

Commission also announced that it would publish a document in the **Federal Register** announcing the effective date. The Commission's estimate of burden hours for the information collection approved by OMB also considers the potential filing of waiver requests to provide the Commission and the public safety community, including public safety organizations and State and local jurisdiction and PSAPs, awareness of the wireless carriers and SSPs that are experiencing an inability to comply with the amended location accuracy requirements. In the *2ndR&O*, the Commission declined to adopt any changes to the Commission's existing waiver criteria, which it found have been sufficient to date in addressing particular circumstances on a case-by-case basis and remain available to all carriers. Further, the Commission expected that the rule changes allowing for handset-based and network-based carriers to claim exclusions based on the specified limitations should minimize the need for waiver relief.

### Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the Commission is notifying the public that it received OMB approval on March 30, 2011, for the information collection requirements contained in 47 CFR 20.18(h). Under 5 CFR 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid OMB Control Number. The OMB Control Number is 3060-1147 and the total annual reporting burdens for respondents for this information collection are as follows:

*OMB Control Number:* 3060-1147.

*Title:* Wireless E911 Location Accuracy Requirements.

*OMB Approval Date:* March 30, 2011.

*OMB Expiration Date:* March 31, 2014.

*Form No.:* N/A.

*Type of Review:* New collection (Request for a new OMB Control Number).

*Respondents:* Business or other for-profit.

*Number of Respondents:* 6,000 respondents; 13,700 responses.

*Estimated Time per Response:* 11.85 hours (average).

*Frequency of Response:* On occasion reporting requirement.

*Obligation to Respond:* Mandatory.

*Total Annual Burden:* 71,100 hours.

*Total Annual Cost:* N/A.

*Privacy Act Impact Assessment:* N/A.

*Nature and Extent of Confidentiality:* No confidentiality is required for this collection.

*Needs and Uses:* Pursuant to 47 CFR 20.18(h)(1)(vi), wireless carriers using network-based technologies to provide Enhanced 911 (E911) Phase II service may exclude from compliance with the Commission's amended location accuracy standards under 47 CFR 20.18(h)(1)(i)-(v) particular counties, or portions of counties, where triangulation is not technically possible, such as locations where at least three cell sites are not sufficiently visible to a handset. However, carriers must file a list of the specific counties or portions of counties where they are utilizing this exclusion within 90 days following approval from the Office of Management and Budget for the related information collection. This list must be submitted electronically into PS Docket No. 07-114, and copies must be sent to the National Emergency Number Association, the Association of Public-Safety Communications Officials-International, and the National Association of State 9-1-1 Administrators. Further, carriers must submit in the same manner any changes to their exclusion lists within thirty days of discovering such changes. This exclusion will sunset eight years after January 18, 2011.

Pursuant to 47 CFR 20.18(h)(2)(iii), wireless carriers using handset-based technologies to provide Enhanced 911 (E911) Phase II service must file a list of the specific counties or PSAP service areas where they are utilizing an exclusion under 47 CFR 20.18(h)(2)(i)-(ii) to exclude 15 percent of counties or PSAP service areas from the 150 meter requirement based upon heavy forestation that limits handset-based technology accuracy in those counties or PSAP service areas. Such carriers must file the list within 90 days following approval from the Office of Management and Budget for the related information collection. This list must be submitted electronically into PS Docket No. 07-114, and copies must be sent to the National Emergency Number Association, the Association of Public-Safety Communications Officials-International, and the National Association of State 9-1-1 Administrators. Further, carriers must submit in the same manner any changes to their exclusion lists within thirty days of discovering such changes.

Pursuant to 47 CFR 20.18(h)(3), two years after January 18, 2011, all carriers subject to this section shall be required to provide confidence and uncertainty

data on a per-call basis upon the request of a PSAP. Once a carrier has established baseline confidence and uncertainty levels in a county or PSAP service area, ongoing accuracy shall be monitored based on the trending of uncertainty data and additional testing shall not be required. All entities responsible for transporting confidence and uncertainty between wireless carriers and PSAPs, including LECs, CLECs, owners of E911 networks, and emergency service providers (collectively, System Service Providers (SSPs)) must implement any modifications that will enable the transmission of confidence and uncertainty data provided by wireless carriers to the requesting PSAP. If an SSP does not pass confidence and uncertainty data to PSAPs, the SSP has the burden of proving that it is technically infeasible for it to provide such data.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Part 231

[Docket No. FRA-2008-0116, Notice No. 2]

RIN 2130-AB97

#### Railroad Safety Appliance Standards

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

**ACTION:** Final rule.

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**SUMMARY:** FRA is amending the regulations related to safety appliance arrangements on railroad equipment. The amendments will promote the safe placement and securement of safety appliances on modern rail equipment by establishing a process for the review and approval of existing industry standards. This process will permit railroad industry representatives to submit requests for the approval of existing industry standards relating to the safety appliance arrangements on newly constructed railroad cars, locomotives, tenders, or other rail vehicles in lieu of the specific provisions currently contained in part 231. It is anticipated that this special approval process will further railroad safety by allowing FRA to consider technological advancements and ergonomic design standards for new

car construction and ensuring that modern rail equipment complies with the applicable statutory and safety-critical regulatory requirements related to safety appliances while also providing the flexibility to efficiently address safety appliance requirements on new designs in the future for railroad cars, locomotives, tenders, or other rail vehicles.

**DATES:** *Effective Date:* This final rule is effective June 27, 2011.

**FOR FURTHER INFORMATION CONTACT:** Stephen J. Carullo, Railroad Safety Specialist, Office of Safety, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone 202-493-6480), [stephen.carullo@dot.gov](mailto:stephen.carullo@dot.gov) or Stephen N. Gordon, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Mail Stop 10, Washington, DC 20590 (telephone 202-493-6001), [stephen.n.gordon@dot.gov](mailto:stephen.n.gordon@dot.gov).

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**I. General**

The Association of American Railroads (AAR) submitted a petition to amend 49 CFR part 231 on March 28, 2006. The AAR petition requested that FRA adopt new Federal railroad safety appliance standards to incorporate changes in railcar design that have occurred since the safety appliance regulations were promulgated in their current form. FRA is acting on AAR's request by amending 49 CFR part 231 to add sections 231.33 and 231.35 to the existing regulations. These new sections establish a special approval process similar to what is found in parts 232 and 238. The special approval process enables the railroad industry to submit new rail equipment designs to FRA for approval with respect to the placement and securement of safety appliances on the designs. FRA anticipates that the special approval process will have multiple benefits, including allowing for greater flexibility within the railroad industry and increasing rail safety by

incorporating modern ergonomic design standards and technological advancements in construction.

**II. Statutory and Regulatory History**

The Railroad Safety Appliance Standards set forth in 49 CFR part 231 arose out of an extended legislative and regulatory effort, beginning in the 19th century, to improve the safety of railroad employees and the public. As railroads rapidly began to grow and develop following the Civil War, it became increasingly apparent that new measures were needed to protect railroad employees who were directly involved in the movement of trains. Most vehicles did not have adequate safety mechanisms and many of the practices and procedures used by railroad employees were not safe. For example, employees regularly controlled the speed of (and sometimes stopped) trains by using the handbrakes. In many cases, this required employees to perch themselves on top of freight cars while the cars were moving at high rates of speed over rough track. Additionally, use of the "link and pin" coupler, which was the standard method for coupling railcars, required employees to go between the ends of railcars to operate or adjust the coupler. These practices and others of like type led to excessive numbers of deaths and injuries among train service employees during the expansion of the railroad system following the Civil War. Indeed, during the eight (8) years prior to the passage of the first Safety Appliance Act in 1893, the number of employees killed or injured was equal to the total number of people employed by the railroad in a single year.

The rate at which railroad employees were killed or injured during this time frame spurred efforts to increase workplace safety in at least two areas related to appliances on railroad cars, locomotives, tenders, and other rail vehicles. New technologies such as power brakes and automatic couplers were pursued, but also there were increased calls for regulation. Between 1890 and 1892, Congress responded with the introduction of seventeen (17) bills designed to promote the safety of employees and travelers on the railroad. Ultimately, the first Safety Appliance Act was passed by Congress and signed into law on March 2, 1893. Among other things, the first Safety Appliance Act required the use of power brakes on all trains engaged in interstate commerce as well as requiring all railcars engaged in interstate commerce to be equipped with automatic couplers, drawbars, and handholds. In 1903, Congress passed the second Safety Appliance Act, which

extended the requirements of the first Act to any rail equipment operated by a railroad engaged in interstate commerce. Finally, in 1910 the third Safety Appliance Act was passed requiring that all rail vehicles be equipped with hand brakes, sill steps, and, where appropriate, running boards, ladders, and roof handholds. The third Safety Appliance Act also directed the Interstate Commerce Commission (ICC) to designate the number, dimensions, locations, and manner of application of the various safety appliances identified in the Act.

The ICC complied with this mandate by issuing its order of March 13, 1911. The March 13, 1911 order first established the Federal railroad safety appliance standards. This order, as amended, designated the number, dimensions, location, and manner of application for safety appliances on box cars, hopper cars, gondola cars, tank cars, flat cars, cabooses, and locomotives. It also contained a catch-all section for "cars of special construction" that were not specifically covered in the order. In many ways, the March 13, 1911 order continues to serve as the basis for the present day regulations found in part 231. Indeed, although FRA supplanted the ICC as the agency responsible for promulgating and enforcing railroad safety programs in 1966, *see* Department of Transportation Act of 1966, 49 U.S.C. 103, the general framework established by the order of March 13, 1911 is still in existence today.

**III. FRA's Approach to the Railroad Safety Appliance Standards in This Final Rule**

The Federal railroad safety appliance standards encompassed in part 231 serve the purpose of increasing railroad safety by identifying the applicable safety appliance requirements for various individual railcar types. *See e.g.* 49 CFR 231.1, box and other house cars built or placed into service before October 1, 1966. While these regulations continue to serve their purpose, FRA recognizes the railroad industry has evolved over time. The industry has created and continues to create new railcar types to satisfy the demands for transporting freight as well as passengers on the present-day railroad. Many of the modern railcar types that are presently being built to handle railroad traffic do not fit neatly within any of the specific car body types identified in the existing regulations and ambiguities sometimes arise regarding the placement of safety appliances on these car types.

Because modern designs often cannot be considered a railcar type that is explicitly listed in part 231, they are typically treated as cars of special construction. See 49 CFR 231.18. The “cars of special construction” provision does not identify specific guidelines that can be used by the railroad industry to assist it in the construction and maintenance of the safety appliances on modern railcar designs. Instead, § 231.18 directs the industry to use the requirements, as nearly as possible, of the nearest approximate car type. Problems arise because modern designs are often combinations of multiple car types, and the design of any particular car may appear to be one type or another depending on the position of the individual viewing the car. As an example, a bulkhead flat car appears to be a box car when viewed from the A-end or B-end of the car, but appears to be a flat car when viewed from either side. As a result, the industry is forced to use bits and pieces from multiple sections of part 231 in an effort to ensure compliance with the Federal railroad safety appliance standards on bulkhead flatcars and other modern rail equipment.

Another problem for modern railcar designs is that part 231 defines the location of many safety appliances by reference to the side or end of the railcar. While this worked well for the car types that were in existence when the ICC issued its March 13, 1911 order, it often is difficult to define exactly what parts on modern railcars constitute the side or end. This results in ambiguity regarding what is the appropriate location for certain safety appliances, such as handholds and sill steps.

Moreover, the requirements in part 231 sometimes allow for spatial relationships between safety appliances that can result in the placement of appliances in less than optimal locations to ensure the safety of a person working in and around the railcar. For example, in § 231.21, Tank cars without underframes, the center of the tread of the sill step can be up to 18 inches from the end of the car while the outside edge of the horizontal side handhold over the sill step can be up to 12 inches from the end of the car. Consequently, a car built using these requirements may be compliant with the regulation even though the sill step and horizontal handhold are not aligned in a manner that maximizes the safety of a person working in and around the car.

Together these factors can make compliance with the Federal railroad safety appliance standards difficult and inefficient when dealing with modern

railcar designs. In addition, the current regulations do not contemplate advancements in the design of such vehicles. This means that the current regulations can operate to preclude the application of technological innovations and modern ergonomic design principles that would increase the safety of persons who work on and around rail equipment and use safety appliances on a regular basis.

The AAR Safety Appliance Task Force (Task Force) consists of representatives from the Class I railroads, labor unions, car builders, and government (FRA and Transport Canada participate as a non-voting members), as well as ergonomics experts. The Task Force was created by AAR’s Equipment Engineering Committee to develop new industry standards for safety appliance arrangements that could be used to reduce the differences of opinion that can arise in the interpretation of the Federal safety appliance standards contained in part 231. The Task Force has drafted a base safety appliance standard as well as industry safety appliance standards for modern boxcars, covered hopper cars, and bulkhead flat cars. These industry safety appliance standards have been adopted by AAR’s Equipment Engineering Committee, and FRA expects them to serve as the core safety appliance criteria that can be used to guide the safety appliance arrangements on railcars that are more specialized in design. The industry safety appliance standards developed by the Task Force incorporate ergonomic design principles that increase the safety and comfort for persons working on and around safety appliance apparatuses. For example, the Task Force standards establish minimum foot clearance guidelines for end platforms that allow for wider and stiffer sill steps to support a person’s weight.

The AAR petition to amend part 231 requested that FRA adopt these new industry standards and amend its regulations to recognize changes in railcar design since the safety appliance regulations were promulgated in their current form. Because the standards submitted by AAR in connection with its petition require some modification before they can be approved and adopted by FRA, FRA is not incorporating the standards into part 231 at this time. FRA prefers to utilize the process being established in this final rule to fully evaluate and assess the industry safety appliance standards developed by AAR through the Task Force to ensure that they are complete and enforceable. Thus, FRA is acting on AAR’s petition for rulemaking by establishing a special approval process

similar to that currently contained in 49 CFR parts 232 and 238.

Section 232.17 allows railroads to adopt an alternative standard for single car air brake tests and use new brake system technology where the alternative standard or new technology is shown to provide at least the equivalent level of safety. Similarly, § 238.21 allows railroads to adopt alternative standards related to passenger equipment safety in a wide range of areas such as performance criteria for flammability and smoke emission characteristics, fuel tank design and positioning, single car air brake testing, and suspension system design, where the alternative standards or new technologies are demonstrated to provide at least the equivalent level of safety. Section 238.230 borrows the process set out in § 238.21. It allows a recognized representative of the railroads to request special approval of industry-wide alternative standards relating to the safety appliance arrangements on any passenger car type considered to be a car of special construction.

The final rule closely follows the processes set forth in §§ 232.17, 238.21, and 238.230. The special approval process for part 231 establishes a process for submitting, reviewing, and approving the use of industry safety appliance standards once they have been developed by the industry. The process will also allow for an industry representative to submit modifications of industry-approved safety appliance standards for FRA’s review and approval. Once an existing industry safety appliance standard or modification to an existing industry safety appliance standard is approved by FRA, it will become applicable to the industry for the purposes of new railcar construction. FRA expects that this amendment to part 231 will benefit railroad safety by: (1) Allowing FRA to take into account technological advancements and ergonomic design standards for new car construction, (2) ensuring that modern railcar designs comply with applicable statutory and safety-critical regulatory requirements related to safety appliances, and (3) providing flexibility to efficiently address safety appliance requirements on new railcar and locomotive designs in the future.

#### **IV. Response to Public Comment**

##### *General Comments*

In response to its Notice of Proposed Rulemaking (NPRM), FRA received a total of four comments representing seven different organizations, including one government entity. There seems to

be general support among various sectors of the railroad industry for FRA to update the Federal railroad safety standards in part 231. AAR commented that it is “pleased that FRA has made this proposal” and notes that modernization of the safety appliance standards is long overdue. Trinity Rail (Trinity), a railcar manufacturer, commented that it is very much in favor of the amendments that FRA has proposed to part 231. Additionally, the Brotherhood of Locomotive Engineers and Trainmen (BLET), the Transportation Communications Union, the Transport Workers Union (TWU), and the United Transportation Union (UTU) (who filed comments jointly and will be collectively referred to as Labor) also agree with the concept of adding a special approval process to part 231 to address the placement and securement of safety appliances on new rail car designs.

The United States Transportation Command (USTRANSCOM), however, on behalf of the Department of Defense (DOD), has provided a number of objections to the proposed rule. Many of the objections are not directed at the special approval process that was proposed but were concerns relating to the outcomes that USTRANSCOM expects to occur once FRA begins to consider industry petitions in the course of the special approval process. FRA will address each of these comments, which it believes are based on a fundamental misunderstanding the proposed special approval process, below.

First, USTRANSCOM argues that the proposed rule requires additional safety appliances on TTX Company (TTX) flat cars that will make it difficult for the military to use commercially-owned cars in the future for transportation of tanks and other military equipment. It contends that commercially-owned TTX flat cars have proven to be safe and any “speculative, limited increase in safety” that would be achieved by modifying the safety appliance arrangements on such cars is not justifiable at the expense of national defense. This rulemaking is not the appropriate forum to address USTRANSCOM’s arguments related to commercially-owned TTX flat cars. The comments are beyond the scope of this rulemaking, as USTRANSCOM is commenting on an industry safety appliance standard that is not even being considered in the present rulemaking. At this time, FRA merely seeks to establish a process for consideration of standards that have received final approval from industry (*i.e.*, existing industry safety appliance standards) prior to being submitted to

FRA. If AAR submits a standard negatively affecting the military’s use of commercially-owned TTX flat cars through the special approval process that is being established in this rulemaking, then FRA expects that USTRANSCOM will submit comments on the industry standard as an interested party, and FRA will give those comments the appropriate attention at that time.

Second, USTRANSCOM argues that the proposed rule is inconsistent with 49 U.S.C. 301, which requires the Secretary to exercise leadership in transportation matters that affect national defense, and 49 U.S.C. 302, which requires the Secretary to consider the needs of national defense in establishing policies for transportation. FRA does not view this rulemaking as impeding compliance with sections 301 and 302. Under the special approval process, FRA would continue to take into account the needs of the DOD in determining whether to grant, deny, or send a petition back for further consideration. However, in light of USTRANSCOM’s comment, FRA has decided to add language in § 231.33(f)(3) of this final rule explicitly stating that FRA will consider applicable Federal statutes in determining whether to grant, deny, or send a petition back for further consideration. Similarly, FRA is adding language to §§ 231.33(f)(6) and 231.35(f)(3), allowing a petition that has been granted to be re-opened where there is a showing that approval of the industry standard violates an applicable Federal statute.

Third, USTRANSCOM contends that the special approval process would conflict with 49 U.S.C. 5501, which seeks to promote “a National Intermodal System that is economically efficient and environmentally sound, provides the foundation for the United States to compete in the global economy, and will move individuals and property in an energy efficient way.” FRA disagrees and does not view the special approval process being established as being in conflict with § 5501. Instead, FRA envisions that the special approval process will further the stated policy goals of the law by encouraging petitions that factor in concepts of innovation, productivity, growth, and accountability. *See* 49 U.S.C. 5501(b)(6). Indeed, as stated in the NPRM, FRA expects the special approval process to increase economic efficiency by increasing flexibility within the railroad industry and incorporating technological advancements in new railcar construction. Nonetheless, FRA has added language to §§ 231.33(f)(3), 231.33(f)(6), and 231.35(f)(3) that

explicitly states that FRA will factor applicable Federal statutes into its decision-making process while reviewing petitions that have been submitted before it.

Fourth, USTRANSCOM asserts that the NPRM is inconsistent with 49 U.S.C. 103(j)(2), which directs the Administrator of the FRA to develop a preliminary national rail plan within one year of the enactment of the Passenger Rail Investment and Improvement Act of 2008. FRA fails to understand the basis for this comment, as FRA already prepared its Preliminary National Rail Plan and delivered it to Congress on October 16, 2009. However, USTRANSCOM’s comments again seem to focus on Task Force’s rejection of DOD’s contention that commercially-owned TTX flat cars could not be efficiently converted to military use under the draft industry safety appliance standard. On this point FRA notes, as explained above, that such an assertion is outside the scope of the rulemaking because FRA has not formally reviewed, much less granted any petitions for special approval of existing industry safety appliance standards at this time.

Fifth, USTRANSCOM contends that the ad hoc process proposed by FRA allows mode-specific associations to establish modal rules and fails to consider outside concerns, including those of the DOD. This comment totally misconstrues the special approval process as laid out in the NPRM and as amended in this final rule. The special approval process merely allows a railroad industry representative to submit petitions for special approval of an existing industry safety appliance standard; however, FRA retains authority to grant, deny, or send a petition back to the industry representative for further consideration. At all times, FRA retains ultimate control over whether a petition is granted, including the authority to impose conditions necessary for approval. Additionally, FRA does not understand USTRANSCOM’s argument that the special approval process fails to consider the concerns of the DOD or other outside entities in light the specific language contained in §§ 231.33(e) and 231.35(d) that provides 60 days for any interested party to comment on a petition for special approval or a petition for modification. FRA believes that allowing comments from interested parties, such as DOD, helps to ensure that FRA will be able to adequately consider outside concerns that a petitioner may fail to raise and provides the ability to assess those outside concerns in determining the

appropriate disposition of a submitted petition.

Finally, USTRANSCOM asserts that FRA has adopted AAR's proposal regarding commercially-owned TTX flat cars without any independent Federal government deliberation, testing, or verification, and that FRA's reliance on the AAR and its Task Force constitutes the inappropriate use of an advisory committee under the Federal Advisory Committee Act (FACA), 5 U.S.C. app. As an initial matter, as noted above, FRA has not adopted any industry safety appliance standards for new railcar construction. Moreover, any discussion of the bases for the purported granting or denying of a petition for approval that has not even been submitted to FRA is beyond the scope of this rulemaking. Notwithstanding this statement, FRA will exercise its own judgment in determining whether a petition complies with all applicable Federal statutes, whether the petition complies with each of the requirements established in § 231.33, and whether the existing industry safety appliance standard provides at least an equivalent level of safety as the existing FRA standards prior to granting, denying, or sending a petition back to the industry representative for further consideration.

FRA additionally notes that the FACA is inapplicable to AAR and its Task Force within the context of this rule. In order for a task force to be treated as an "advisory committee" it must be—

(A) Established by statute or reorganization plan, or

(B) Established or utilized by the President, or

(C) Established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government \* \* \*

5 U.S.C. app. 3(2). While USTRANSCOM does not provide a rationale for arguing that the Task Force is an advisory committee that does not comply with the FACA, FRA assumes that USTRANSCOM is not arguing that the Task Force meets the definition of advisory committee under section 3(2)(A) or (B). Instead, FRA understands USTRANSCOM's argument to be that the Task Force was either established by FRA or utilized by FRA in a manner that brings the Task Force within the terms of the FACA. As explained in detail below, the only correct determination is that FRA neither established nor utilizes the Task Force within the meaning of the FACA.

An advisory committee is "established" by an agency only where

the agency has actually formed the committee. *See Byrd v. U.S. EPA*, 174 F.3d 239, 245 (D.C. Cir. 1999). The Task Force was established by AAR's Equipment Engineering Committee to develop an industry safety appliance standard that reduced the differences of opinion that sometimes arise in interpreting the Federal safety appliance standards in part 231. The Task Force develops industry safety appliance standards which are then submitted to the AAR Equipment Engineering Committee, which votes on whether to adopt the industry standard. FRA agreed to participate in the Task Force as a non-voting member, provided that an ergonomics expert, labor representatives, and Transport Canada were invited to participate along with the railroads, private car owners, and railcar builders. However, FRA does not control participation on the Task Force and does not compensate its participants. Based on these factors, it simply cannot be said that FRA established the Task Force such that it would be considered an advisory committee under FACA. Therefore, the critical factor is whether the Task Force is "utilized" by FRA within the framework established by the special approval process.

While the term "utilized" appears upon first impression to have broad effect such that it would encompass virtually any consultation between a government agency and an outside party, the Supreme Court has construed the term narrowly to prevent sweeping interpretations that extend beyond the intent of Congress. *See Public Citizen v. U.S. DOJ*, 491 U.S. 440, 459 (1989). The primary purpose of the FACA "was to enhance public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures on them." 491 U.S. at 459. The Supreme Court has noted that Congress added the term "utilized" to the FACA in an apparent attempt to clarify that the statute applies "to advisory committees established by the Federal government in a generous sense of that term," meaning that the use of the term "utilize" in the FACA was merely to ensure that quasi-public agencies established for public agencies were included within the terms of the statute rather than capturing only those committees established by such public agencies. *See* 491 U.S. at 462. As a result, courts interpreting "utilize" have enforced a stringent standard, stressing that the term "denot[es] something along the lines of actual management or control of the advisory committee." *See Washington Legal Foundation v. U.S.*

*Sentencing Comm'n*, 17 F.3d 1446, 1450 (DC Cir. 1994).

When considered in this light, it becomes clear that the special approval process does not "utilize" the AAR, the Task Force, or any other group as an advisory committee within the terms of the FACA. The Task Force is chaired by a person chosen by AAR. It does not have a set membership and the number of attendees has fluctuated over time, but it regularly includes representatives from the railroads, private car owners, car builders, labor unions, an ergonomics expert, Transport Canada, and FRA. At the first meeting of the Task Force in June 2002, there were seven participants, which did not include any labor representatives or Transport Canada. At the September/October 2008 meeting, there were 22 participants. The most recent meeting held in January 2011 had 16 attendees. Over the time of the Task Force's existence, FRA has made up a small percentage of the participants. Two employees in FRA's Motive Power & Equipment Division regularly attend the Task Force meetings. FRA's two employees provide input concerning the FRA's safety appliance standards, but, as noted above, they do not vote on matters before the Task Force. FRA recognizes that, by participating in the Task Force, it can exercise some influence over the Task Force's determinations; however, at least one United States Circuit Court of Appeals has noted that "influence is not control." *Washington Legal Foundation*, 17 F.3d at 1451. FRA does not set the Task Force agenda, and the Task Force drafts industry safety appliance standards without any formal assurances from FRA that the industry safety standards will be granted by the agency when included in a petition for approval.

Moreover, it is important to recognize that the industry safety appliance standards created by the Task Force are merely draft standards until approved by the AAR Equipment Engineering Committee. FRA does not regularly participate in AAR Equipment Engineering Committee meetings. As a result, FRA's influence, as it is, on the development of industry safety appliance standards is one step removed from the actual stage where AAR adopts industry safety appliance standards. It is only once AAR formally adopts an industry safety appliance standard that it becomes existing such that the standard can be included in a petition for special approval under the process that this final rule is creating.

*Comments Related to 49 CFR 231.33*

Paragraph (a) establishes the general framework for the special approval process. It provides that the procedures laid out in the rulemaking will be applicable to petitions for special approval of existing industry safety appliance standards for new construction of railcars, locomotives, tenders, and other vehicles. AAR notes that under certain circumstances equipment owners may want to convert existing equipment to the FRA-approved industry safety appliance standard even though the equipment was built prior to FRA's granting of the petition for special approval. It presumes that there would be no prohibition against converting the existing equipment to the new industry standards once the new standards have been approved; however, AAR contends that such conversion should be voluntary. AAR reads too much into the NPRM. This rule does not propose to allow existing railroad equipment to be converted to an FRA-approved industry safety appliance standard. The special approval process applies only to new construction that occurs after the petition covering the specific car type has been granted by FRA. However, manufacturers and railroads may avail themselves of the waiver process currently in place, where necessary, if they wish to convert applicable existing equipment to an existing industry safety appliance standard upon FRA's approval. Because FRA believes that the waiver process provides an adequate vehicle for applying FRA-approved industry standards to existing railcars on a case-by-case, fact-specific basis, FRA has decided not to extend the rule to cover existing equipment.

FRA received a number of comments related to paragraph (b). In paragraph (b)(2), FRA sets forth the minimum requirements for a petition for special approval of an existing industry safety appliance standard. FRA envisioned that this paragraph would include each of the elements that would be necessary to allow it to make an informed decision on a petition for special approval. As a result, it requested comment regarding whether the information required in this paragraph is necessary and sufficient to allow FRA to make an informed decision. In response, FRA received comments from Trinity, Labor, and AAR. Trinity and Labor found that the minimum requirements were both necessary and sufficient, with Labor specifically noting its agreement with the requirement to demonstrate "the ergonomic suitability of the proposed arrangements in normal use."

AAR did not provide comment about the specific minimum requirements; however, it did raise an issue with the wording of the paragraph. Specifically, AAR notes that the proposed paragraph would require the standard to contain supporting data and analysis. AAR contends that such information should be included in the supporting analysis, but that it would be unusual for the actual industry standard to contain the supporting analysis. FRA agrees with AAR's point and has reordered paragraph (b) to clarify that the supporting data or analysis may be submitted in the petition, but separate from the actual industry safety appliance standard. As a result, paragraph (b)(2) has been split into multiple paragraphs.

The new paragraph (b)(2) provides that the petition must contain an industry-wide standard that identifies the type of the equipment to which the standard is applicable; ensures as nearly as possible that the standard requires the same complement of safety appliances as the nearest approximate car type(s); complies with all of the statutory requirements in 49 U.S.C. 20301 and 20302; and addresses the specific number, dimension, location, and manner of attachment for each safety appliance in the industry standard.

Proposed paragraphs (b)(2)(v)–(vii) have been renumbered as paragraphs (b)(3)–(5). Paragraph (b)(3) requires the petition for special approval to contain appropriate dates or analysis, or both, that will allow FRA to determine if the industry safety appliance standard will provide at least an equivalent level of safety. Paragraph (b)(4) requires that the petition include visual aids, such as drawings or sketches, that provide detailed information about the design, location, placement, and attachment of safety appliances under the industry standard. Finally, paragraph (b)(5) requires a demonstration that the safety appliance arrangements are ergonomically suitable. Revising proposed paragraph (b)(2) in this manner ensures that the FRA is provided with the information that it deems necessary, while allowing the industry safety appliance standards to remain uncluttered with information that is not traditionally found in the Federal railroad safety appliance standards.

Labor supports the requirement in paragraph (b)(6)—which was formerly proposed paragraph (b)(3)—that the petitioner serve the petition upon the designated representatives of the employees affected. It states that serving a copy of the petition on the President

of each Union representing the affected employees would be a satisfactory application of this requirement. FRA considers the person named as the designated labor representative to be an internal decision for each union. Once the final rule becomes effective, each union may designate the individual that it deems appropriate.

AAR suggests that paragraph (b)(6) be deleted. It argues that FRA does not normally require service on labor unions. It contends that the only instance where FRA has required service upon labor unions is with respect to the rulemaking requiring certification of conductors. AAR argues that, unlike with conductor certification, this rulemaking will not directly affect employees and there will be numerous labor organizations upon which AAR would potentially have to serve notice. Instead of requiring service upon the labor unions responsible for the equipment's operation, inspection, testing, and maintenance under part 231, AAR contends that FRA can rely merely on the standard practice of notifying interested parties through the publication of notices in the **Federal Register**. AAR further suggests that FRA could set up a special approval docket through <http://www.regulations.gov>, which would enable interested parties to sign up and be notified of any actions with respect to the specific docket.

FRA disagrees with AAR's contention that paragraph (b)(6) should be deleted. First, providing service of the petition upon the designated labor representative and other interested parties ensures that those persons and/or organizations that have an interest in the petition will have an adequate opportunity to review and comment on the petition prior to FRA issuing its decision. Second, in contradistinction from AAR's argument, it is FRA's view that the overriding purpose of establishing this special approval process is to enhance the safety of those employees who use safety appliances on regular basis in the performance of their duties. As a result, FRA considers notification to the applicable labor representatives particularly important to achieving a special approval process that considers all relevant comments. Third, FRA would note that there were only four labor unions that provided comments to the subject NPRM, three of which, the UTU, BLET, and TWU, actively participate in the Task Force. In light of this, FRA does not expect that there will be a substantial number of labor organizations or other interested parties that will require notification for each petition. Finally, FRA would note that the special approval processes

established in parts 232 and 238 similarly require that a petitioner serve a copy of the petition on the designated representative of the employees. See 49 CFR 232.17(d)(2)(i) and 238.21(b)(4) and (c)(3). To FRA's knowledge, these provisions have not created a significant hardship for railroads in pursuing special approval of alternative standards for braking systems or passenger equipment. Given these factors, FRA has decided not to remove paragraph (b)(6) in this final rule.

For the same reasons as identified above, AAR argues that paragraph (c)(2) should be deleted. Additionally, with respect to proposed paragraph (c)(2)(iii), AAR states that "FRA does not maintain service lists" and questions the means by which a petitioner will know if an individual has filed a statement of interest. This requirement is no different than that which is found in § 232.17(d), which was promulgated in 2001, after going through the Rail Safety Advisory Committee Process. See 66 FR 4104, 4198 (January 17, 2001). To FRA's knowledge this requirement has not presented any difficulties with respect to the special approval process in § 232.17, and FRA does not expect that the requirement will present a significant hardship with respect to the special approval process being established in part 231.

Labor is concerned that FRA allows for a petition to be returned to the petitioner for amendment in paragraph (f)(3)(iii). It believes that such a petition should be denied with the reasons for the denial identified. Labor contends that allowing for amendment will complicate the approval process. Moreover, Labor suggests that returning the petition effectively results in negotiating with the petitioner rather than restarting the process which appears to be counterproductive and potentially confusing. Labor states that "this third option for approval also appears to require all of the same elements as re-filing an amended petition and appears to offer no significant advantage over a restart of the petition process."

In FRA's view, returning the petition for further consideration, as provided for in paragraph (f)(3)(iii), may in some cases be more efficient than denying a petition outright. In FRA's experience with other filings, many times a filing party will substantially comply with the requirements, yet be deficient in some minimal way. It is FRA's belief that, in such circumstances, it is better to work with the filing party to resolve the inadequacies without denying the petition outright and requiring a party to re-submit a new petition. Moreover,

given that petitions will be able to be identified by their docket number, FRA does not believe that returning petitions for further consideration will foster confusion.

In paragraph (f)(5), FRA proposed that, if a petition is granted, it shall go into effect on January 1st, not less than one year from the date of approval and not more than two years from the date of approval. FRA received numerous comments on this provision. Taking into account these comments, it has decided to amend paragraph (f)(5) to allow FRA to tailor the effective date based on the information before it at the time that it decides to grant a petition.

AAR provides that it "opposes a general prohibition on compliance with new standards immediately upon FRA approval." It believes that under most circumstances manufacturers will be able to immediately transition to an FRA-approved industry safety appliance standard without adversely affecting safety. As a result, it requests that "[e]quipment may be built to the new standard immediately upon FRA's written notice granting the petition, unless FRA provides otherwise in its written notice."

Labor similarly suggests that FRA-approved industry safety appliance standards should become effective immediately, or at least as soon as reasonably possible, because it feels that the safety appliance arrangements provided for in granted petitions will be superior to the current arrangements provided for in part 231. Labor additionally argues that the effective date should be flexible. This would allow it to be adjusted where it is determined that a new design offers safety improvements.

Trinity contends that it is necessary for a manufacturer to have some lead time before an FRA-approved industry safety appliance standard becomes effective, but suggests revising paragraph (f)(5) to provide greater flexibility. It believes that lead time is necessary for design activity, production planning and the procurement of material. Additionally, Trinity argues that scheduling could be affected by many factors that are beyond the control of the car builder. As a result, it states that there may be times where it is almost impossible to make a change-over precisely on January 1st of any given year. Trinity also contends that car builders may not have any control over delayed material shipments, weather conditions, equipment break downs and customer requested schedule changes. To allow for these variables, Trinity suggests that the proposed rule be modified to allow for a three month

window prior to the January 1st mandatory incorporation date of an approved petition where the change-over can take place. Trinity states that because the built date is always stenciled on the car, the determination as to whether a car is in compliance with an approved petition can easily be ascertained. Trinity contends that its proposal would result in earlier compliance with an approved petition and give car builders some flexibility.

FRA is mindful of the fact that lead time is often necessary for design activity, production planning, and the procurement of material, as noted by Trinity. Indeed, this is why FRA initially proposed that once a petition is granted it would have an effective date of January 1st, not less than one year and not more than two years from the date of FRA's written notice granting the petition. However, there seems to be a consensus among the commenters that in many cases the industry safety appliance standards contained in a granted petition should be able to be implemented much more expediently. As a result, FRA is amending paragraph (f)(5) to allow FRA to establish the effective date in its written notice granting a petition. In such cases, where FRA establishes the effective date in writing, FRA's decision will be based on the materials presented in the petition and after fully considering any comments received. This will allow FRA to tailor the effective date to fit with the lead time if any is necessary for design activity, production planning, or the procurement of material. In the event that FRA does not specify an effective date, the effective date will fall back to January 1st, not less than one year and not more than two years from the date of FRA's written notice granting the petition.

#### *Comments Related to 49 CFR 231.35*

Paragraph (b) requires that each petition for modification be served upon the designated representatives of employees responsible for the operation, inspection, testing, and maintenance of equipment that is the subject of the petition. Labor requests that FRA continue to require that any petitions for modification be shared in a formal manner with the representatives of the employees impacted by the petition. Labor suggests that all parties involved in the process should collaborate and that, when the need arises to file a petition for approval or a petition for modification, the first consideration of all of the parties involved should be to file a joint petition that includes representatives of the employees that work on the affected equipment. In its

view, collaboration at the basic levels is much more productive than the traditional processes, such as filing waiver petitions without any type of prior notification to the employees or other interested parties. FRA views collaboration between all interested parties favorably. Indeed, one of the recognized benefits of the Task Force is that it receives input from not only railroads, but also private car owners, car builders, and labor representatives. As a result, FRA welcomes petitions filed jointly by representative of the railroads and labor. However, FRA does not think that it would be appropriate to mandate collaboration or the joint filing of petitions, which could result in unnecessary stagnation and delay. Paragraph (b) ensures that designated labor representatives will be served with a copy of a petition for modification and provides 60 days to comment on any such petition. In FRA's view, this is an adequate method to ensure that labor representatives have an opportunity to provide any relevant information that they deem appropriate.

Paragraph (f)(1) establishes an effective date for modified industry safety appliance standards that are approved by FRA. Under this paragraph, a modified industry standard will become effective 15 days after the 60-day comment period unless a commenter or FRA objects to the petition for modification. Trinity believes it is not clear whether paragraph (f)(1) only applies to modifications of petitions already approved under § 231.33 or whether § 231.35 applies to all petitions, including those for new car types. FRA believes that the paragraph clearly applies only to modifications under § 231.35, and this paragraph is not applicable to new petitions that have not been granted approval under § 231.33.

Additionally, while Trinity believes that it may be appropriate to allow for modifications to go into effect 15 days after the 60-day comment period for simple modifications (e.g., relocating handholds), the abbreviated period prior to the effective date will not provide sufficient time to convert production for more extensive modifications because such changes may require ordering substantial new material or the fabrication of new major railcar assemblies. FRA proposed an abbreviated transition period for an unopposed modification because it envisions in most instances that this provision will be used to address minor adjustments that become apparent in the course of using the subject rail equipment. In the event that a petition

for modification requests major changes that would require a greater time period to transition into the modification, FRA expects that the petition for modification will make FRA aware of the potential for delays in implementation. Otherwise, upon reviewing the petition, either an interested party or FRA may object to the petition for modification based on the grounds that insufficient time exists to transition to the modified standard, then the timeline for disposition of the modification would revert back to that established by § 231.33(f)(5). FRA views these safeguards as adequate protection against a modified requirement becoming effective prior to there being the capabilities to incorporate the modification.

AAR also submitted similar comments on paragraph (f)(1). It contends that allowing a modified industry standard to go into effect 15 days after the close of the 60-day comment period ignores that a transition period may be needed before the manufacturer can build to the modified standard. It suggests that the transition period for modification be similar to that used for new industry standards approved by FRA. At the outset, FRA finds AAR's comment strange in light of its comments with respect to § 231.33(f)(5), suggesting that FRA require that newly approved industry standards become effective immediately. As noted in the previous paragraph, FRA envisions the modification process to be used for minor changes. As a result, FRA believes that some minimal transition time is necessary, but expects that most changes can easily be accomplished in the time period specified in § 231.35(f)(1).

#### V. Section-by-Section Analysis

##### *Section 231.33 Procedure for Special Approval of Existing Industry Safety Appliance Standards*

This section establishes a process through which a representative of the railroad industry may petition FRA for special approval of an existing industry safety appliance standard. FRA anticipates that this special approval process will minimize uncertainty in vehicle design and maintenance by allowing the industry, through AAR's Safety Appliance Task Force, to create clear industry standards that identify the appropriate safety appliance arrangements on railroad cars, locomotives, tenders, or other rail vehicles. This should lessen the extensive reliance on § 231.18, cars of special construction, under which much

of the modern rail equipment presently is built. While AAR's petition for rulemaking requests that FRA adopt new Federal railroad safety appliance standards incorporating changes based on modern railcar design, FRA expects that the special approval process contained in this final rule will better serve the goal of adapting to changes in modern railcar design while also facilitating compliance with statutory and safety-critical regulatory requirements.

FRA recognizes that a necessary adjunct to developing industry standards for new railcar types that would otherwise fall under § 231.18 is to update the standards for cars that are already covered under part 231. The core criteria in these standard car types can then be used as guidelines for other types of cars with more specialized designs. It is FRA's understanding that the industry standards developed by the Task Force include a new base industry safety appliance standard as well as standards for modern boxcars and covered hopper cars, each of which is specifically covered in part 231. It is anticipated that AAR will petition, through the special approval process, to have the industry standards for these car types approved by FRA since such standards must be approved by FRA prior to going into effect. The use of industry safety appliance standards for new car construction related to these car types will ensure consistency in the application of FRA-approved industry standards when applied to other types of rail equipment while also serving as the building blocks towards recognizing safer, more efficient designs.

The regulatory relief provided by this section will allow FRA to review existing industry safety appliance standards created by the railroad industry to ensure that the standards will provide at least an equivalent level of safety as the existing FRA standards. The public will be given notice of and opportunity to comment on any changes to existing regulations that are contained in a special approval petition before FRA acts on the petition in accordance with the Administrative Procedure Act. See 5 U.S.C. 553(b). Where FRA determines that a petition complies with all applicable Federal statutes and the requirements of this section and the existing industry safety appliance standard provides an equivalent level of safety to existing FRA standards, FRA may grant approval to the industry standard for use in new car construction. FRA expects that the special approval process will allow the rail industry to incorporate new railcar designs as well as technological and

ergonomic advancements with greater speed and efficiency.

Paragraph (a) states that the procedures laid out in this section govern the method considering and handling any petition for special approval of an existing industry safety appliance standard. Although there were no comments, FRA has made a minor change to this paragraph by replacing the phrase "similar vehicles" with the phrase "other vehicles." FRA believes that the phrase "similar vehicles" could be interpreted as unnecessarily limiting the scope of the amendment to rail equipment that is similar to railroad cars, locomotives, and tenders. As a result, it has revised the text to better reflect the scope of rail equipment that is covered by this amendment to part 231.

Paragraph (b) establishes the process for submission of a petition for special approval of an existing industry standard for new railcar construction. Petitions will only be accepted from an industry representative and must contain standard(s) that will be enforced industry-wide. Each petition for special approval must include the name, title, address, and telephone number of the primary person to be contacted with regard to review of the petition.

In the NPRM, FRA specifically requested comments on whether the information required is necessary and sufficient to allow FRA to make an informed decision regarding a petition for approval. While the comments received indicated that the information requested is necessary and sufficient, AAR pointed out that the paragraph was structured in a manner that required supporting data and analysis to be included in the industry safety appliance standard. AAR noted that it would be unusual to require the actual industry safety appliance standard to contain supporting information. FRA agrees and has revised this paragraph to clarify that supporting information need not be included in the actual industry standard as long as the information is provided in the petition for approval submitted to FRA.

Paragraphs (b)(2) sets the minimum requirements for an existing industry safety appliance standard that is submitted as part of a petition for special approval. The industry safety appliance standard must identify the type(s) of railcar to which it would be applicable as well as the section or sections within the safety appliance regulations that the existing industry standard would act as an alternative to for new car construction. The standard must, as nearly as possible, be based upon the design of the equipment, provide for

the same complement of handholds, sill steps, ladders, hand or parking brakes, running boards, and other safety appliances as are required for a piece of equipment of the nearest approximate type(s) already identified in part 231. Because the Federal railroad safety appliance standards encompassed in part 231 were promulgated to enforce specific statutory provisions, paragraph (b)(2) requires that the industry safety appliance standard comply with the requirements contained at 49 U.S.C. 20301 and 20302. The specific number, dimension, location, and manner of application of each safety appliance also must be contained in the industry standard in the petition. Under paragraph (b)(3), the industry representative submitting the petition also must include sufficient information through data or analysis, or both, for FRA to consider in making its determination of whether the existing industry standard will provide the requisite level of safety. This would include identifying where the industry standard deviates from the existing FRA regulation and providing an explanation for any such deviation. Additionally, pursuant to paragraph (b)(4), drawings, sketches, or other visual aids that provide detailed information relating to the design, location, placement, and attachment of the safety appliances must be included in the petition to assist FRA in its decision making process. Paragraph (b)(5) requires the petition to include a demonstration of the ergonomic suitability of the proposed arrangements in normal use. Given that the AAR Task Force regularly includes at least one ergonomic expert, FRA expects that such factors will be considered during the development process of the industry standards that are being submitted for approval. Finally, paragraph (b)(6) requires that the petitioner include a statement affirming that a copy of the petition has been served on the designated labor representatives of the employees responsible for the equipment's operation, inspection, testing, and maintenance under part 231. The statement must include a list of the names and addresses of each person served.

Paragraph (c) sets up the service requirements for the petition for special approval of an existing industry standard for new railcar construction. The petitioner is required to submit the petition to FRA's Docket Clerk. The petitioner is also required to serve a copy of the petition on the appropriate labor representatives and the organizations or bodies to which the

special approval pertains or that issued the industry standard that is proposed in the petition. The petitioner also must serve any other person who, at least 30 days, but not more than 5 years prior to the filing of the petition, has filed with FRA a current statement of interest in reviewing special approvals under the particular requirement of part 231. Any such statement of interest shall reference the specific section(s) of part 231 in which the person has an interest. FRA will post any such statement of interest that complies with the regulation in the docket to ensure that each statement is accessible to the public.

Paragraph (d) provides that FRA will publish a notice in the **Federal Register** announcing the receipt of each petition for special approval of an existing industry standard for new car construction.

Paragraph (e) establishes a 60-day comment period from the date of publication of the notice in the **Federal Register** concerning a petition. Due to the nature of the special approval process and the fact that the industry standards, if approved, will have an industry-wide effect, FRA seeks to provide sufficient time for all interested parties to comment prior to making its decision disposing of a petition. All comments must set forth the specific basis upon which the comments are made and contain a concise statement of the interest of the commenter in the proceeding.

Paragraph (f) sets up the process for disposing of petitions for special approval. Under this paragraph, FRA may grant the petition, deny the petition, or return it for additional consideration. Normally, FRA will act on a petition within 90 days of the close of the comment period related to the petition; however, if the petition is neither granted nor denied within the 90-day period, then it will remain pending unless withdrawn by the petitioner.

Paragraph (f)(3) sets forth that a petition may be granted where FRA determines that the petition complies with all applicable Federal statutes, that the petition complies with the requirements of § 231.33, and that the existing industry safety appliance standard provides at least an equivalent level of safety to existing FRA standards. Alternatively, a petition will be denied where FRA determines that it does not comply with an applicable Federal statute, it does not comply with the requirements established in § 231.33, or the existing industry safety appliance standard does not provide at least an equivalent level of safety as the existing FRA standard.

In instances where FRA determines that further information is required or that the petition may be amended in a reasonable manner to comply with an applicable Federal statute, comply with the requirements of § 231.33, or ensure that the existing industry standard provides an equivalent level of safety to existing FRA standards; the petition may be returned to the petitioner. In such circumstances, FRA will provide written notice to the petitioner of the item(s) requiring additional consideration. The petitioner is provided with 60 days from the date of FRA's written notice of return for additional consideration to reply. The petitioner's reply must address the item(s) identified by FRA in the written notice of the return of the petition for additional consideration as well as complying with the submission requirements of § 231.33(b) and the service requirements in § 231.33(c). If petitioner fails to submit a response within the prescribed time period, the petition will be deemed withdrawn, unless good cause is shown.

Paragraph (f)(5) provides that when a petition is granted, the effective date may be specified in FRA's written notice granting the petition. If no date is specified in FRA's written notice granting the petition, the existing safety appliance will become effective on January 1st, not less than one (1) year and not more than two (2) years from the date of FRA's written notice granting the petition. FRA decided to amend this paragraph based on the comments received, which uniformly indicated that a lead time of not less than one year would in many cases be unnecessary. As a result, FRA will retain authority to establish an effective date based on the information contained in the petition for approval and the comments received from other parties. However, FRA is mindful of the fact that the industry will need appropriate time to incorporate the standard, train employees, and fit facilities to meet the new requirements.

Paragraph (f)(6) establishes the standard for reopening a granted petition for special approval. A granted petition may be reopened only where there is a showing of good cause. Good cause requires the submission of subsequent evidence that was not previously considered. The subsequent evidence must demonstrate that a granted petition fails to comply with an applicable Federal statute; that the petition fails to comply with the requirements of § 231.33; that the existing industry safety appliance standard does not provide at least an equivalent level of safety as the corresponding FRA regulation for the

nearest railcar type; or that further information is required to make such a determination.

Paragraph (g) provides that any industry standard approved pursuant to § 231.33 will be enforced against any person, as defined in 49 CFR 209.3, who violates any provision of the approved standard or causes the violation of any such provision. Civil penalties associated with the failure to follow an approved industry safety appliance standard will be assessed under part 231 by using the applicable defect code contained in Appendix A.

#### *Section 231.35 Procedure for Modification of an Approved Industry Safety Appliance Standard*

This section contains the procedural requirements for modifying existing industry safety appliance standards that previously have been approved by FRA. As in § 231.33, FRA believes that notice to the public and an opportunity to comment is necessary under the Administrative Procedure Act. If the petition for modification is minor and there is no objection to the petition for modification by FRA or any other interested party, the modified industry safety appliance standard will automatically become effective fifteen (15) days after the close of the comment period. In those circumstances where FRA or any other interested party objects to the modification petition, the petition will be handled through the special approval process laid out in § 231.33(f). FRA expects that using the framework in § 231.33(f) will allow for a more thorough review by the agency to ensure that the proposed modification provides at least an equivalent level of safety as the corresponding FRA regulation for the nearest railcar type(s) prior to disposing of the petition for modification.

Paragraph (a) provides that an industry representative may seek modification of an existing industry safety appliance standard for new railcar construction after it has been approved under § 231.33. Any such petition for modification must include each of the elements identified in § 231.33(b).

Paragraph (b) covers service of petitions for modification. The procedures for service of petitions for modification is the same as in § 231.33(c).

Paragraph (c) provides that FRA will publish a notice in the **Federal Register** announcing the receipt of each petition for modification received under § 231.35(a).

Paragraph (d) provides for the same 60-day comment period as in § 231.33(e).

Paragraph (e) establishes the process for FRA review of petitions for modification. It is expected that FRA will review the petition for modification during the 60-day comment period. In instances where FRA has an objection to the requested modification, it will provide written notification to the party requesting the modification detailing FRA's objection.

Paragraph (f) sets up the procedure for FRA's disposition of petitions for modification. A modification proposed in a petition for modification will become effective fifteen (15) days after the close of the 60-day comment period if FRA does not receive any comments objecting to the requested modification or if FRA does not issue a written objection to the requested modification. If an objection to the requested modification is raised by either an interested party or FRA, the requested modification will be treated as a petition for special approval of an existing industry safety appliance standard and disposition of the petition will fall under the procedures provided in § 231.33(f). Similarly, a petition for modification that has been granted may be re-opened where good cause is shown, as discussed above.

Paragraph (g) provides that any modification of an industry standard approved by FRA under § 231.35 will be enforced against any person, as defined in 49 CFR 209.3, who violates any provision of the approved standard or causes the violation of any such provision. As with § 231.33, civil penalties will be assessed using the applicable defect code contained in appendix A to part 231.

## **V. Regulatory Impact**

### *A. Executive Order 12866 and 13563 and DOT Regulatory Policies and Procedures*

This final rule has been evaluated in accordance with existing policies and procedures. It is not considered a significant regulatory action under either section 3(f) of Executive Order 12866, 58 FR 51735 (September 30, 1993), or Executive Order 13563, 76 FR 3821 (January 18, 2011), and, therefore, was not reviewed by the Office of Management and Budget. This rule is not significant under the Regulatory Policies and Procedures of the Department of Transportation. 44 FR 11034 (February 26, 1979). FRA has prepared and placed in the docket a Regulatory Evaluation. Since this rule merely establishes a process for seeking

special approval to use an industry standard instead of the existing regulatory requirements for cars of special construction contained in 49 CFR part 231, the costs associated with this rule are nominal. Since a special approval process will allow FRA to accept new railcar designs incorporating ergonomic design standards and technological advancements without detriment to safety, the benefits would likely exceed the costs.

#### *B. Regulatory Flexibility Determination*

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, and Executive Order 13272, 67 FR 53461 (August 16, 2002), require agency review of proposed and final rules to assess their impact on small entities. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), FRA has prepared and placed in the docket a Certification Statement that assesses the small entity impact of this rule, and certifies that this final rule is not expected to have a significant economic impact on a substantial number of small entities. Document inspection and copying facilities are available at the DOT Central Docket Management Facility located in Room W12-140 on the Ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590. Docket material is also available for inspection electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at the Office of Chief Counsel, RCC-10, Mail Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; please refer to Docket No. FRA-2008-0116.

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." "Small entity" is defined in the Act as a small business that is independently owned and operated and is not dominant in its field of operation. Federal agencies may use different "Size Standards" after consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final policy that formally establishes "small entities" as railroads which meet the line haulage revenue requirements of a Class III railroad. The revenue requirements are currently \$20 million or less in annual operating

revenue. The \$20 million limit (which is adjusted by applying the railroad revenue deflator adjustment) is based on the Surface Transportation Board's threshold for a Class III railroad carrier. FRA uses the same revenue dollar limit to determine whether a railroad or shipper or contractor is a small entity.

There are approximately 700 small railroads that could be affected by the regulation. Consequently, this regulation could affect a substantial number of small entities. However, FRA does not anticipate that this regulation, which establishes a permissive process that allows for FRA approval of industry standards, would impose a significant economic impact on such entities.

The final rule would also apply to governmental jurisdictions or transit authorities that provide commuter rail service—none of which is small for purposes of the SBA (*i.e.*, no entity serves a locality with a population less than 50,000). These entities also receive Federal transportation funds. Intercity rail service providers Amtrak and the Alaska Railroad Corporation would also be subject to this rule, but they are not small entities and likewise receive Federal transportation funds.

The final rule will not have a significant economic impact on a substantial number of small entities, as there are no direct costs to small entities. Small entities will not be responsible for preparing the petitions for special approval. Furthermore, FRA does not believe there will not be any significant costs to implementing any approved industry standard as any such standard will likely be a repositioning of existing safety appliances and will only be applicable to newly manufactured units. FRA believes that these construction costs, if any, will be low. Moreover, few small entities purchase newly manufactured equipment; generally, these operators acquire used equipment from larger railroads. Accordingly, FRA does not consider this impact of this proposal to be significant for small entities.

#### *C. Federalism*

Executive Order 13132, 64 FR 43255 (August 10, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and

responsibilities among the various levels of government." Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

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

However, the final rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970 (former FRSA), repealed and recodified at 49 U.S.C 20106, and the former Safety Appliance Acts (former SAA), repealed and recodified at 49 U.S.C. 20301-20304, 20306. *See* Public Law 103-272 (July 5, 1994). The former FRSA 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 "local safety or security hazard" exception to section 20106. Moreover, the former SAA has been interpreted by the Supreme Court as totally preempting the field "of equipping cars with appliances intended for the protection of employees." *See Southern Ry. Co. v. R.R. Comm'n of Ind.*, 236 U.S. 439, 446, 35 S.Ct. 304, 305 (1915).

In sum, FRA has analyzed this final rule in accordance with the principles

and criteria contained in Executive Order 13132. As explained above, FRA has determined that this rule has no federalism implications, other than the possible preemption of State laws under the former FRSA and the former SAA. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this rule is not required.

*D. International Trade Impact Assessment*

The Trade Agreement Act of 1979, Public Law 96-39 (July 26, 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 final rule are being 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, and the estimated time to fulfill each requirement are as follows:

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
231.33—Special Approval Petitions of an Existing Industry Safety Appliance Standard for New Car Construction.	AAR .....	5 petitions .....	160 hours ....	800
—Statement Affirming Copy of Special Approval Petition Has Been Served on RR Employee Representatives.	AAR .....	5 statements .....	30 minutes ..	3
—Special Approval Petition Copies to RR Employee Representative/Other Parties.	AAR .....	565 copies .....	2 hours .....	1,130
—Statements of Interest to FRA .....	5 Labor Groups/ Public.	15 statements ...	7 hours .....	105
—Comments on Special Approval Petitions .....	728 Railroads/5 Labor Groups/ Public.	25 comments ....	6 hours .....	150
—Disposition of Petitions: Hearings .....	AAR/5 Labor Groups/ Pub- lic.	1 hearing .....	8 hours .....	8
—Disposition of Petitions: Further Information Needed .....	AAR .....	1 document .....	3 hours .....	3
231.35—Petitions for Modification of an Approved Existing Industry Safety Appliance Standard for New Car Construction.	AAR .....	5 petitions .....	160 hours ....	800
—Statement Affirming Copy of Modification Petition Has Been Served on RR Employee Representatives.	AAR .....	5 statements .....	30 minutes ..	3
—Modification Petition Copies to RR Employee Representative/Other Parties.	AAR .....	565 copies .....	2 hours .....	1,130
—Statements of Interest to FRA .....	5 Labor Groups/ Public.	15 statements ...	7 hours .....	105
—Comments on Modification Approval Petitions .....	728 Railroads/5 Labor Groups/ Public.	25 comments ....	6 hours .....	150
—Disposition of Petitions: Further Information Needed .....	AAR .....	1 document .....	3 hours .....	3

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, FRA Office of Safety, Information Clearance Officer, at 202-493-6292, or Ms. Kimberly Toone, FRA Office of Administration, Information Clearance Officer, at 202-493-6132.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503, Attention: FRA Desk Officer. Comments may also be sent via e-mail to the Office of Management and Budget at the

following address: *oira-submissions@omb.eop.gov*.

OMB is required to make a decision concerning the collection of information requirements contained in this final 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.

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

announced by separate notice in the **Federal Register**.

*F. Compliance With the Unfunded Mandates Reform Act of 1995*

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995, Public Law 104-4 (March 22, 1995), 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 204(a) of the Act, 2 U.S.C. 1534(a), requires the Federal agency to develop an effective process to permit timely input by elected officers (or their designees) of State, local, and Tribal governments on a “significant

intergovernmental mandate.” A “significant intergovernmental mandate” under the Act is any provision in a Federal agency regulation that would impose an enforceable duty upon State, local, and Tribal governments in the aggregate of \$100 million (adjusted annually for inflation) (currently \$140.8 million) in any one year. Section 203 of the Act, 2 U.S.C. 1533, which supplements section 204(a), provides that, before establishing any regulatory requirements that might significantly or uniquely affect small governments, the agency shall have developed a plan, which, among other things, must provide for notice to potentially affected small governments, if any, and for a meaningful and timely opportunity for these small governments to provide input in the development of regulatory proposals. The final rule does not contain any Federal intergovernmental or private sector mandates. Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

#### G. Environmental Assessment

FRA has evaluated this rule in accordance with its “Procedures for Considering Environmental Impacts” (FRA’s Procedures), 64 FR 28545 (May 26, 1999), as required by the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this final 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 final rule is not a major Federal action

significantly affecting the quality of the human environment.

#### H. Energy Impact

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

#### I. Privacy Act

Anyone is able to search the electronic form of all comments received into any of DOT’s dockets 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 published in the **Federal Register** on April 11, 2000 (Volume 65, Number 70, Pages 19477–78), or you may visit <http://DocketsInfo.dot.gov>.

#### List of Subjects in 49 CFR Part 231

Penalties, Railroad safety, Railroad safety appliances, Special approval process.

For the reasons discussed in the preamble, FRA amends part 231 of subtitle B, chapter II of title 49 of the Code of Federal Regulations as follows:

#### PART 231—[AMENDED]

■ 1. The authority citation for part 231 continues to read as follows:

**Authority:** 49 U.S.C. 20102–20103, 20107, 20131, 20301–20303, 21301–21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. Add §§ 231.33 and 231.35 to read as follows:

#### § 231.33 Procedure for special approval of existing industry safety appliance standards.

(a) *General.* The following procedures govern the submission, consideration and handling of any petition for special approval of an existing industry safety appliance standard for new construction of railroad cars, locomotives, tenders, or other rail vehicles.

(b) *Submission.* An industry representative may submit a petition for special approval of an existing industry safety appliance standard for new construction. A petition for special approval of an industry standard for safety appliances shall include the following:

(1) The name, title, address, and telephone number of the primary individual to be contacted with regard to review of the petition.

(2) An existing industry-wide standard that, at a minimum:

(i) Identifies the type(s) of equipment to which the standard would be applicable and the section or sections within the safety appliance regulations that the existing industry standard would operate as an alternative to for new car construction;

(ii) Ensures, as nearly as possible, based upon the design of the equipment, that the standard provides for the same complement of handholds, sill steps, ladders, hand or parking brakes, running boards, and other safety appliances as are required for a piece of equipment of the nearest approximate type(s) already identified in this part;

(iii) Complies with all statutory requirements relating to safety appliances contained at 49 U.S.C. 20301 and 20302; and

(iv) Addresses the specific number, dimension, location, and manner of application of each safety appliance contained in the industry standard;

(3) Appropriate data or analysis, or both, for FRA to consider in determining whether the existing industry standard will provide at least an equivalent level of safety;

(4) Drawings, sketches, or other visual aids that provide detailed information relating to the design, location, placement, and attachment of the safety appliances;

(5) A demonstration of the ergonomic suitability of the proposed arrangements in normal use; and

(6) A statement affirming that the petitioner has served a copy of the petition on designated representatives of the employees responsible for the equipment’s operation, inspection, testing, and maintenance under this part, together with a list of the names and addresses of the persons served.

(c) *Service.* (1) Each petition for special approval under paragraph (b) of this section shall be submitted to the FRA Docket Clerk, West Building Third Floor, Office of Chief Counsel, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(2) Service of each petition for special approval of an existing industry safety appliance standard under paragraph (b) of this section shall be made on the following:

(i) Designated representatives of the employees responsible for the equipment's operation, inspection, testing, and maintenance under this part;

(ii) Any organizations or bodies that either issued the standard to which the special approval pertains or issued the industry standard that is proposed in the petition; and

(iii) Any other person who has filed with FRA a current statement of interest in reviewing special approvals under the particular requirement of this part at least 30 days but not more than 5 years prior to the filing of the petition. If filed, a statement of interest shall be filed with the FRA Docket Clerk, West Building Third Floor, Office of Chief Counsel, 1200 New Jersey Avenue, SE., Washington, DC 20590, and shall reference the specific section(s) of this part in which the person has an interest. A statement of interest that properly references the specific section(s) in which the person has an interest will be posted in the docket to ensure that each statement is accessible to the public.

(d) **Federal Register** document. FRA will publish a document in the **Federal Register** announcing the receipt of each petition received under paragraph (b) of this section. The document will identify the public docket number in the Federal eRulemaking Portal (FeP) where the contents of each petition can be accessed and reviewed. The FeP can be accessed 24 hours a day, seven days a week, via the Internet at the docket's Web site at <http://www.regulations.gov>. All documents in the FeP are available for inspection and copying on the Web site or are available for examination at the DOT Docket Management Facility, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, during regular business hours (9 a.m.–5 p.m.).

(e) *Comment.* Not later than 60 days from the date of publication in the **Federal Register** concerning a petition received pursuant to paragraph (b) of this section, any person may comment on the petition. Any such comment shall:

(1) Set forth specifically the basis upon which it is made and contain a

concise statement of the interest of the commenter in the proceeding; and

(2) Be submitted by mail or hand-delivery to the Docket Clerk, DOT Docket Management Facility, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or electronically via the Internet at <http://www.regulations.gov>. Any comments or information sent directly to FRA will be immediately provided to the DOT FeP for inclusion in the public docket related to the petition. All comments should identify the appropriate docket number for the petition to which they are commenting.

(f) *Disposition of petitions.* (1) FRA will conduct a hearing on a petition in accordance with the procedures provided in § 211.25 of this chapter, if necessary.

(2) FRA will normally act on a petition within 90 days of the close of the comment period related to the petition. If the petition is neither granted nor denied within that timeframe, the petition will remain pending unless withdrawn by the petitioner.

(3) A petition may be:

(i) Granted where it is determined that the petition complies with all applicable Federal statutes, that the petition complies with the requirements of this section, and the existing industry safety appliance standard provides at least an equivalent level of safety as the existing FRA standards;

(ii) Denied where it is determined that the petition does not comply with an applicable Federal statute, the petition does not comply with the requirements of this section, or the existing industry safety appliance standard does not provide at least an equivalent level of safety as the existing FRA standards; or

(iii) Returned to the petitioner for additional consideration where it is determined that further information is required or that the petition may be amended in a reasonable manner to comply with all applicable Federal statutes, that petition may be amended to comply with the requirements of this section, or to ensure that the existing industry standard provides at least an equivalent level of safety as the existing FRA standards. Where the petition is returned to the petitioner, FRA will provide written notice to the petitioner of the item(s) identified by FRA as requiring additional consideration. Petitioner shall reply within 60 days from the date of FRA's written notice of return for additional consideration or the petition will be deemed withdrawn, unless good cause is shown. Petitioner's reply shall:

(A) Address the item(s) raised by FRA in the written notice of the return of the petition for additional consideration;

(B) Comply with the submission requirements of paragraph (b) of this section; and

(C) Comply with the service requirements in paragraph (c) of this section.

(4) When FRA grants or denies a petition, or returns a petition for additional consideration, written notice will be sent to the petitioner and other interested parties.

(5) If a petition is granted, it shall go into effect on the date specified in FRA's written notice granting the petition. If no date is specified in FRA's written notice granting the petition, the effective date shall begin on January 1st, not less than one (1) year and not more than two (2) years from the date of FRA's written notice granting the petition. FRA will place a copy of the approved industry safety appliance standard in the related public docket where it can be accessed by all interested parties.

(6) A petition, once approved, may be re-opened upon good cause shown. Good cause exists where subsequent evidence demonstrates that an approved petition does not comply with an applicable Federal statute; that the approved petition does not comply with the requirements of this section; that the existing industry safety appliance standard does not provide at least an equivalent level of safety as the corresponding FRA regulation for the nearest railcar type(s); or that further information is required to make such a determination. When a petition is re-opened for good cause shown, it shall return to pending status and shall not be considered approved or denied.

(g) *Enforcement.* Any industry standard approved pursuant to this section will be enforced against any person, as defined at 49 CFR 209.3, who violates any provision of the approved standard or causes the violation of any such provision. Civil penalties will be assessed under this part by using the applicable defect code contained in appendix A to this part.

#### **§ 231.35 Procedure for modification of an approved industry safety appliance standard for new railcar construction.**

(a) *Petitions for modification of an approved industry safety appliance standard.* An industry representative may seek modification of an existing industry safety appliance standard for new construction of railroad cars, locomotives, tenders, or other rail vehicles after the petition for special approval has been approved pursuant to

§ 231.33. The petition for modification shall include each of the elements identified in § 231.33(b).

(b) *Service.* (1) Each petition for modification of an approved industry standard under paragraph (a) of this section shall be submitted to the FRA Docket Clerk, West Building Third Floor, Office of Chief Counsel, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(2) Service of each petition for modification of an existing industry safety appliance standard under paragraph (a) of this section shall be made on the following:

(i) Designated representatives of the employees responsible for the equipment's operation, inspection, testing, and maintenance under this part;

(ii) Any organizations or bodies that either issued the standard incorporated in the section(s) of the rule to which the modification pertains or issued the industry standard that is proposed in the petition for modification; and

(iii) Any other person who has filed with FRA a current statement of interest in reviewing special approvals under the particular requirement of this part at least 30 days but not more than 5 years prior to the filing of the petition. If filed, a statement of interest shall be filed with FRA's Associate Administrator for Safety and shall reference the specific section(s) of this part in which the person has an interest.

(c) **Federal Register** document. Upon receipt of a petition for modification, FRA will publish a document in the **Federal Register** announcing the receipt of each petition received under paragraph (a) of this section. The document will identify the public docket number in the Federal eRulemaking Portal (FeP) where the contents of each petition can be accessed and reviewed. The FeP can be accessed 24 hours a day, seven days a week, via the Internet at the docket's Web site at <http://www.regulations.gov>. All documents in the FeP are available for inspection and copying on the Web site or are available for examination at the DOT Docket Management Facility, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, during regular business hours (9 a.m.–5 p.m.).

(d) *Comment.* Not later than 60 days from the date of publication in the **Federal Register** concerning a petition for modification under paragraph (a) of this section, any person may comment on the petition. Any such comment shall:

(1) Set forth specifically the basis upon which it is made, and contain a

concise statement of the interest of the commenter in the proceeding; and

(2) Be submitted by mail or hand-delivery to the Docket Clerk, DOT Docket Management Facility, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, or electronically via the Internet at <http://www.regulations.gov>. Any comments or information sent directly to FRA will be immediately provided to the DOT FeP for inclusion in the public docket related to the petition. All comments should identify the appropriate docket number for the petition to which they are commenting.

(e) *FRA Review.* During the 60 days provided for public comment, FRA will review the petition. If FRA objects to the requested modification, written notification will be provided within this 60-day period to the party requesting the modification detailing FRA's objection.

(f) *Disposition of petitions for modification.* (1) If no comment objecting to the requested modification is received during the 60-day comment period, provided by paragraph (d) of this section, or if FRA does not issue a written objection to the requested modification, the modification will become effective fifteen (15) days after the close of the 60-day comment period.

(2) If an objection is raised by an interested party, during the 60-day comment period, or if FRA issues a written objection to the requested modification, the requested modification will be treated as a petition for special approval of an existing industry safety appliance standard and handled in accordance with the procedures provided in § 231.33(f).

(3) A petition for modification, once approved, may be re-opened upon good cause shown. Good cause exists where subsequent evidence demonstrates that an approved petition does not comply with the applicable Federal statute, that an approved petition does not comply with the requirements of this section; that the existing industry safety appliance standard does not provide at least an equivalent level of safety as the corresponding FRA regulation for the nearest railcar type(s); or that further information is required to make such a determination. When a petition is re-opened for good cause shown, it shall return to pending status and shall not be considered approved or denied.

(g) *Enforcement.* Any modification of an industry standard approved pursuant to this section will be enforced against any person, as defined at 49 CFR 209.3, who violates any provision of the approved standard or causes the

violation of any such provision. Civil penalties will be assessed under this part by using the applicable defect code contained in appendix A to this part.

Issued in Washington, DC, on April 20, 2011.

**Joseph C. Szabo,**  
Administrator, Federal Railroad  
Administration.

[FR Doc. 2011-10015 Filed 4-27-11; 8:45 am]

BILLING CODE 4910-06-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 622

[Docket No. 101124579-1236-02]

RIN 0648-BA51

#### Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery Off the Southern Atlantic States; Red Snapper Management Measures

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to implement a regulatory amendment (Regulatory Amendment 10) to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP), as prepared by the South Atlantic Fishery Management Council (Council). This final rule removes the snapper-grouper area closure implemented through Amendment 17A to the FMP. The intended effect of this final rule is to minimize socio-economic impacts to snapper-grouper fishermen, without subjecting the red snapper resource to overfishing.

**DATES:** This final rule is effective May 31, 2011.

**ADDRESSES:** Copies of the regulatory amendment, which includes an environmental assessment and a regulatory impact review, may be obtained from the South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone 843-571-4366; fax 843-769-4520; e-mail [safmc@safmc.net](mailto:safmc@safmc.net); or may be downloaded from the Council's Web site at <http://www.safmc.net/>.

**FOR FURTHER INFORMATION CONTACT:** Rick DeVictor, 727-824-5305.