to evaluate the residual risks after removal of PIH materials traffic from a subject line.

At the time of the final rule, FRA called attention to the need to develop a risk evaluation methodology to estimate residual risk on rail lines and compare that risk to the national average risk on non-passenger lines with 5 million gross tons of annual freight traffic and some PIH materials traffic. That developmental process is underway and must be completed before railroads are required to commit resources for installation of PTC on any track segments pending for review under paragraph (b)(3).

Paragraph (b)(3)(i) informs the regulated community that FRA will develop the risk evaluation methodology through a separate rulemaking proceeding. As detailed earlier in the preamble discussion of “Residual Risk Analysis”, FRA has retained an independent contractor to help it initially develop the risk evaluation methodology. FRA intends to utilize the RSAC and a PTC Working Group to provide peer review of the initially developed methodology. After completion of peer review and changes made based upon that review, FRA intends to issue an NPRM to solicit public comments on the sufficiency of the developed methodology and the

advisability of using such a model. FRA will consider the public comments before deciding what, if any, final risk evaluation methodology should become effective. Once a determination is made, FRA will then issue a final rule to complete the proceeding, which will either implement the risk evaluation methodology or remove the residual risk provision from the regulation.

If FRA determines that a particular risk model should be implemented in the final rule, then when the provision goes into effect, FRA will determine the average risk value for lines with PIH materials required to be equipped with PTC and conduct the comparison utilizing the line segment data provided by the railroads for the subject lines. In this scenario, FRA also anticipates that the methodology and related notices might identify automatic approval of specific types of line segments, when such line segments pose minimal risks. This approach could be similar to that utilized in regard to lines considered to have *de minimis* PIH risks identified in § 236.1005(b)(4)(ii) of the final rule.

Lines identified for removal by the railroad will be considered to be pending for decision during the period that the methodology is being developed, and should be noted as such in the PTCIP. Any such line may be placed at the back of the order for PTC installation (within the sequence required to be shown in the PTCIP) if the railroad believes that it is warranted, subject to subsequent FRA review and a final decision. A railroad will not be required to equip any line with PTC under paragraph (b)(3) until the risk evaluation methodology is finalized, the railroad is provided an opportunity to supplement its request, and a final decision is made regarding the railroads request for removal of that track line or track segment.

Paragraph (c) recognizes that the 2008 baseline for analysis should not become a restraint that bars recognition of changing or equally relevant risk elsewhere. Accordingly, the provision states that, if a track segment qualifies for removal from the PTCIP under paragraphs (b)(1) and (b)(2) of this section but does not meet the test of paragraph (b)(3), the railroad may nevertheless request that the PTCIP be amended to remove the track segment based upon compensating reductions in the risk related to PTC-preventable accidents based on installation of PTC technology on one or more track segments not otherwise required to be equipped. Upon a proper showing that the other installation(s) fully compensate using the risk evaluation methodology accepted for use under

paragraph (b)(3), FRA approves the substitution. AAR seemed to be receptive to this flexibility, but asked that its understanding be confirmed. We attempt to do so in this revision.

## V. Regulatory Impact and Notices

### A. Executive Order 12866 and DOT Regulatory Policies and Procedures

These amendments to the final rule have been evaluated in accordance with existing policies and procedures, and determined to be significant under both Executive Order 12866 and DOT policies and procedures. 44 FR 11034 (Feb. 26, 1979). Although the final rule met the criteria for being considered an economically significant rule under those policies and procedures, the amendments contained in this document are not considered economically significant because they either clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the final rule. The economic impact of the amendments and clarifications contained in this document will generally reduce the cost of compliance with the rule. However, the cost reduction is not easily quantified and does not significantly alter FRA's original analysis of the cost and benefits associated with the final rule. Consequently, FRA strongly supports the economic arguments and estimates advanced in its RIA for the final rule.

### B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of rules to assess their impact on small entities. FRA certifies that these amendments to the final rule do not have a significant impact on a substantial number of small entities. Because the amendments contained in this document either clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, FRA has concluded that there are no substantial economic impacts on small units of government, businesses, or other organizations.

### C. Paperwork Reduction Act

These amendments of the final rule do not significantly change any of the information collection requirements contained in the original final rule. The OMB control number for that information collection is 2130-0553, and it has been approved through May 31, 2013.

### D. Federalism Implications

FRA believes it is in compliance with Executive Order 13132, "Federalism." See 64 FR 43255 (Aug. 4, 1999). Because these amendments to the final rule either clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, this document will not have a substantial effect 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. This document will not have federalism implications that impose any direct compliance costs on state and local governments.

### E. Environmental Impact

FRA has evaluated these amendments to the final 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 document 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) of FRA's Procedures.

### F. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$140,800,000 or more (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. Because the amendments

contained in this response document either clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, this document will not result in the expenditure, in the aggregate, of \$100,000,000 or more in any one year, and thus preparation of such a statement is not required.

**G. Energy Impact**

Executive Order 13211 requires federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28355 (May 22, 2001). Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated these amendments to the final rule in accordance with Executive Order 13211. Because the amendments contained in this document either clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, FRA has determined that this document 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.

**H. Privacy Act**

FRA wishes to inform all interested parties that anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Interested parties may also review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or visit <http://www.regulations.gov>.

**List of Subjects in 49 CFR Part 236**

Penalties, Positive train control, Railroad safety, Reporting and recordkeeping requirements.

**The Rule**

■ In consideration of the foregoing, FRA amends chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

**PART 236—[AMENDED]**

■ 1. The authority citation for part 236 is revised to read as follows:

**Authority:** 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20157, 20301–20303, 20306, 20501–20505, 20701–20703, 21301–21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. In § 236.1005, revise paragraph (b)(4)(i)(A)(2) to read as follows:

**§ 236.1005 Requirements for Positive Train Control systems.**

\* \* \* \* \*

(b) \* \* \*

(4) \* \* \*

(i) \* \* \*

(A) \* \* \*

(2) In the case of current or planned cessation of PIH materials traffic over a track segment, FRA will approve an exclusion of a line from the PTCIP if the railroad satisfies the requirements of § 236.1020.

\* \* \* \* \*

■ 3. In § 236.1011, revise paragraph (a)(6)(iv)(B) to read as follows:

**§ 236.1011 PTC Implementation Plan content requirements.**

(a) \* \* \*

(6) \* \* \*

(iv) \* \* \*

(B) Include each tenant railroad's response to the host railroad's written request made in accordance with paragraph (a)(6)(iv)(A) of this section;

\* \* \* \* \*

■ 4. In § 236.1019, revise the introductory text of paragraph (c) to read as follows:

**§ 236.1019 Main line track exceptions.**

\* \* \* \* \*

(c) *Limited operations exception.* FRA will consider an exception in the case of a track segment used for limited operations (operating in accordance with § 236.0 of this part) under one of the following sets of conditions:

\* \* \* \* \*

■ 5. Add a new § 236.1020 to subpart I to part 236 to read as follows:

**§ 236.1020 Exclusion of track segments for implementation due to cessation of PIH materials service or rerouting.**

(a) *Purpose and scope.* This section sets forth the conditions under which track segments identified in the 2008 baseline described in § 236.1005(b)(2) may be removed from the PTCIP. A track segment qualified for removal

under this section may be removed after FRA approves a request contained in the PTCIP or an RFA filed prior to the required and scheduled PTC installation date for the subject track segment.

(b) *Cessation of PIH materials service.* Except as provided in paragraph (c) of this section, the following three conditions must all be satisfied in order to justify removal of a track segment from the PTCIP:

(1) *Local service.* The railroad must affirm that there is no remaining local PIH materials traffic expected on the track segment, or that service is expected to cease as of a date certain prior to December 31, 2015. In the case of future cessation of local service, the expectation may be documented by statements from all current PIH materials shippers and/or consignees. The railroad is not required to anticipate future requests for service not in keeping with prior service patterns. (See § 236.1005(b)(3)).

(2) *Overhead traffic.*

(i) To the extent that the track segment carried PIH materials traffic other than local traffic in 2008, the railroad must establish that current or prospective rerouting to one or more alternate track segments is justified. In making this showing, the railroad must assume, for purposes of analysis only, that both the subject track segment and the alternative route(s) will be equipped and operated with PTC. Rerouting will be justified if the analysis is conducted in accordance with the same procedures and using the same methodology as required for safety and security route analysis under 49 CFR 172.820, with appropriate quantitative weight given to risk reduction effected by installation of a PTC system. If the track segment in question is not clearly the route posing the least overall safety and security risks, then removal of the line from the PTCIP may be granted.

(ii) However, unlike analysis under part 172, FRA will consider the case for rerouting and removal of the line from the PTCIP to be made if the alternative(s) to the track segment sought to be removed has substantially the same overall safety and security risks as the subject routes under the stipulated conditions for analysis. In determining whether risk is substantially the same, FRA will consider the volume of traffic diverted, and such other factors as safety may require.

(3) *Residual risk.* In the case of a track segment for which cessation of local service is established under paragraph (b)(1) of this section and for which analysis shows any overhead PIH materials traffic could properly be

rerouted under paragraph (b)(2) of this section, the railroad shall also establish that the remaining risk arising from rail operations on the track segment—pertaining to events that can be prevented or mitigated in severity by a PTC system—is less than the average equivalent risk per route mile on track segments required to be equipped with PTC because of annual gross tonnage and the presence of PIH materials traffic (excluding track segments also carrying passenger traffic). Such average equivalent risk shall be determined as of a time prior to installation of PTC on the line segments. This provision of the rule requires a future rulemaking to finalize and implement a risk evaluation methodology. Lines identified for removal subject to this provision will not be required to be equipped with PTC prior to the issuance of a final rule detailing the methodology.

(i) FRA will develop a risk evaluation methodology for the purpose of conducting the analysis required pursuant to paragraph (b)(3) of this section. The risk evaluation methodology will be finalized through a separate rulemaking proceeding that will permit all interested parties to provide input on the specific methodology and, whether that methodology should be employed. If in the rulemaking proceeding FRA determines that a risk methodology should not be employed, then FRA will amend this final rule to eliminate the residual risk provisions.

(ii) Any track segment qualifying for consideration under paragraph (b)(3) of this section and identified by the railroad for requested removal from the PTCIP shall be considered to be “pending for decision” until such time as FRA has published the risk evaluation methodology identified in paragraph (b)(3)(i) of this section. If a final risk evaluation methodology is employed, the railroad may be requested to provide supplemental information related to its request for removal of specific lines. The railroad is not required to commence installation of PTC on any track segment “pending for decision” under this paragraph, until a final FRA determination is made.

(c) If a track segment qualifies for removal from the PTCIP under paragraphs (b)(1) and (b)(2) of this section but does not meet the test of paragraph (b)(3) of this section, the railroad may nevertheless request that the PTCIP be amended to remove the track segment based upon compensating reductions in the risk related to PTC-preventable accidents based on installation of PTC technology on one or more track segments not otherwise required to be equipped. Upon a proper showing that the increment of risk reduction is at least as great on the substitute line as it would be on the line sought to be excluded from the PTCIP, FRA may approve the substitution.

Issued in Washington, DC, on September 15, 2010.

Joseph C. Szabo,  
Administrator.

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**DEPARTMENT OF TRANSPORTATION**

**Federal Motor Carrier Safety Administration**

**49 CFR Parts 383, 384, 390, 391, and 392**

[Docket No. FMCSA-2009-0370]

RIN 2126-AB22

**Limiting the Use of Wireless Communication Devices**

AGENCY: Federal Motor Carrier Safety Administration, DOT.

ACTION: Final rule.

**SUMMARY:** The Federal Motor Carrier Safety Administration (FMCSA) prohibits texting by commercial motor vehicle (CMV) drivers while operating in interstate commerce and imposes sanctions, including civil penalties and disqualification from operating CMVs in interstate commerce, for drivers who fail to comply with this rule. Additionally, motor carriers are prohibited from requiring or allowing their drivers to engage in texting while driving. FMCSA amends its commercial driver’s license (CDL) regulations to add to the list of disqualifying offenses a conviction

under State or local traffic laws or ordinances that prohibit texting by CDL drivers while operating a CMV, including school bus drivers. Recent research commissioned by FMCSA shows that the odds of being involved in a safety-critical event (e.g., crash, near-crash, unintentional lane deviation) is 23.2 times greater for CMV drivers who engage in texting while driving than for those who do not. This rulemaking increases safety on the Nation’s highways by reducing the prevalence of or preventing certain truck- and bus-related crashes, fatalities, and injuries associated with distracted driving.

**DATES:** The final rule is effective October 27, 2010.

**ADDRESSES:** For access to the docket to read background documents, including those referenced in this document, or to read comments received, go to <http://www.regulations.gov> at any time and insert FMCSA-2009-0370 in the “Keyword” box, and then click “Search.” You may also view the docket online by visiting the Docket Management Facility in Room W12-140, DOT Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** If you have questions about this rule, contact the Federal Motor Carrier Safety Administration, Vehicle and Roadside Operation Division, at 202-366-1225 or [FMCSA\\_MCPSV@dot.gov](mailto:FMCSA_MCPSV@dot.gov).

**SUPPLEMENTARY INFORMATION:**

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**I. Abbreviations**

AAMVA .....	American Association of Motor Vehicle Administrators.
Advocates .....	Advocates for Highway and Auto Safety.
AIA .....	American Insurance Association.
APTA .....	American Public Transportation Association.
ATA .....	American Trucking Associations, Inc.
ATU .....	Amalgamated Transit Union.
CDL .....	Commercial Driver’s License.
CeRI .....	Cornell eRulemaking Initiative.
CMV .....	Commercial Motor Vehicle.
CTA .....	Chicago Transit Authority.