DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 271

[Docket No. FRA–2009–0038, Notice No. 1]

RIN 2130–AC11

Risk Reduction Program

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Rail Safety Improvement Act of 2008 requires the development and implementation of railroad safety risk reduction programs. This NPRM proposes to implement this mandate by requiring each Class I railroad and each railroad with inadequate safety performance to develop and implement a Risk Reduction Program (RRP) to improve the safety of their operations. RRP is a comprehensive, system-oriented approach to safety that determines an operation's level of risk by identifying and analyzing applicable hazards and involves developing plans to mitigate, if not eliminate, that risk. Each RRP would be statutorily required to include a risk analysis and a technology implementation plan. An RRP would be implemented by a written RRP plan that has been submitted to FRA for review and approval. A railroad would be required to conduct an annual internal assessment of its RRP, and a railroad's RRP processes and procedures would be externally audited by FRA.

DATES: Written comments must be received by April 28, 2015. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

FRA anticipates being able to resolve this rulemaking without a public, oral hearing. However, if FRA receives a specific request for a public, oral hearing prior to March 30, 2015, one will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: *Comments:* Comments related to Docket No. FRA–2009–0038, Notice No. 1, may be submitted by any of the following methods:

- *Web site:* The Federal eRulemaking Portal, *www.regulations.gov.* Follow the Web site's online instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590.
- *Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12–140 on the Ground level of the West Building, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name, docket name and docket number or Regulatory Identification Number (RIN) for this rulemaking (2130–AC11). Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

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

FOR FURTHER INFORMATION CONTACT: Miriam Kloeppel, Staff Director, Risk Reduction Program Division, U.S. Department of Transportation, Federal Railroad Administration, Office of Railroad Safety, Mail Stop 25, West Building 3rd Floor, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 202–493–6224), *Miriam.Kloeppel@dot.gov*; or Elizabeth Gross, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, Mail Stop 10, West Building 3rd Floor, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 202–493–1342), *Elizabeth.Gross@dot.gov.*

SUPPLEMENTARY INFORMATION:

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I. Introduction

A. Executive Summary

The proposed rulemaking would add to FRA's regulations a new part, which would require each Class I railroad and each railroad with inadequate safety performance to develop and implement a Risk Reduction Program (RRP). An RRP is a structured program with proactive processes and procedures developed and implemented by a railroad to identify hazards and to mitigate, if not eliminate, the risks associated with those hazards on its system. An RRP encourages a railroad and its employees to work together to proactively identify hazards and to jointly determine what action to take to mitigate or eliminate the associated risks.

FRA understands that each railroad that would be subject to the RRP rule would have a unique operating system, and that not all railroads have the same amount of resources. Best practices for implementing an RRP would therefore differ from railroad to railroad. Accordingly, the proposed RRP rule does not establish prescriptive requirements that may be appropriate for one railroad but unworkable for another. Instead, the rule proposes only general, performance-based requirements. This approach would

provide each railroad a substantial amount of flexibility to tailor those requirements to its specific operations.

FRA is proposing this RRP rule as part of its efforts to continually improve rail safety and to satisfy the statutory mandate contained in sec. 103 and sec. 109 of the Rail Safety Improvement Act of 2008 (RSIA), Public Law 110–432, Division A, 122 Stat. 4848 *et seq.,* codified at 49 U.S.C. 20156, and 20118–20119. The proposed RRP rule is a performance-based rule, and FRA seeks comments on all aspects of the proposed rule.

Section 103 of the RSIA directs the Secretary of Transportation (Secretary) to issue a regulation requiring Class I railroads, railroad carriers that provide intercity rail passenger or commuter rail passenger transportation (passenger railroads), and railroads with inadequate safety performance to develop, submit to the Secretary for review and approval, and implement a railroad safety risk reduction program. The proposed rule would implement this mandate for Class I freight railroads and railroads with inadequate safety performance. A railroad not otherwise required to comply with the proposed rule would also be permitted to voluntarily submit an RRP plan for FRA review and approval. A separate system safety program (SSP) rulemaking would similarly implement this mandate for passenger railroads, and an SSP NPRM was published by FRA on September 7, 2012, 77 FR 55372.

Section 109 of the RSIA specifies that certain risk reduction records obtained by the Secretary are exempt from the public disclosure requirements of the Freedom of Information Act (FOIA). This exemption is subject to two exceptions for disclosure necessary to enforce or carry out any Federal law and disclosure when a record is comprised of facts otherwise available to the public and FRA has determined that disclosure would be consistent with the confidentiality needed for RRPs. *See* 49 U.S.C. 20118. FRA therefore believes that railroad risk reduction records in its possession would generally be exempted from mandatory disclosure under FOIA. Unless one of the two exceptions provided by the RSIA would apply, FRA would withhold disclosing any such records in response to a FOIA request. *See* 5 U.S.C. 552(b)(3) and 49 CFR 7.13(c)(3).

Section 109 of the RSIA also authorizes the Secretary to issue a regulation protecting from discovery and admissibility into evidence in litigation certain information generated for the purpose of developing, implementing, or evaluating an RRP. Currently, the proposed rule would implement sec. 109 with respect to RRPs covered by this proposed part. If an SSP final rule is published before an RRP final rule, however, the information protection provisions contained in the SSP final rule would specifically apply to information generated for an RRP as well.

The Secretary has delegated the responsibility to carry out his responsibilities under both sec. 103 and sec. 109 of RSIA, as well as the general responsibility to conduct rail safety rulemakings, codified at 49 U.S.C. 20103, to the Administrator of FRA. *See* 49 CFR 1.89(m) and (oo).

The primary component of an RRP would be an ongoing risk-based hazard management program (risk-based HMP), supported by a risk-based hazard analysis. A properly implemented risk-based HMP would identify hazards and the associated risks on the railroad's system, compare and prioritize the identified risks for mitigation purposes, and develop mitigation strategies to address the risks. An RRP would also be required to contain the following additional components: a safety performance evaluation; a safety outreach component; and a technology analysis and technology implementation plan (which would consider various technologies that may mitigate or eliminate identified hazards and the associated risks). A railroad would also be required to provide RRP training to employees who have significant responsibility for implementing and supporting the railroad's RRP.

Implementation of an RRP would be supported by a written risk reduction program plan (RRP plan) describing the railroad's processes and procedures for implementing the requirements for an RRP. An RRP plan would not be required to contain the results of a railroad's risk-based hazard analysis or to describe specific mitigation strategies. An RRP plan would also be required to contain certain elements that support the development of an RRP, such as a policy statement, a statement of the railroad's RRP goals, a description of the railroad's system, and an RRP implementation plan.

An RRP could be successful only if a railroad engaged in a robust assessment of the hazards and associated risks on its system. However, a railroad may be reluctant to reveal such hazards and risks if there is the possibility that such information may be used against it in a court proceeding for damages. In sec. 109 of the RSIA, Congress directed FRA to conduct a study to determine if it was in the public interest to withhold certain information, including the railroad's assessment of its safety risks and its statement of mitigation measures, from discovery and admission into evidence in proceedings for damages involving personal injury and wrongful death. *See* 49 U.S.C. 20119. FRA contracted with an outside organization to conduct this study, and the study concluded that it was in the public interest to withhold this type of information from these types of proceedings. *See* ''Study of Existing Legal Protections for Safety-Related Information and Analysis of Considerations for and Against Protecting Railroad Safety Risk Reduction Program Information,'' FRA, docket no. FRA–2011–0025–0031, Oct. 21, 2011. Furthermore, Congress authorized FRA, by delegation from the Secretary, to prescribe a rule, subject to notice and comment, to address the results of the study. *See* 49 U.S.C. 20119(b). The proposed rule would address the study's results and set forth protections of certain information from discovery, admission into evidence, or use for other purposes in a proceeding for damages.

An RRP could affect almost all facets of a railroad's operations. To ensure that all employees directly affected by an RRP have an opportunity to provide input on the development, implementation, and evaluation of a railroad's RRP, a railroad would be required to consult in good faith and use its best efforts to reach agreement with all of its directly affected employees on the contents of the RRP plan and any amendments to the plan. Guidance regarding what constitutes ''good faith'' and ''best efforts'' would be included in proposed Appendix B.

FRA anticipates that a final RRP rule would become effective 60 days after the date of publication. However, by statute, the protection of certain information from discovery, admission into evidence, or use for other purposes in a proceeding for damages would not become applicable until one year after the publication of the final rule. Assuming that an SSP final rule could be published before an RRP final rule, FRA would make the SSP information protection provisions applicable to RRP programs as well. This approach would permit a railroad subject to the RRP rule to obtain information protection as soon as possible. A Class I railroad would be required to submit its RRP plan to FRA for review no later than 545 days after the publication date of the final rule. This deadline for submission accounts for the time that must pass before an information protection provision could become applicable. Similarly, railroads with inadequate safety performance or

railroads either reclassified or newly classified by the Surface Transportation Board (STB) as Class I railroads after the effective date of the final rule would not be required to submit RRP plans before the information protection provisions go into effect. These railroads would be required to submit an RRP plan either no later than 90 days after they have either received notification from FRA that they have been determined to have an inadequate safety performance or after the effective date of the STB classification or reclassification, or no later than 545 days after the publication date of the final rule, whichever is later. If an SSP final rule is published before an RRP final rule, permitting the information protection provision of SSP to apply to RRP information, an RRP final rule may require railroads to submit an RRP plan sooner than 545 days after the publication date of the final rule.

Within 90 days of receipt of a railroad's RRP plan, FRA would review the plan and determine whether it meets all the process and procedure requirements set forth in the regulation. FRA will not be reviewing a railroad's risk-based hazard analysis or selection of particular mitigation strategies as part of its RRP plan. If, during the review, FRA determines that the railroad's RRP plan does not comply with the requirements, FRA would notify the railroad of the specific points in which the plan is deficient. The railroad would then have 60 days to correct these deficient points and resubmit the plan to FRA. Whenever a railroad decides to amend its RRP, it would be required to submit an amended RRP plan to FRA for approval and provide a cover letter describing the amendments. A similar approval process and timeline would apply whenever a railroad amends its RRP plan. A railroad should not begin implementing an RRP plan before obtaining FRA approval, as the information protection provisions proposed in this NPRM would not apply to any risk reduction information that was not compiled or collected pursuant to an FRA-approved RRP plan.

The costs for this proposed regulation basically stem from the requirements for each railroad to which this rule would be applicable to have a fully developed and implemented RRP that is supported by an RRP plan. The primary costs come from the development of an ongoing risk-based HMP, the ongoing evaluation of safety performance, and the safety outreach component of the RRP. In addition, there are costs for the development of a technology implementation plan, the consultation process, and internal assessments.

The total cost for this proposed regulation is $18.6 million, undiscounted. The discounted costs over 10 years are $12.7 million, using a 7 percent discount rate, and $15.7 million, using a 3 percent discount rate.

The proposed rule is expected to improve railroad safety on Class I freight railroads by ensuring that railroad accidents/incidents, associated casualties, other railroad-related incidents and workplace injuries decrease through the process of identifying hazards, mitigating the risks associated with those hazards, and decreasing unsafe work practices. Decreases in unsafe behaviors or hazards create a decrease in railroad-related incidents and casualties. The sections of the proposed RRP regulation that contribute most to the potential benefits include improved or more robust safety cultures, hazard identification and risk-based hazard management, allying technology with risk reduction, systemic evaluation of program and mitigation strategy effectiveness, and the protection of information provision in § 271.11.

FRA has performed a break-even analysis for this proposed rule. In this break-even analysis, FRA has estimated the amount of investment (capital expenditure) savings or the decreases in costs stemming from railroad-related incidents (and their associated casualties) for Class I railroads that the proposed rule would need to break even. FRA has found that only a very small improvement in either safety or investment is sufficient to make the proposed rule break-even. The proposed rule would break even if railroad investments improve by less than .006% (6 thousandths of a percent). FRA believes that such an improvement would quite likely result from the adoption and implementation of RRPs by Class I railroads, which would lead to reductions in the (1) number of railroad accidents/incidents and employee injuries; (2) other railroad incidents and related casualties; (3) employee absenteeism; and (4) employee discipline actions.

B. Abbreviations

The following abbreviations are used in this preamble and are collected here for the convenience of the reader:

CFR Code of Federal Regulations
DOT United States Department of Transportation
FMP Fatigue Management Plan
FOIA Freedom of Information Act
FR Federal Register
FRA Federal Railroad Administration
HMP Hazard Management Program
NPRM Notice of Proposed Rulemaking
OST Office of the Secretary, United States Department of Transportation
PTC Positive Train Control
Pub. L. Public Law
RRP Risk Reduction Program
RSAC Railroad Safety Advisory Committee
RSIA Railroad Safety Improvement Act of 2008, Public Law 110–432, Div. A, 122 Stat. 4848
Secretary Secretary of Transportation
SSP System Safety Program
U.S.C. United States Code

II. Background and History

A. What is a risk reduction program?

Risk reduction is a comprehensive, system-oriented approach to improving safety by which an organization formally identifies and analyzes applicable hazards and takes action to mitigate, if not eliminate, the risks associated with those hazards. It provides a railroad with a set of decision making processes and procedures that can help it plan, organize, direct, and control its business activities in a way that enhances safety and promotes compliance with regulatory standards. As such, risk reduction is a form of safety management system, which is a term generally referring to a comprehensive, process-oriented approach to managing safety throughout an organization.

The principles and processes of risk reduction are based on those of safety management systems developed to assure high safety performance in various industries, including aviation, passenger railroads, the nuclear industry, and other industries with the potential for catastrophic accidents. Safety management systems have evolved through experience to include a multitude of equally important elements without which the organization's safety does not reliably improve. For ease of understanding, these elements are typically grouped into larger descriptive categories. For safety management systems, these descriptive categories include: (1) An organization-wide safety policy; (2) formal methods for identifying hazards, and for prioritizing and mitigating risks associated with those hazards; (3) data collection, data analysis, and evaluation processes to determine the effectiveness of mitigation strategies and to identify emerging hazards; and (4) outreach, education, and promotion of an improved safety culture within the organization.

The requirements of the proposed RRP rule provide a framework for reducing safety risk. While each railroad subject to the proposed rule would be required to develop all required components, the scope and complexity

of those components would vary from one railroad to the next, because of the railroads' differing safety needs, capabilities, and available resources. Because risk reduction is inherently scalable, the burdens imposed by the proposed rule would depend upon the size of a railroad, the type of operations the railroad provides, and the strategies for mitigating risk that the railroad decides to use.

B. Passenger Railroads and System Safety Programs

Risk reduction, as a type of safety management system, is not a new concept to FRA. Specifically, FRA has previously worked with passenger railroads to implement system safety programs (SSP), and has published a separate SSP NPRM for passenger railroads. *See* System Safety Program, 77 FR 55372 (proposed Sep. 7, 2012) (to be codified at 49 CFR part 270). FRA anticipates that an SSP final rule will be published before an RRP final rule.

In 1996, FRA issued Emergency Order No. 20, Notice No. 1 (EO 20), which required, among other things, commuter and intercity passenger railroads to promptly develop interim system safety plans addressing the safety of operations that permit passengers to occupy the leading car in a train.[1] *See* 61 FR 6876, Feb. 22, 1996. Subsequently, in 1997 APTA and the commuter railroads, in conjunction with FRA and the U.S. DOT, developed the ''Manual for the Development of System Safety Program Plans for Commuter Railroads,'' to more comprehensively address the safety of these railroad systems. Pursuant to APTA's manual, the existing commuter railroads developed system safety plans, and a triennial audit process for these plans began in early 1998 with FRA's participation. A majority of commuter railroads still participate in APTA's program.

FRA has also developed a ''Collision Hazard Analysis Guide'' to assist passenger rail operators in conducting collision hazard assessments.[2] *See* ''Collision Hazard Analysis Guide: Commuter and Intercity Passenger Rail Service'' (2007), FRA, available at *http://www.fra.dot.gov/eLib/Details/L03191.* The ''Collision Hazard Analysis Guide'' is based both on MIL–STD–882, discussed below, and the hazard identification/resolution processes described in APTA's ''Manual for the Development of System Safety Program Plans for Commuter Railroads.'' The ''Collision Hazard Analysis Guide'' provides a ''step-by-step procedure on how to perform hazard analysis and how to develop effective mitigation strategies that will improve passenger rail safety.'' *See id.* at 5. Although the ''Collision Hazard Analysis Guide'' focuses on passenger rail collisions, the techniques described in the guide are also valid for evaluating other hazards or safety issues related to any type of operating system. *See id.* A railroad subject to the requirements of a final RRP rule could use the ''Collision Hazard Analysis Guide'' as guidance on how to perform a an acceptable hazard analysis.

From its experience with the APTA program and the ''Collision Hazard Analysis Guide,'' FRA has gained substantial knowledge regarding the best methods for developing, implementing, and evaluating SSPs for passenger railroads. This experience is reflected in a recently-published NPRM, developed with the assistance of the Railroad Safety Advisory Committee (RSAC), that would require passenger railroads to develop and implement FRA-approved SSPs.

C. Other Federal Safety Management System Programs

Several Federal agencies have established or proposed safety management system requirements or guidance for regulated entities. For example, the Federal Transit Administration (FTA) has established regulations at 49 CFR part 659 (Rail Fixed Guideway Systems; State Safety Oversight) that implement a Congressional mandate for a program requiring State-conducted oversight of the safety and security of rail fixed guideway systems that are not regulated by FRA. *See* Intermodal Surface Transportation Efficiency Act of 1991, Public Law 102–240, sec. 3029, also codified at 49 U.S.C. 5330; and 60 FR 67034, Dec. 27, 1995.[3]

The Federal Aviation Administration (FAA) has also published an NPRM proposing to require each certificate holder operating under 14 CFR part 121 to develop and implement a safety management system (SMS). *See* 75 FR 68224, Nov. 5, 2010; and 76 FR 5296, Jan. 31, 2011. An SMS ''is a comprehensive, process-oriented approach to managing safety throughout the organization.'' 75 FR 68224, Nov. 5, 2010. An SMS includes: ''an organization-wide safety policy; formal methods for identifying hazards, controlling, and continually assessing risk; and promotion of safety culture.'' *Id.* Under FAA's proposed rule, an SMS would have four components: Safety Policy, Safety Risk Management, Safety Assurance, and Safety Promotion. *Id.* at 68225. In addition, the United States Coast Guard has published an NPRM proposing an SMS regulation for towing vessels. *See* 76 FR 49976, Aug. 11, 2011. Components similar to those included in both the FAA's SMS regulation as well as the Coast Guard's regulation are found in this RRP rule proposed by FRA.

The U.S. Department of Defense (DoD) has also set forth guidelines for a system safety program. In July 1969, DoD published ''System Safety Program Plan Requirements'' (MIL–STD–882). MIL–STD–882 is DoD's standard practice for system safety, with the most recent version, MIL–STD–882E, published on May 11, 2012. DoD, MIL–STD–882E, ''Department of Defense Standard Practice System Safety'' (May 11, 2012). MIL–STD–882 is used by many industries in the U.S., and internationally, and could be useful to a railroad (particularly a smaller railroad with inadequate safety performance) when trying to determine which methods to use to comply with this RRP rule. In fact, MIL–STD–882 is cited in FRA's safety regulations for railroad passenger equipment, 49 CFR part 238, as an example of a formal safety methodology to use in complying with certain analysis requirements in that rule. *See* 49 CFR 238.103 and 238.603. Part 238 defines MIL–STD–882 as a standard issued by DoD ''to provide uniform requirements for developing and implementing a system safety plan and program to identify and then eliminate the hazards of a system or reduce the associated risk to an acceptable.''

D. Risk Reducing FRA Programs

FRA also has established two voluntary, independent programs that exemplify the philosophy of risk reduction: The Confidential Close Call Reporting System (C3RS) and the Clear Signal for Action (CSA) program. FRA has developed these programs in the

[1] FRA issued EO 20 in response to New Jersey Transit (NJT) and Maryland Rail Commuter accidents in early 1996.

[2] FRA developed the ''Collision Hazard Analysis Guide: Commuter and Intercity Passenger Rail Service'' following a January 2005 accident in Glendale, CA, in which a Southern California Regional Rail Authority (Metrolink) commuter train derailed after striking an abandoned vehicle left on the tracks. The derailment caused the Metrolink train to collide with trains on both sides of it, a Union Pacific Railroad Company (UP) freight train and another Metrolink train, and resulted in the death of 11 people.

[3] FTA's part 659 program applies only to rapid transit systems or portions thereof not subject to FRA's regulations. *See* 49 CFR 659.3 and 659.5. FTA amended 49 CFR part 659 in April 2005 to incorporate the experience and insight it had gained regarding the benefits of and recommended practices for implementing State safety oversight requirements. *See* 70 FR 22562, Apr. 29, 2005.

belief that, in addition to process and technology innovations, human factors-based solutions can make a significant contribution to improving safety in the railroad industry.

The FRA C3RS program includes: (1) Voluntary confidential reporting of close-call events by employees; (2) root-cause-analysis problem solving by a Peer Review Team composed of labor, management, and FRA; (3) identification and implementation of corrective actions; (4) tracking the results of change; and (5) reporting the results of change to employees. Confidential reporting and joint labor-management-FRA root-cause problem solving are the most innovative of these characteristics for the railroad industry. Demonstration pilot sites for FRA C3RS are at the Union Pacific Railroad Company (UP), New Jersey Transit, Strasburg Railroad, and the National Railroad Passenger Corporation (Amtrak). An evaluation of one of these demonstration pilot sites indicated that a C3RS program demonstrably resulted in increased safety.[4] *See* Ranney, J. and Raslear, T., ''Derailments decrease at a C3RS site at midterm,'' FRA Research Results: RR12–04, April 2012, available at *http://www.fra.dot.gov/eLib/details/L01321.*

FRA has also implemented the CSA program, another human factors-based solution shown to improve safety. The CSA Program includes: (1) Voluntary peer-to-peer feedback in the work environment on both safe and risky behaviors and conditions (data associated with the program are owned by labor and not disclosed to management); (2) labor Steering Committee root cause analysis and the development of behavior and condition-related corrective actions; (3) Steering Committee implementation of behavior-related corrective actions; (4) joint labor-management Barrier Removal Team refining condition-related corrective actions and implementation; (5) tracking the results of the change; and (6) reporting the results of change to employees. Peer-to-peer feedback on safe and risky behaviors and conditions, root cause analysis, and cooperation between labor and management in corrective actions are the most innovative of these characteristics for the railroad industry. FRA considers the CSA program ready for broad implementation across the industry, as the completion of three demonstration pilots has demonstrated its applicability in diverse railroad work settings. One demonstration pilot covered Amtrak baggage handlers; a second covered UP yard crews; and a third covered UP road crews. *See* Coplen, M. Ranney, J. & Zuschlag, M., ''Promising Evidence of Impact on Road Safety by Changing At-risk Behavior Process at Union Pacific,'' FRA Research Results: RR08–08, June 2008, available at *http://www.fra.dot.gov/eLib/details/L03483;* Coplen, M. Ranney, J., Wu, S. & Zuschlag, M., ''Safe Practices, Operating Rule Compliance and Derailment Rates Improve at Union Pacific Yards with STEEL Process—A Risk Reduction Approach to Safety,'' FRA Research Results: RR09–08, May 2009, available at *http://www.fra.dot.gov/eLib/details/L04248.* After the completion of these pilot projects, BNSF Railway Company (BNSF) elected to participate in a peer-to-peer pilot project, and UP elected to develop and implement a system-wide peer-to-peer program modeled in part on the CSA demonstration pilots. Currently, FRA is funding the development of low cost program materials to aid in its distribution starting with passenger rail.

The C3RS and CSA programs embody many of the concepts and principles found in an RRP: Proactive identification of hazards and risks; analysis of those hazards and risks; and implementation of appropriate action to eliminate or mitigate the hazards and risks. While FRA does not intend to require any railroad to implement a C3RS or CSA program as part of its RRP, FRA believes that these types of programs would be useful for a railroad developing an RRP, and encourages railroads to include such programs as part of their RRPs. FRA seeks comment on the extent to which these programs might be useful in the development of an RRP or as a component of an RRP.

III. Statutory Background

A. Rail Safety Improvement Act of 2008

In sec. 103 of the RSIA, Congress directed the Secretary to issue a regulation requiring certain railroads to develop, submit to the Secretary for review and approval, and implement a railroad safety risk reduction program. *See* 49 U.S.C. 20156. The Secretary has delegated this responsibility to the FRA Administrator. *See* 49 CFR 1.89(oo) (74 FR 26981, Jun. 5, 2009); *see also* 49 U.S.C. 103(g). The railroads required to comply with such a regulation include:

(1) Class I railroads;

(2) Railroad carriers with inadequate safety performance, as determined by the Secretary; and

(3) Railroad carriers that provide intercity rail passenger or commuter rail passenger transportation (passenger railroads).

The proposed rule would implement this railroad safety risk reduction mandate for Class I freight railroads and railroads with inadequate safety performance. *See* 49 U.S.C. 20156(a)(1). Generally, these railroads would be required to assess and manage risk and develop proactive risk mitigation strategies to promote safety improvement. The proposed rule would also implement the Congressional mandate permitting a railroad not required to develop and implement an RRP to voluntarily submit an RRP plan meeting the requirements of any final RRP rule to FRA for review and approval. *See* 49 U.S.C. 20156(a)(4). As proposed, a railroad voluntarily submitting an RRP plan for FRA approval would be required to implement the plan in accordance with FRA's requirements and could be subject to civil penalties for noncompliance. The proposed rule would also implement other specific safety risk reduction program requirements found in sec. 103, such as the requirement that a railroad consult with, employ good faith and use its best efforts to reach agreement with all of its directly affected employees (including any non-profit employee labor organization representing a class or craft of directly affected employees) on the contents of the railroad's RRP plan.

The proposed rule would also respond to sec. 109 of the RSIA, which addresses the protection of information in railroad safety risk analyses. *See* 49 U.S.C. 20118. In sec. 109, Congress specified that certain risk reduction records obtained by the Secretary are exempt from the public disclosure requirements of the Freedom of Information Act (FOIA). *See* 49 U.S.C. 20118. Section 109 also directed FRA to complete a study evaluating whether it is in the public interest (including public safety and the legal rights of persons injured in railroad accidents) to withhold from discovery or admission into evidence in a Federal or State court proceeding for damages involving personal injury or wrongful death against a railroad certain risk reduction information, including a railroad's analysis of its safety risks and its statement of the mitigation measures with which it will address those risks. *See* 49 U.S.C. 20119(a). Based upon authority granted by Congress in sec. 109, the proposed rule contains provisions responding to the results of this study, which found that it is in the public interest to protect certain risk reduction information from discovery or admission into evidence in a Federal or

[4] Additional evaluations will be performed for other demonstration pilot sites as sufficient data become available.

State court proceeding for damages. *See* 49 U.S.C. 20119(b). The study and its results will be discussed in greater depth later in this preamble.

B. Related System Safety Rulemaking

A separate SSP rulemaking, as discussed above, would implement the sec. 103 and sec. 109 RSIA mandates for passenger railroads. *See* 49 U.S.C. 20156(a). On September 7, 2012, FRA published an NPRM proposing an SSP rule in the **Federal Register**. *See* 77 FR 55372. Establishing separate safety risk reduction rules for passenger railroads and the Class I freight railroads [5] would allow these rules to account for significant differences between passenger and freight operations. For example, freight railroads may generate risks uniquely associated with the transportation of hazardous materials. The proposed RRP rule can be specifically tailored to these types of risks, which are not independently generated by passenger railroads.

Some overlap would exist between certain components of the proposed SSP and RRP rules. Most significantly, the RRP and SSP rules would contain essentially identical provisions implementing the consultation requirements of sec. 103(g) and responding to the information protection study mandated under sec. 109 of the RSIA. There was significant discussion during the RRP and SSP RSAC processes on how to implement these provisions of the RSIA. FRA worked with the General Passenger Safety Task Force's System Safety Task Group and the RRP Working Group to receive input regarding how information protection and the consultation process should be addressed, with the understanding that the same language would be included in both the SSP and RRP NPRMs for review and comment. The consultation and information protection provisions proposed in this NPRM, therefore, are essentially identical to those proposed in the 2012 SSP NPRM.

In response to the SSP NPRM, FRA has received a number of comments addressing the proposed consultation and information protection provisions. While FRA intends to discuss these comments further as part of the ongoing RRP and SSP RSAC processes, FRA has decided not to respond to the SSP comments on the consultation and information protection provisions in this NPRM. Any comments submitted to the SSP NPRM regarding these provisions, however, will be considered applicable to the RRP NPRM as well and will be considered before publication of an RRP final rule. Ultimately, FRA anticipates that the consultation and information protection provisions of the SSP and RRP rules will be essentially identical.

Furthermore, FRA intends to make any information protection provision in a final SSP rule applicable to any railroad safety risk reduction program required under chapter II of subtitle B of title 49, Code of Federal Regulations, such as an RRP. When Congress granted FRA authority to issue a rule based upon the results of the study, it also specified that any such rule could not become effective until one year after its adoption. *See* 49 U.S.C. 20119(b). Making an SSP information protection provision applicable to any RRP program would allow RRP information to be protected from use in certain litigation sooner. This would allow a railroad subject to the proposed RRP rule to begin developing its RRP earlier, without having to wait an entire year for the information protection provisions to become effective.

In addition to the proposed consultation and information protection sections, some overlap would exist between various other RRP and SSP provisions (*e.g.,* certain definitions, the process for amending plans, etc.). The requirements in this proposed NPRM generally follow those in the SSP NPRM, and do not reflect any comments FRA has received in response to the SSP NPRM. FRA recognizes that drafting proposals on related topics simultaneously can give the appearance of overlapping or duplicative requirements. As these rulemakings progress, we will work to minimize any overlapping or duplicative requirements.

C. Related Fatigue Management Plans Rulemaking

Section 103(f) of the RSIA states that an RRP must include a fatigue management plan meeting certain requirements. *See* 49 U.S.C. 20156(d)(2) and 20156(f). This proposed RRP rulemaking does not address this mandate, however, because it is currently being considered by a separate rulemaking process.

On December 8, 2011, the RSAC voted to establish a Fatigue Management Plans Working Group (FMP Working Group). The purpose of the FMP Working Group is to provide ''advice regarding the development of implementing regulations for Fatigue Management Plans and their deployment under the Rail Safety Improvement Act of 2008.'' ''Railroad Safety Advisory Committee Task Statement: Fatigue Management Plans,'' Task No.: 11–03, Dec. 8, 2011. (A copy of this statement will be placed in the public docket for this RRP rulemaking.) Specifically, the FMP Working Group is tasked to: ''review the mandates and objectives of the [RSIA] related to the development of Fatigue Management Plans, determine how medical conditions that affect alertness and fatigue will be incorporated into Fatigue Management Plans, review available data on existing alertness strategies, consider the role of innovative scheduling practices in the reduction of employee fatigue, and review the existing data on fatigue countermeasures.'' *Id.*

FRA notes that the RRP Working Group recommended including a placeholder in the proposed RRP rule text that would require a railroad, as part of its RRP, to develop a fatigue management plan no later than three years after the effective date of the final rule, or three years after commencing operations, whichever is later. This placeholder did not contain any additional substantive requirements, however, and was intended merely to be an acknowledgement of the RSIA fatigue management plan mandate. FRA has elected to not include this placeholder; however, because it may create confusion regarding the separate FMP Working Group process and the ongoing fatigue management plans rulemaking. Rather, FRA will address the substantive requirements of the fatigue management plan mandate in the separate rulemaking that FRA has initiated. FRA would approve an RRP plan without the fatigue management plan component prior to the issuance of fatigue management final rule, provided the plan met all other applicable RRP requirements. Until the fatigue management plan final rule is effective, a railroad could use the processes and procedures in its RRP to address fatigue-related issues.

IV. Proceedings to Date

A. Advance Notice of Proposed Rulemaking (ANPRM)

On December 8, 2010, FRA published an ANPRM soliciting public comment on how FRA could best develop and implement a risk reduction regulation based upon the requirements of the RSIA. *See* 75 FR 76345–76351.

[5] There is only one Class I railroad that also qualifies as a passenger railroad: Amtrak. Amtrak would be required to comply with the proposed requirements of the SSP rule. So long as Amtrak remains in compliance with the requirements of an SSP rule, Amtrak would be deemed to be in compliance with an RRP rule. This same approach will be taken for any passenger railroad that also becomes designated as a Class I railroad.

Comments were due by February 7, 2011.

FRA received 11 written comments in response to the ANPRM from a variety of entities, including railroads, industry organizations, non-profit employee labor organizations, a consulting firm, and a private citizen.[6] Many of the questions and issues raised by commenters were subsequently discussed in depth during the RSAC process. This NPRM, therefore, will contain only a very brief overview of the comments. Written comments submitted in response to the ANPRM are in the public docket for this proceeding and can be viewed and downloaded at *www.regulations.gov.*

Many of the ANPRM commenters identified similar issues or questions. Two commenters recommended that FRA develop a performance-based risk reduction rule, in order to encourage railroads to find flexible and creative solutions to safety risks. These commenters also stressed the importance of protecting risk reduction information from disclosure and use in litigation. Other commenters requested clarification on the relationship between risk reduction and system safety, or expressed concerns related to how a risk reduction rule would address issues such as contractors or training requirements. Commenters also provided recommendations on how FRA should identify railroads with inadequate safety performance. Several labor organizations also submitted a joint comment strongly emphasizing the importance of the sec. 103(g) consultation requirements. Issues such as the above were subsequently discussed at length with both industry and labor organization representatives during the RSAC process.

B. Public Hearings

Following publication of the ANPRM and close of the comment period, FRA also held two public hearings that provided interested persons an opportunity to discuss the development of a risk reduction regulation in response to the ANPRM. Interested persons were invited to present oral statements and to proffer information and views at the hearings. The first public hearing was held on July 19, 2011 in Chicago, IL, and the second public hearing was held on July 21, 2011 in Washington, DC. *See* 76 FR 40320, July 8, 2011. During the hearings, testimony was given by representatives of the AAR, ASLRRA, Rail World, Inc., and the Teamsters Rail Conference (the BLET/IBT and BMWED/IBT). As with the comments in response to the ANPRM, the hearing testimony focused almost exclusively on topics that continued to be discussed during the RSAC process. Significant topics of discussion included the following: The identification of railroads with inadequate safety performance; the consultation requirements of sec. 103(g); the role of contractors within a railroad's RRP; the information protection study mandated by sec. 109; retention of RRP records; and FRA review of a railroad's RRP. Transcripts of the public hearings are in the public docket for this proceeding and can be viewed and downloaded at *www.regulations.gov.*

C. Railroad Safety Advisory Committee (RSAC)

Following the close of the ANPRM comment period and the public hearings, FRA decided that additional input regarding the development of a risk reduction regulation would be beneficial. FRA therefore placed the risk reduction rulemaking into a modified RSAC process, which discussed many of the questions and concerns that appeared in the ANPRM and in responses thereto.

1. Risk Reduction Program (RRP) Working Group

FRA proposed Task No. 11–04 to the RSAC on December 8, 2011. The RSAC accepted the task, and formed the Risk Reduction Program (RRP) Working Group (Working Group) for the purpose of developing and implementing RRP under the RSIA. The Working Group is comprised of members from the following organizations:

- AAR;[7]
- Amtrak;
- APTA;
- ASLRRA;
- BLET;
- BMWED;
- BRS;
- FRA;
- Long Island Rail Road (LIRR);
- Metro-North Commuter Railroad Company (Metro-North);
- National Association of Railroad Passengers (NARP);
- National Railroad Construction and Maintenance Association;
- National Transportation Safety Board (NTSB);
- SEPTA;
- TRA; and
- UTU.

The Working Group completed its work after four in-person meetings and several conference calls. The first meeting of the Working Group took place on January 31 and February 1, 2012, in Cambridge, Massachusetts. At that meeting the group discussed the appropriate scope of a risk reduction regulation and heard several presentations from stakeholders regarding the requirements of the RSIA and current risk reduction practices on railroads. Subsequent meetings were held in Washington, DC on April 10, 2012; May 16, 2012; and June 13, 2012.

At the April, May, and June meetings, the group discussed a document entitled ''Recommendations to the Administrator,'' which provided FRA advice to consider in developing a risk reduction rule. The document was updated after each meeting to reflect the Working Group's discussions.

2. Working Group Tentative Agreement Vote

At the conclusion of the Working Group's last meeting on June 13, 2012, the Working Group obtained tentative agreement on the ''Recommendations to the Administrator'' document. This document did not include advice regarding railroads with inadequate safety performance, as this was developed further during subsequent conference calls. The document was also not put before the full RSAC for vote, and therefore does not represent formal RSAC consensus. FRA utilized the comments and documents from the Working Group when developing the proposed rule text, although it has streamlined and reorganized suggestions from the Working Group in order to make the rule's requirements as clear as possible. FRA has also attempted to note in this NPRM areas in which the proposed rule text substantively differs from the Working Group's suggestions. Ultimately, however, language contained in this proposed rule reflects

[6] The following 18 entities were signatories to comments in response to the ANPRM: Amtrak; Association of American Railroads (AAR); Association of Railways Museums, Inc. (ARM); American Public Transportation Association (APTA); American Short Line and Regional Railroad Association (ASLRRA); American Train Dispatchers Association (ATDA); Behavioral Science Technology (BST); Brotherhood of Locomotive Engineers and Trainmen (BLET/IBT); Brotherhood of Maintenance of Way Employees Division (BMWED/IBT); Brotherhood of Railroad Signalmen (BRS); Metrolink; New York State Metropolitan Transportation Authority (NYSMTA); Patrick J. Coyle (Chemical Facility Security News); Southern Pennsylvania Transportation Authority (SEPTA); Transport Workers Union of America (TWU); Transportation Communications Union (TCU); Trinity Railway Express; Tourist Railway Association (TRA); and United Transportation Union (UTU).

[7] The AAR is comprised of members including the following entities: BNSF Railway Company (BNSF); Canadian National Railway Company (CN); Canadian Pacific Railway (CP); CSX Transportation, Inc. (CSXT); Iowa Interstate Railroad, Ltd. (IAIS); Kansas City Southern (KCS); Metra Electric District; Norfolk Southern Corporation (NS); and UP.

the RSIA statutory requirements and the Working Group's tentative agreement on how the requirements should be applied.

V. Railroads With Inadequate Safety Performance

As previously discussed, sec. 103 of the RSIA directs FRA to require railroads with inadequate safety performance (as determined by FRA) to develop and implement an RRP. FRA discussed potential definitions of inadequate safety performance during the April, May, and June 2012 RSAC Working Group meetings, and also conducted several conference calls discussing the issue after the final June 2012 Working Group meeting. These meetings and conference calls developed and refined a general approach to determining inadequate safety performance, and discussed several specific concerns of the ASLRRA, whose member railroads are those most likely to be affected by FRA's approach. For example, participants in the conference calls expressed concerns regarding the need for consistent nationwide application of FRA's approach to determining inadequate safety performance. FRA achieved tentative agreement on the proposed approach, but did not seek consensus.

As a result of these discussions and tentative agreement, FRA developed an annual process, involving two phases, for determining whether a railroad's safety performance may be inadequate. This process would only evaluate railroads that were not already complying with an SSP or RRP rule, including voluntarily-compliant railroads. In the first phase, FRA would conduct a statistical quantitative analysis to determine a railroad's safety performance index, using the three most recent full calendar years' historical data maintained by FRA. The quantitative analysis would utilize the following four factors: (1) Fatalities; (2) FRA reportable injury/illness rate; (3) FRA reportable accident/incident rate; and (4) FRA violation rate. Railroads that had either a fatality, or that were at or above the 95th percentile in at least two of the three other factors (FRA reportable injury/illness, FRA reportable accident/incident, or FRA violation rate), would be further examined in a qualitative assessment. FRA would notify the railroads identified for further examination in a qualitative assessment, and would give them an opportunity to comment and provide evidence explaining why they should or should not be required to develop an RRP. A railroad would also be required to inform its employees that it had received the notification from FRA and that employees could submit confidential comments on the matter directly to FRA. For the second phase of its analysis, FRA would consider the comments from the railroads, and any comments from the railroad's employees, as well as any other pertinent evidence, in a qualitative review of the railroad's safety performance. Following the qualitative review, FRA would notify the affected railroads regarding whether or not they must develop an RRP.

Based on Working Group input and results from the C3RS and CSA projects, FRA also determined appropriate timeframes for compliance, and deadlines for various notices and submissions. A railroad with inadequate safety performance would have to comply with this part 271 for a period of at least five years, after which it could petition FRA for removal from the program. These provisions are discussed further in the section-by-section analysis.

During discussions, the RSAC Working Group advised FRA to allow a railroad with inadequate safety performance to choose to establish either an RRP in compliance with this proposed part 271 or an SSP in compliance with proposed part 270. For reasons discussed further in the section-by-section analysis for § 271.13, FRA has not included this suggestion in the NPRM, but could ultimately include it in a final rule.

VI. Risk Reduction Information Protection

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

As previously discussed, the information protection provisions proposed in this NPRM are essentially identical to provisions in the proposed SSP rule, as there was significant discussion during the SSP and RRP RSAC processes on how to implement this provision of the RSIA. FRA worked with the System Safety Task Group and the Risk Reduction Program Working Group to receive input regarding how information protection should be addressed, with the understanding that the same language would be included in both the SSP and RRP NPRMs for review and comment. While the language proposed in this NPRM does not respond to comments already received in response to the SSP NPRM, FRA will consider comments submitted to both the SSP and RRP NPRMs regarding the information protection provisions when developing an RRP final rule.

A. Exemption From Freedom of Information Act Disclosure

In sec. 109 of the RSIA (codified at 49 U.S.C. 20118–20119), Congress determined that for risk reduction programs to be effective, the risk analyses must be shielded from production in response to Freedom of Information Act (FOIA) requests. *See* 49 U.S.C. 20118. FOIA is a Federal statute establishing certain requirements for the public disclosure of records held by Federal agencies. *See* 5 U.S.C. 552. Formal rules for making FOIA requests to DOT agencies are set forth in 49 CFR part 7. Generally, FOIA requires a Federal agency to make most records available upon request, unless a record is protected from mandatory disclosure by one of nine exemptions. One of those exemptions, known as Exemption 3, applies to records that are specifically exempted from disclosure by statute, if the statute requires that matters be withheld from the public in such a manner as to leave no discretion on the issue or establishes particular criteria for withholding or refers to particular types of matters to be withheld. *See* 5 U.S.C. 552(b)(3) and 49 CFR 7.13(c)(3).[8]

Section 109(a) of the RSIA specifically provides that a record obtained by FRA pursuant to a provision, regulation, or order related to a risk reduction program or pilot program is exempt from disclosure under FOIA. The term ''record'' includes, but is not limited to, ''a railroad carrier's analysis of its safety risks and its statement of the mitigation measures it has identified with which to address those risks.'' *Id.* This FOIA exemption would also apply to records made available to FRA for inspection or copying pursuant to a risk reduction program or pilot program. Section 109(c) also gives FRA the discretion to prohibit the public disclosure of risk analyses or risk mitigation analyses obtained under other FRA regulations if FRA determines that the prohibition of

[8] In 2009, Congress amended 5 U.S.C. 552(b)(3) to require Exemption 3 statutes to specifically cite to sec. 552(b)(3). *See* OPEN FOIA Act of 2009, Public Law 111–83, 123 Stat. 2142, 2184 (Oct. 28, 2009). Because this requirement applies only to statutes enacted after October 29, 2009, however, it does not apply to section 109 of the RSIA, which was enacted in October of 2008.

public disclosure is necessary to promote public safety.

FRA believes that sec. 109 of the RSIA qualifies as an Exemption 3 statute under FOIA. FRA therefore believes that railroad risk reduction records in its possession would generally be exempted from mandatory disclosure under FOIA, unless one of two exceptions provided by the RSIA would apply. *See* 49 U.S.C. 20118(a)–(b). The first exception permits disclosure when it is necessary to enforce or carry out any Federal law. The second exception permits disclosure when a record is comprised of facts otherwise available to the public and when FRA, in its discretion, has determined that disclosure would be consistent with the confidentiality needed for a risk reduction program or pilot program.

B. Discovery and Other Use of Risk Analysis Information in Litigation

1. The RSIA Mandate

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

2. The Study and Its Conclusions

FRA contracted with a law firm, Baker Botts L.L.P., to conduct the study on FRA's behalf. Various documents related to the study are available for review in public docket number FRA–2011–0025, which can be accessed online at *www.regulations.gov.* As a first step, the contracted law firm prepared a comprehensive report identifying and evaluating other Federal safety programs that protect risk reduction information from use in litigation. *See* ''Report on Federal Safety Programs and Legal Protections for Safety-Related Information,'' FRA, docket no. FRA–2011–0025–0002, April 14, 2011. Next, as required by sec. 109 of the RSIA, FRA published a **Federal Register** notice seeking public comment on the issue of whether it would be in the public interest to protect certain railroad risk reduction information from use in litigation. *See* 76 FR 26682, May 9, 2011. Comments received in response to this notice may be viewed in the public docket.

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

3. FRA's Proposal

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

VII. RRP Plan Consultation Requirements

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

FRA is proposing to implement this mandate by requiring each railroad required to establish an RRP to consult with its directly affected employees (using good faith and best efforts) on the contents of its RRP plan. A railroad would have to include a consultation statement in its submitted plan describing how it consulted with its employees. If a railroad and its employees were not able to reach consensus, directly affected employees could file a statement with FRA describing their views on the plan. Additional specifics regarding this proposal are discussed in the section-by-section analysis of this NPRM for proposed §§ 271.207 and 271.209.

As with this NPRM's information protection provisions, the proposed language is essentially identical to provisions proposed in the 2012 SSP NPRM, since there was significant discussion during the SSP and RRP RSAC processes on how to implement this provision of the RSIA. FRA worked with the System Safety Task Group to receive input regarding how the consultation process should be addressed, with the understanding that the same language would be included in both the SSP and RRP NPRMs for review and comment. While the language proposed in this NPRM does not respond to comments already

received in response to the SSP NPRM, FRA will consider comments submitted to both the SSP and RRP NPRMs regarding consultation requirements when developing an RRP final rule.

VIII. Section-by-Section Analysis

FRA proposes to add a new part 271 to chapter 49 of the CFR. Part 271 would satisfy the RSIA requirements regarding safety risk reduction programs for Class I railroads and railroads with inadequate safety performance. *See* 49 U.S.C. 20156(a)(1). Part 271 would also protect certain information compiled or collected pursuant to a safety risk reduction program from admission into evidence or discovery during court proceedings for damages. *See* 49 U.S.C. 20119.

The proposed rule would require a risk reduction program that is a somewhat streamlined version of a safety management system. To adhere as closely as possible to the requirements of the RSIA, FRA has not proposed to include a number of program and plan components that are common to many safety management systems. For example, FRA is not proposing to include a requirement for a description of the railroad management and organizational structure (including charts or other visual representations), but instead asks for a less specific system description. The RRP plan is also not required to contain a description of the processes and procedures used for maintenance and repair of infrastructure and equipment, rules compliance and procedures review, workplace safety, workplace safety assurance, or public safety outreach. FRA is also not proposing to require an RRP to establish processes ensuring that safety concerns are addressed during the procurement process. As additional examples, a full safety management system would also require: (1) Development and implementation of processes to manage emergencies; (2) processes and procedures for the railroad to manage changes that have a significant effect on railroad safety; (3) processes and permissions for making configuration changes to the railroad; and (4) safety certification prior to initiation of operations or implementation of major projects. The proposed RRP rule does not currently include such requirements. FRA is specifically seeking public comments regarding whether any or all of these elements should be considered essential in order for RRP to function effectively, and requirements for such additional elements may be included in the final rule.

The proposed rule contains various filing and communication requirements. FRA is generally requesting public comment on whether any provision imposing a filing or communication requirement should permit a railroad to comply with that requirement electronically.

Subpart A—General

Subpart A of the proposed rule would contain general provisions, including a formal statement of the rule's purpose and scope, and provisions limiting the discovery and admissibility of certain RRP information.

Section 271.1—Purpose and Scope

Proposed § 271.1 would set forth the purpose and scope of the proposed rule. Paragraph (a) would state that the purpose of this part is to improve railroad safety through structured, proactive processes and procedures developed and implemented by railroads. The proposed rule would require each affected railroad to establish an RRP that systematically evaluates railroad safety hazards on its system and manages the risks generated by those hazards in order to reduce the number and rates of railroad accidents/incidents, injuries, and fatalities. The proposed rule would not require an RRP to address every safety hazard on a railroad's system. For example, rather than identifying every safety hazard on its system, a large railroad could take a more focused and project-specific view of safety hazard identification.

Paragraph (b) would state that the proposed rule prescribes minimum Federal safety standards for the preparation, adoption, and implementation of RRPs. A railroad would not be restricted from adopting and enforcing additional or more stringent requirements that are not inconsistent with a rule arising from this proposed rule.

Paragraph (c) would state that the proposed rule protects information generated solely for the purpose of developing, implementing, or evaluating an RRP. FRA may decide not to include this provision in the final rule if an SSP final rule is published significantly before an RRP final rule, so that the SSP information protection provision could be made applicable to RRPs.

Paragraph (d) would contain a clarifying statement indicating that RRPs are not intended to address certain areas of employee safety. While FRA is always concerned with the safety of railroad employees performing their duties, employee safety in maintenance and servicing areas generally falls within the jurisdiction of the United States Department of Labor's Occupational Safety and Health Administration (OSHA). It is not FRA's intent in this rule to displace OSHA's jurisdiction with regard to the safety of employees while performing inspections, tests, and maintenance, except where FRA has already addressed workplace safety issues, such as blue signal protection in 49 CFR part 218. Similar provisions are found in other rules, clarifying that FRA does not intend to displace OSHA's jurisdiction over certain subject matters. *See, e.g.,* 49 CFR 238.107(c). FRA requests public comment on whether this statement clearly indicates the relationship between RRPs and OSHA's jurisdiction.

Similarly, while FRA is concerned with environmental damage that could result from the violation of Federal railroad safety laws and regulations, FRA does not intend this rule to address environmental hazards and risks that are unrelated to railroad safety and that would fall within the jurisdiction of the Environmental Protection Agency (EPA). For example, FRA would not expect a railroad's RRP to address environmental hazards regarding particulate emissions from locomotives that otherwise comply with FRA's safety regulations. FRA seeks public comment on whether it is necessary for this section to contain a clarifying statement regarding any such subject matter that this proposed part may affect, whether potentially implicating the jurisdiction of OSHA, EPA, or another agency of the Federal government.

Section 271.3—Application

The RSIA directs FRA to require each Class I railroad, railroad carrier that has inadequate safety performance, and railroad that provides intercity rail passenger or commuter rail passenger transportation to establish a railroad safety risk reduction program. *See* 49 U.S.C. 20156(a)(1). This proposed rule sets forth requirements related to a railroad safety risk reduction program for Class I freight railroads and railroads with inadequate safety performance. Safety risk reduction programs for railroads that provide intercity rail passenger or commuter rail passenger transportation are being addressed in a separate SSP rulemaking.

Paragraph (a) would state that, except as provided in paragraph (b) of this section, this part applies to Class I railroads, railroads determined to have inadequate safety performance pursuant to proposed § 271.13, and railroads that voluntarily comply with the part 271 requirements pursuant to § 271.15 (voluntarily-compliant railroads).

FRA proposes to exempt certain railroads from the proposed rule's applicability. The applicability exemptions proposed in paragraphs (b)(1) through (4) are general exemptions found in many FRA regulations. The first exemption, proposed in paragraph (b)(1), would apply to rapid transit operations in an urban area that are not connected to the general railroad system of transportation. Paragraph (b)(1) is intended merely to clarify the circumstances under which rapid transit operations would not be subject to FRA jurisdiction under the proposed rule. It should be noted, however, that some rapid transit type operations, given their links to the general system, are within FRA's jurisdiction, and FRA would specifically intend for part 271 to apply to those rapid transit type operations.

Paragraph (b)(2) proposes an exemption for operations commonly described as tourist, scenic, historic, or excursion service, whether on or off the general railroad system of transportation. Tourist, scenic, historic, or excursion rail operations are defined by proposed § 271.5, and this exemption is consistent with other FRA regulations. *See* 49 CFR 227.3(b)(4), 232.3(c)(5), 238.3(c)(3) and 239.3(b)(3). FRA has also proposed to exempt tourist operations, whether on or off the general railroad system of transportation, from the proposed SSP rule. It should be noted, however, that this exemption would not cover any freight operations conducted by a railroad that also performed tourist operations. A railroad with both freight and tourist operations may be required to establish an RRP covering the freight operations if the railroad is determined to have inadequate safety performance. The railroad's tourist operations would also have to be addressed by the RRP to the extent that they created hazards affecting the freight operations. If the tourist operations are conducted by a separate entity, they would have to be addressed by a railroad's RRP as required by proposed § 271.101(d), which would require a railroad to ensure that any persons utilizing or providing safety-sensitive services support and participate in the railroad's RRP. FRA specifically requests public comment on this exemption and how an RRP final rule should address tourist operations that may create hazards for freight operations.

Paragraph (b)(3) would clarify that the requirements of the proposed rule do not apply to the operation of private passenger train cars, including business or office cars and circus train cars. While FRA believes that a private passenger car operation should be held to the same basic level of safety as other passenger train operations, such operations were not specifically identified in the RSIA mandate, and FRA is taking into account the potential burden that would be imposed by requiring private passenger car owners and operators to conform to the requirements of this part. FRA is also proposing to exempt private passenger train cars from the SSP rule, which would implement the RSIA mandate for passenger railroads.

Paragraph (b)(4) proposes an exemption for railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.,* plant railroads, as defined in § 271.5). Plant railroads are typified by operations such as those in steel mills that do not go beyond the plant's boundaries and that do not involve the switching of rail cars for entities other than themselves. Generally, safety issues on a plant railroad are factually unique, limited to a single operation, and can be addressed with targeted safety measures. An RRP is designed to address systemic safety issues on a railroad's operations through proactive processes and procedures. Due to the difference in the type of safety issues plant railroads typically encounter and the complexity of safety issues an RRP is designed to address, plant railroads are exempt from implementing an RRP.

Paragraph (b)(5) would exempt from the proposed RRP rule any commuter or intercity passenger railroad that is already subject to an FRA SSP rule. As RRP and SSP rules would both implement the RSIA mandate for railroad safety risk reduction programs, FRA believes that requiring a commuter or intercity passenger railroad to maintain two separate safety risk reduction programs would be an unnecessary and duplicative burden. FRA is therefore proposing to exempt commuter or intercity passenger railroads required to comply with the SSP rule from the RRP rule's requirements. Railroads should note that this proposal would not exempt freight operations conducted by another railroad on the same track as a commuter or intercity passenger railroad. A railroad with both freight and passenger operations would be required to account for its freight operations in its SSP. FRA is specifically requesting public comment on this proposal and may elect in the final rule to require railroads with both freight and passenger operations to implement both an RRP and SSP, or to implement an RRP accounting for passenger operations.

Section 271.5—Definitions

Proposed § 271.5 would contain a set of definitions clarifying the meaning of important terms used in the proposed rule. The proposed definitions are carefully worded in an attempt to minimize potential misinterpretation of the regulations. FRA requests public comment regarding the terms defined in this section and whether other terms should also be defined.

''Accident/incident'' means (1) any impact between railroad on-track equipment and a highway user (including automobiles, buses, trucks, motorcycles, bicycles, farm vehicles, pedestrians, and all other modes of surface transportation motorized and un-motorized, at a highway-rail grade crossing); (2) any collision, derailment, fire, explosion, act of God, or other event involving operation of railroad on-track equipment (standing or moving) that results in reportable damages greater than the current reporting threshold identified in 49 CFR part 225 to railroad on-track equipment, signals, track, track structures, and roadbed; and (3) each death, injury, or occupational illness that is a new case and meets the general reporting criteria listed in 49 CFR 225.19(d)(1) through (6) if any event or exposure arising from the operation of a railroad is a discernible cause of a significant aggravation to a pre-existing injury or illness. Regarding item (3), the event or exposure arising from the operation of a railroad need only be one of the discernible causes; it need not be the sole or predominant cause. The proposed definition is identical to the definition for ''accident/incident'' contained in FRA's accident/incident reporting regulations at 49 CFR part 225.

''Administrator'' means the Administrator of the Federal Railroad Administration or his or her delegate.

''FRA'' means the Federal Railroad Administration.

''FRA Associate Administrator'' means the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, or the Associate Administrator's delegate.

''Fully implemented'' means that all RRP elements, as described in an RRP plan, have been established and applied to the safety management of the railroad.

''Hazard'' means any real or potential condition that can cause injury, illness, or death; damage to or loss of a system, equipment, or property; or damage to the environment. Because the proposed definition would be limited to hazards

identified in a railroad's risk-based hazard analysis, discussed in proposed § 271.103, this would include hazards related to ''infrastructure; equipment; employee levels and work schedules; operating rules and practices; management structure; employee training; and other areas impacting railroad safety that are not covered by railroad safety laws or regulations or other Federal laws or regulations.'' FRA does not intend this definition to include hazards that are completely unrelated to railroad safety and that would fall exclusively under the jurisdiction of either OSHA or the EPA. The proposed definition is identical to the SSP NPRM's proposed definition for ''hazard'' and is based on an existing definition of the term found in 49 CFR part 659, which contains FTA's regulations regarding system safety program plans. *See* 49 CFR 659.5. The RSAC RRP Working Group advised FRA to specify that the ''system'' referenced by the definition of ''hazard'' was a ''safety system.'' FRA decided not to follow this suggestion, however, in order to maintain consistency between the proposed RRP and SSP rules. FRA also believes that the descriptor ''safety'' would improperly limit the scope of the proposed definition. An RRP should address hazards that could result in damage or loss to any system related to the railroad's operations, and not merely safety systems.

''Inadequate safety performance'' means safety performance that FRA has determined to be inadequate based on the analysis described in proposed § 271.13.

''Mitigation strategy'' means an action or program to reduce or eliminate the risk generated by a hazard.

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

''Pilot project'' means a limited scope project used to determine whether quantitative proof suggests that a particular system or mitigation strategy has potential to succeed on a full-scale basis.

''Plant railroad'' means a type of operation that has traditionally been excluded from the application of FRA regulations because it is not part of the general railroad system of transportation. Under § 271.3, FRA has chosen to exempt plant railroads, as defined in this proposed section, from the proposed rule. In the past, FRA has not defined the term ''plant railroad'' in other regulations that it has issued because FRA assumed that its ''Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws, The Extent and Exercise of FRA's Safety Jurisdiction'', 49 CFR part 209, Appendix A (FRA's Policy Statement or the Policy Statement), provided sufficient clarification as to the definition of that term. However, it has come to FRA's attention that certain rail operations believed that they met the characteristics of a plant railroad, as set forth in the Policy Statement, when, in fact, their rail operations were part of the general railroad system of transportation (general system) and therefore did not meet the definition of a plant railroad. FRA would like to avoid any confusion as to what types of rail operations qualify as plant railroads. FRA would also like to save interested persons the time and effort needed to cross-reference and review FRA's Policy Statement to determine whether a certain operation qualifies as a plant railroad. Consequently, FRA has decided to define the term ''plant railroad'' in this part 271.

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

The proposed definition of the term ''plant railroad'' is consistent with FRA's longstanding policy that it will exercise its safety jurisdiction over a rail operation that moves rail cars for entities other than itself because those movements bring the track over which the entity is operating into the general system. *See* 49 CFR part 209, Appendix A. Indeed, FRA's Policy Statement provides that ''operations by the plant railroad indicating it [i]s moving cars on . . . trackage for other than its own purposes (*e.g.,* moving cars to neighboring industries for hire)'' brings plant track into the general system and thereby subjects it to FRA's safety jurisdiction. 49 CFR part 209, Appendix A. Additionally, this interpretation of the term ''plant railroad'' has been upheld in litigation before the U.S. Court of Appeals for the Fifth Circuit. *See Port of Shreveport-Bossier* v. *Federal Railroad Administration,* No. 10–60324 (5th Cir. 2011) (unpublished per curium opinion).

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

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

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

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

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

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

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

''Risk-based HMP'' means a risk-based hazard management program.

''Risk reduction'' means the formal, top-down, organization-wide approach to managing safety risk and assuring the effectiveness of safety risk mitigation strategies. It includes systematic procedures, practices, and policies for the management of safety risk.

''RRP'' means a Risk Reduction Program.

''RRP plan'' means a Risk Reduction Program plan.

''Safety culture'' means the shared values, actions, and behaviors that demonstrate a commitment to safety over competing goals and demands. FRA is proposing this definition because the RSIA requires a railroad's RRP to address safety culture. *See* 49 U.S.C. 20156(c). Because there was significant discussion in the RRP Working Group as to whether this definition was needed, however, FRA specifically requests public comment on the necessity and content of the proposed definition.

The proposed ''safety culture'' definition was discussed in the section-by-section analysis of the SSP NPRM. *See* 77 FR 55382. This definition is based on a research paper published by the DOT Safety Council. *See* U.S. Dep't of Transp., Safety Council, ''Safety Culture: A Significant Driver Affecting Safety in Transportation 2'' (2011), available at *http://safetycouncil.dot.gov/publications/safety-research-paper.pdf.* The DOT Safety Council developed this definition after extensive review of definitions used in a wide range of industries and organizations over the past two decades.

FRA acknowledges that this proposed definition is different than the one recommended by the RRP Working Group, and that railroads may have a different understanding of what constitutes safety culture. During RRP Working Group discussions, for example, some participants expressed the concern that the language ''over competing goals and demands'' would require a railroad to make safety the ultimate priority to the exclusion of all other concerns, without providing flexibility for a railroad to balance the concerns of profit and efficiency. FRA believes it is important, however, to utilize in this rule a definition that has been formulated by the DOT Safety Council. Furthermore, the proposed definition would not require a railroad to always prioritize safety concerns over competing goals and demands (*i.e.,* it would not require a railroad to have a perfect safety culture). Rather, the definition merely expresses how a safety culture can be evaluated by measuring the extent to which a railroad emphasizes safety over competing goals and demands, without imposing any such requirement.

''Safety performance'' means a realized or actual safety accomplishment relative to stated safety objectives.

''Safety outreach'' means the communication of safety information to support the implementation of an RRP throughout a railroad.

''Senior management'' means personnel at the highest level of a railroad's management who are responsible for making major policy decisions and long-term business plans regarding the operation of the railroad.

''STB'' means the Surface Transportation Board of the United States.

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

The RSAC RRP Working Group recommended including definitions for the following terms: safety performance index and safety performance threshold. FRA determined that these definitions did not provide any additional clarity and were unnecessary. FRA requests public comment regarding whether any of these definitions or any other definitions should be added to the final rule.

Section 271.7—Waivers

Proposed § 271.7 would explain the process for requesting a waiver from a provision of the rule. FRA has historically entertained waiver petitions from parties affected by an FRA regulation. In reviewing such requests, FRA conducts investigations to determine if a deviation from the general regulatory criteria is in the public interest and can be made without compromising or diminishing railroad safety.

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

Section 271.9—Penalties and Responsibility for Compliance

Proposed § 271.9 would contain provisions regarding the proposed penalties for failure to comply with the proposed rule and the responsibility for compliance.

Paragraph (a) would identify the civil penalties that FRA may impose upon any person that violates or causes a violation of any requirement of the proposed rule. These penalties would be authorized by 49 U.S.C. 20156(h), 21301, 21302, and 21304. The proposed penalty provision parallels penalty provisions included in numerous other safety regulations issued by FRA. Essentially, any person that violates any requirement of the rule arising from this rulemaking or causes the violation of any such requirement would be subject to a civil penalty of at least $650 and not more than $25,000 per violation. Civil penalties would be assessed against individuals only for willful violations. Where a grossly negligent violation or a pattern of repeated violations creates an imminent hazard of death or injury to individuals, or causes death or injury, a penalty not to exceed $105,000 per violation could be assessed. In addition, each day a violation continues would constitute a separate offense. Maximum penalties of $25,000 and $105,000 are required by the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, 28 U.S.C. 2461, note, as amended by the Debt Collection Improvement Act of 1996, Public Law 104–134, 110 Stat. 1321–373 (April 26, 1996), which requires each agency to regularly adjust certain civil monetary penalties in an effort to maintain their remedial impact and promote compliance with the law. Furthermore, a person could be subject to criminal penalties under 49 U.S.C. 21311 for knowingly and willfully falsifying reports required by these regulations. FRA believes that the inclusion of penalty provisions for the failure to comply with the regulations is important in ensuring that compliance is achieved. The proposed rule does not include a schedule of civil penalties, but a final rule would contain such a schedule.

Proposed paragraph (b) would clarify that any person, including but not limited to a railroad, contractor, or subcontractor for a railroad, or a local or state governmental entity that performs any function covered by the proposed rule, must perform that function in accordance with the requirements of part 271.

Section 271.11—Discovery and Admission as Evidence of Certain Information

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

Following the issuance of the study, the RSAC met and reached consensus on recommendations regarding the discovery and admissibility of information for the proposed SSP rule, with the understanding that an identical provision would be included in a proposed RRP rule. RSAC recommended that FRA issue a rule that would protect documents generated solely for the purpose of developing, implementing, or evaluating an RRP from: (1) Discovery, or admissibility into evidence, or considered for other purposes in a Federal or State court proceeding for damages involving property damage, personal injury, or wrongful death; and (2) State discovery rules and sunshine laws that could be used to require the disclosure of such information. As previously discussed in section III.B of the preamble, FRA published an SSP NPRM on September 7, 2012, and the information protection language contained in this RRP NPRM is essentially identical to that proposed by the SSP NPRM. *See* 77 FR 55390–55392. While this RRP NPRM does not respond to comments already received in response to the SSP NPRM, FRA will consider comments submitted to both the SSP and RRP NPRMs regarding the information protection provisions when developing an RRP final rule.

Also, sec. 109 of the RSIA mandates that the effective date of a rule prescribed pursuant to that section must be one year after the publication of that rule. FRA believes that the public interest considerations for the protections in § 271.11 are the same for the SSP rule for passenger railroads. Therefore, assuming that an SSP final rule might be published before an RRP final rule, FRA would likely make the SSP information protection provisions applicable to RRP programs as well. The effect of this proposal is that the information protection for RRP would become applicable one year after publication of an SSP final rule, permitting a railroad subject to the RRP rule to obtain information protection as soon as possible. FRA requests public comment regarding this approach.

In this § 271.11, FRA proposes discovery and admissibility protections that are based on the study's results and the RSAC recommendations. FRA modeled this proposed section after 23 U.S.C. 409. In sec. 409, Congress enacted statutory protections for certain information compiled or collected pursuant to Federal highway safety or construction programs. *See* 23 U.S.C. 409. Section 409 protects both data compilations and raw data. A litigant may rely on sec. 409 to withhold certain documents from a discovery request, in seeking a protective order, or as the basis to object to a line of questioning during a trial or deposition. Section 409 extends protection to information that may never have been in any Federal entity's possession.

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

In *Guillen,* the Court considered the application of sec. 409 to documents created pursuant to the Hazard Elimination Program, which is a Federal highway program that provides funding to State and local governments to improve the most dangerous sections of their roads. *Id.* at 133. To be eligible for the program, the State or local government must (1) maintain a systematic engineering survey of all roads, with descriptions of all obstacles, hazards, and other dangerous conditions; and (2) create a prioritized plan for improving those conditions. *Id.*

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

A comparison of the text of sec. 409 with sec. 109, which was added to the U.S. Code by the RSIA, shows that Congress used similar language in both provisions. Given the similar language and concept of the two statutes, and the Supreme Court's expressed acknowledgement of the constitutionality of sec. 409, FRA views sec. 409 as an appropriate model for proposed § 271.11.

FRA proposes that under certain circumstances, information (including plans, reports, documents, surveys, schedules, lists, or data) would not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding for damages. This information may not be used in such litigation for any purpose when it is compiled or collected solely for the purpose of developing, implementing, or evaluating an RRP, including the railroad's analysis of its safety risks conducted pursuant to proposed § 271.103(b) and any identification of the mitigation measures with which it would address those risks pursuant to proposed § 271.103(c). Proposed § 271.11(a) applies to information that may not be in the Federal government's possession; rather, it may be information the railroad has as part of its RRP but would not be required to provide to the Federal government under this part.

The RSIA identifies reports, surveys, schedules, lists, and data as the forms of information that should be included as part of FRA's Study. *See* 49 U.S.C. 20119(a). However, FRA does not necessarily view this as an exclusive list. In the statute, Congress directed FRA to consider the need for protecting information that includes a railroad's analysis of its safety risks and its statement of the mitigation measures with which it would address those risks. Therefore, FRA deems it necessary to include ''documents'' and ''plans'' in this proposed provision to effectuate Congress' directive in sec. 109 of the

RSIA. Notwithstanding, FRA does not propose protecting all documents and plans that are part of an RRP. Rather, as proposed in § 271.11(a), the document has to be ''compiled or collected solely for the purpose of developing, implementing, or evaluating an RRP under this part.'' The meaning of ''compiled or collected solely for the purpose of developing, implementing, or evaluating an RRP under this part'' is discussed below.

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

It is important to note that these proposed protections will only extend to information (including plans, reports, documents, surveys, schedules, lists, or data) that is ''compiled or collected solely for the purpose of developing, implementing, or evaluating an RRP.'' The term ''compiled and collected'' is taken directly from the RSIA. FRA recognizes that railroads may be reluctant to compile or collect extensive and detailed information regarding the safety hazards and associated risks on their system if this information could potentially be used against them in litigation. The term ''compiles'' refers to information that is generated by the railroad for the purposes of an RRP; whereas the term ''collected'' refers to information that is not necessarily generated for the purposes of the RRP, but is assembled in a collection for use by the RRP. It is important to note that the collection is protected; however, each separate piece of information that is not originally compiled for use by the RRP remains subject to discovery and admission into evidence subject to any other applicable provision of law or regulation.

The information has to be compiled or collected solely for the purpose of developing, implementing, or evaluating an RRP. The use of the term ''solely'' means that the original purpose of compiling or collecting the information is exclusively for the railroad's RRP. A railroad cannot compile or collect the information for one purpose and then try to use proposed paragraph (a) to protect that information simply because it also uses that information for its RRP. The railroad's original and primary purpose of compiling or collecting the information must be for developing, implementing, or evaluating its RRP in order for the protections to be extended to that information.

Information a railroad had previously compiled or collected for non-RRP purposes would also not be protected, even if the railroad continued to compile or collect that information as part of its RRP. This is because RSIA limits the protections to information that is compiled or collected pursuant to a risk reduction program required by the statute; therefore, the proposed protections cannot be extended to information that was compiled or collected prior to the proposed rule because that information was not collected pursuant to a risk reduction program required by RSIA. As discussed above, when interpreting section 409, the Supreme Court held that there is no reason to interpret the protections as protecting information plaintiffs would have been free to obtain prior to the enactment of the Hazard Elimination Program. Consistent with the Court's ruling in *Guillen,* the proposed protections would not protect information that plaintiffs would have been free to obtain prior to the enactment of the proposed rule.

Furthermore, a single type of record, plan, document, etc., could contain both information that would be protected under the proposed provision and information that would not be protected. In other words, an entire railroad document or record would not be protected simply because it contained a single piece of information that was protected. For example, if a railroad began collecting a new type of information as part of its accident investigations, and that information was being collected solely for the purpose of developing, implementing, or evaluating its RRP, that specific information would be protected. The information that had been historically collected as part of the railroad's accident investigation program, however, would remain unprotected. FRA stresses that the intent of the proposed provisions is to leave neither railroads nor plaintiffs worse off than before the implementation of an RRP rule.

Additionally, if the railroad is required by another provision of law or regulation to collect the information, the protections of proposed paragraph (a) do not extend to that information because it is not being compiled or collected solely for the purpose of developing, implementing, or evaluating an RRP. For example, information that a railroad must compile pursuant to FRA's accident/incident reporting regulations would not be protected.

The information protections would also not apply to information generated by safety risk reduction programs that do not fully comply with all the requirements of a final RRP rule. Section 109 extends protection to information generated by a safety risk reduction program that includes all the required elements of an RRP; a program that includes one or more, but not all, of the required elements of an RRP would not satisfy these statutory requirements. For example, FRA supports the development of the Short Line Safety Institute (*see http://www.fra.dot.gov/eLib/details/L15890*) to promote the safety of short line and regional railroad operations, information generated by such an institute as part of a short line or regional railroad's risk reduction program would only be protected if: (1) The railroad uses the information generated by the institute in a fully-implemented RRP, and (2) that information meets the other requirements in § 109 to receive protection. It is important to note, however, that RRP is scalable by design. Full compliance with the RRP regulation by a short line or regional railroad is therefore not likely to be as complex and comprehensive as it would be for a larger railroad, and a short line or regional railroad that voluntarily complies with an RRP final rule will receive information protection. FRA therefore believes it would be both unnecessary and not authorized by the RSIA to extend the proposed information protection provisions to safety risk reduction programs that did not fully comply with a final RRP rule. FRA invites public comment on this approach.

The information must be compiled or collected solely for the purpose of developing, implementing, or evaluating an RRP. These three terms are taken directly from the RSIA. They cover the necessary uses of the information compiled or collected solely for the RRP. To develop an RRP, a railroad will need to conduct a risk-based hazard analysis to evaluate and identify the safety hazards and associated risks on its system. This type of information is essential and is information that a railroad does not necessarily already have. In order for the railroad to conduct a robust risk-based hazard analysis to develop its RRP, the protections from discovery and admissibility are extended to the RRP development stage. Based on the information generated by the risk-based

hazard analysis, the railroad would implement measures to mitigate or eliminate the risks identified. To properly implement these measures, the railroad will need the information regarding the hazards and risks on the railroad's system identified during the development stage. Therefore, the protection of this information is extended to the implementation stage. Finally, the railroad would be required to evaluate whether the measures it implements to mitigate or eliminate the hazards and risks identified by the risk-based hazard analysis are effective. To do so, it will need to review the information developed by the risk-based hazard analysis and the methods it has used to implement the elimination/mitigation measures. The use of this information in the evaluation of the railroad's RRP is protected.

The proposed protections would not apply to the fact that a railroad ultimately implemented a particular mitigation strategy, although the protections would apply to the information informing the railroad's decision as part of its RRP. For example, a railroad may elect to implement a new type of technology, such as new track inspection vehicles, as part of its technology implementation plan. Once the railroad is using these new track inspection vehicles, the fact that the railroad is using them is not protected by the proposed provision, as the track inspection vehicles are now serving a purpose other the development, implementation, or evaluation of the railroad's RRP (*i.e.,* they are being used for railroad operational purposes). The manner in which the railroad is using these track inspection vehicles would also not necessarily be protected (*e.g.,* is the railroad operating the track inspection vehicles properly?). Information from the technology analysis and technology implementation plan regarding the adopted track inspection vehicles, however, would remain protected. For example, an analysis of the track inspection vehicles' likely effectiveness in mitigating an identified hazard, as opposed to other mitigation strategies, would remain protected, as would any analyses regarding investment decisions related to the vehicles as opposed to alternative mitigations. Information regarding other technologies that had been analyzed but were not selected as mitigation strategies would also be protected. Information regarding the track inspection vehicles' ultimate effectiveness in addressing the identified hazard and risk would also be protected. FRA specifically requests public comment on this discussion.

The information covered by this proposed section shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding that involves a claim for damages involving personal injury, wrongful death, or property damage. The protections apply to discovery, admission into evidence, or consideration for others purposes. The first two situations come directly from the RSIA; however, FRA determined that for the protections to be effective they must also apply to any other situation where a litigant might try to use the information in a Federal or State court proceeding that involves a claim for damages involving personal injury, wrongful death, or property damage. For example, under proposed § 271.11, a litigant would be prohibited from admitting into evidence a railroad's risk-based hazard analysis. However, without the additional language, the railroad's risk-based hazard analysis could be used by a party for the purpose of refreshing the recollection of a witness or by an expert witness to support an opinion. The additional language, ''or considered for other purposes,'' ensures that the protected information remains out of a proceeding completely. The protections would be useless if a litigant is able to use the information in the proceeding for another purpose. To encourage railroads to perform the necessary vigorous risk analysis and to implement truly effective hazard elimination or mitigation measures, the protections should be extended to any use in a proceeding.

FRA further notes that this proposed section applies to Federal or State court proceedings that involve a claim for damages involving personal injury, wrongful death, or property damage. This means, for example, if a proceeding has a claim for personal injury and a claim for property damage, the protections are extended to that entire proceeding; therefore, a litigant cannot use any of the information protected by this section as it applies to either the personal injury or property damage claim. While sec. 109 of the RSIA only required the study to consider proceedings that involve a claim for damages involving personal injury or wrongful death, the RSAC (which includes both railroad and labor representation) recommended that FRA extend the information protection provisions to proceedings involving claims for property damage as well.

FRA believes it is advisable to follow this RSAC recommendation because extending the proposed information protections to property damage claims is consistent with the goal of encouraging railroads to engage in a robust and candid hazard analysis and to develop meaningful mitigation measures. The typical railroad accident resulting in injury or death also involves some form of property damage. Without protecting proceedings that involve a claim for property damage, a litigant could bring two separate claims arising from the same incident in two separate proceedings, the first for property damages and the second one for personal injury or wrongful death, and be able to conduct discovery regarding the railroad's risk analysis and to introduce this analysis in the property damage proceeding but not in the personal injury or wrongful death proceeding. This means that a railroad's risk analysis could be used against the railroad in a proceeding for damages. If this is the case, a railroad will be hesitant to engage in a robust and candid hazard analysis and develop meaningful mitigation measures. FRA also believes that expanding the information protection provisions to property damage claims would be supported by the same considerations underlying the study's conclusion that protecting risk reduction information from use in civil litigation claims for personal injuries or wrongful death would serve the broader public interest. FRA's proposed approach would also mitigate potential confusion from the application of different discovery and evidential standards for personal injury, wrongful death, and property damage claims all potentially arising from the same event.

Proposed paragraph (b) would ensure that the proposed protections set forth in paragraph (a) do not extend to information compiled or collected for a purpose other than that specifically identified in paragraph (a). This type of information shall continue to be discoverable, admissible into evidence, or considered for other purposes if it was discoverable, admissible, or considered for other purposes prior to the existence of this section. This includes information compiled or collected for a purpose other than that specifically identified in paragraph (a) that either: (1) Existed prior to 365 days after the publication date of a final rule; (2) was compiled or collected prior to 365 days after the publication date of a final rule and continues to be compiled or collected; or (3) is compiled and collected after 365 days after the publication date of a final rule. Proposed paragraph (b) affirms the

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

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

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

Section 271.13—Determination of Inadequate Safety Performance

Proposed § 271.13 would describe FRA's methodology for determining which railroads must comply with this part because they have inadequate safety performance. Overall, this section describes how FRA's analysis would have two phases: A statistically-based quantitative analysis phase followed by a qualitative assessment phase. Only railroads identified as possibly having inadequate safety performance in the quantitative analysis would continue on to the qualitative assessment, as discussed further below.

Proposed paragraph (a) describes FRA's methodology as a two-phase annual analysis, comprised of both a quantitative analysis and a qualitative assessment. This analysis would not include railroads excluded under proposed § 271.3(b) (*e.g.,* commuter or intercity passenger railroads that would be subject to FRA SSP requirements), railroads otherwise required to comply with part 271 (*i.e.,* Class I railroads and railroads previously determined to have inadequate safety performance under this section), railroads that voluntarily comply with this part under proposed § 271.15, and new railroads that have reported accident/incident data to FRA for fewer than three years, except that new railroads formed through an amalgamation of operations (for example, railroads formed through consolidations, mergers, or acquisitions of control) will be included in the analysis using the combined accident/incident data of the pre-amalgamation entities. FRA is requesting public comment on whether and, if so, how, it should also exclude from the analysis railroads formed by splitting off from a larger railroad.

FRA specifically requests comment on whether railroads that comply voluntarily under § 271.15 should be included in FRA's analysis, and FRA's final rule may elect to include voluntarily-compliant railroads in the analysis.

Paragraph (b) would describe the quantitative analysis, which would make a threshold identification of railroads that might have inadequate safety performance. Paragraph (b)(1) would specify that the quantitative analysis would be statistically-based and would include each railroad within the scope of the analysis, using historical safety data maintained by FRA for the three most recent full calendar years. The quantitative analysis would identify four factors regarding a railroad's safety performance: (1) Fatalities; (2) FRA reportable injury/illness rate; (3) FRA reportable accident/incident rate; and (4) FRA violation rate.[9]

The first factor, described in proposed paragraph (b)(1)(i), is a railroad's number of on-duty employee fatalities during the three-year period, determined using Worker on Duty-Railroad Employee (Class A) information reported on FRA Form 6180.55a [10] pursuant to FRA's accident/incident reporting regulations in part 225. FRA is requesting public comment on whether this factor should include fatalities to other classes of persons reported on FRA Form 6180.55a, such as Railroad Employee Not On Duty (Class B), Worker on Duty-Contractor (Class F), Nontrespassers-On Railroad Property (Class D), etc.

The second factor, described in proposed paragraph (b)(1)(ii), is a railroad's FRA on-duty employee injury/illness rate, calculated using ''Worker on Duty-Railroad Employee'' information reported on FRA Form 6180.55a and Form 6180.55 [11] pursuant to FRA's accident/incident reporting regulations in part 225. This rate would be calculated with the following formula:

Injury/Illness Rate = (Total FRA Reportable On-Duty Employee Injuries + Total FRA Reportable On-Duty Employee Occupational Illnesses over a 3-year period) ÷ (Total Employee Hours over a 3-year period/200,000)

This calculation would give the rate of employee injuries and occupational illnesses per 200,000 employee hours calculated over a 3-year period. FRA is requesting public comment on whether this factor should include injuries/illnesses to other classes of persons reported on FRA Form 6180.55a, such as Railroad Employee Not On Duty

[9] During RRP Working Group discussions, the ASLRRA expressed concern that use of FRA violation data to determine safety performance might be inappropriate, because FRA's prosecutorial discretion may result in different railroads receiving more or fewer violations. FRA believes that a railroad identified during the quantitative analysis could raise such a concern during the qualitative assessment, and FRA would consider that concern when making the final determination regarding the railroad's safety performance.

[10] Railroads use Form 6180.55a to report on-duty employee injuries and occupational illnesses.

[11] Railroads use Form 6180.55 to report the number of employee hours.

(Class B), Worker on Duty-Contractor (Class F), Nontrespassers-On Railroad Property (Class D), etc.

The third factor, described in proposed paragraph (b)(1)(iii), is a railroad's FRA reportable rail equipment accident/incident rate, calculated using information reported on FRA Form 6180.54 and Form 6180.55.[12] This rate would be calculated with the following formula:

Rail Equipment Accident/Incident Rate = Total FRA Reportable Rail Equipment Accidents/Incidents over a 3-year period ÷ (Total Train Miles over a 3-year period/ 1,000,000)

This calculation would give the rate of rail equipment accidents/incidents per 1,000,000 train miles calculated over a 3-year period. FRA is not proposing to exclude rail equipment accident/ incidents occurring at highway-rail grade crossings from this calculation, as highway-rail grade crossings present a significant safety issue for many railroads. FRA requests public comment on whether it should consider excluding rail equipment accidents/incidents occurring at highway-rail grade crossings from this calculation.

The fourth factor, described in proposed paragraph (b)(1)(iv), is a railroad's FRA violation rate, calculated using FRA's field inspector data system, which captures the number of violations and is made available to each railroad. The calculation also uses information reported to FRA on Form 6180.55. This rate would be calculated with the following formula:

Violation Rate = Total FRA Violations over a 3-year period ÷ (Total Train Miles over a 3-year period ÷ 1,000,000)

This calculation gives the rate of violations issued by FRA to a railroad per 1,000,000 train miles calculated over a 3-year period.

Proposed paragraph (b)(2) states that the quantitative analysis would identify a railroad as possibly having inadequate safety performance if at least one of two conditions were met. Identified railroads would be examined further in the qualitative assessment, described below.

The first condition would be whether a railroad has had one or more fatalities. FRA considers an on-duty employee fatality a strong indication of inadequate safety performance. If a railroad has at least one fatality within the 3-year period of the quantitative analysis, that railroad will be examined further in the qualitative assessment.

[12] Railroads use Form 6180.54 to report accidents/incidents and Form 6180.55 to report total train miles.

The second condition would be whether a railroad was at or above the 95th percentile in at least two of the three factors described in proposed paragraphs (b)(1)(ii) through (iv) of this section (*e.g.,* a railroad's FRA injury/ illness rate, FRA accident/incident rate, and FRA violation rate). For example, if the scope of data includes a set of 100 railroads, the railroads with the five highest injury/illness rates, accident/ incident rates, or violation rates would be flagged. Those railroads flagged in two or more of these factors would be examined further in the qualitative assessment. Preliminary analyses estimate that FRA's proposed approach would identify approximately 42 railroads over a five year period, which FRA believes is a reasonable pool of potential railroads to examine further in the qualitative analysis. Lowering the threshold to railroads in the 90th percentile would identify approximately 84 railroads, and lowering the threshold further to the 80th percentile would identify approximately about 167 railroads. While FRA believes these lower thresholds would yield a pool too large and unwieldy to address comprehensively in the qualitative analysis, FRA requests public comment on whether it should consider flagging railroads at a threshold either above or below the 95th percentile in two or more of the identified factors.

Proposed paragraph (c) would describe FRA's qualitative assessment of railroads identified in the quantitative analysis as possibly having inadequate safety performance. During the qualitative assessment, FRA would consider input from both a railroad and the railroad's employees, as well as any other pertinent information. FRA believes such input would be helpful in determining whether the quantitative analysis accurately identified a problem with the railroad's safety performance.

Paragraph (c)(1) would state that FRA would provide initial written notification to railroads identified in the threshold quantitative analysis as possibly having inadequate safety performance. Paragraph (c)(1)(i) would further specify that a notified railroad must inform its employees of FRA's notice within 15 days of receiving notification. This employee notification would have to be posted at all locations where a railroad reasonably expects its employees to report for work and have an opportunity to observe the notice. The notice must be continuously displayed until 45 days following FRA's initial notice. A railroad must use other means to notify employees who do not have a regular on-duty point to report for work, consistent with the railroad's standard practice for communicating for employees. Such a notification could take place by email, for example. The notification must inform employees that they may submit confidential comments to FRA regarding the railroad's safety performance, and must contain instructions for doing so. Any such employee comments must be submitted within 45 days of FRA's initial notice.

Likewise, paragraph (c)(1)(ii) would provide railroads 45 days from FRA's initial notice to provide FRA documentation supporting any claim that the railroad does not have inadequate safety performance. For example, if a fatality on railroad property was determined to be due to natural causes (such as cardiac arrest), or an accident/incident due to an act of God, the railroad's chief safety officer could provide a signed letter attesting to the facts, and asserting the railroad's reasons for believing that it should not be found to have inadequate safety performance. A railroad could also submit information regarding any extenuating circumstances of an incident or the severity of an injury (for example, a bee sting may not be as serious a safety concern as a broken bone). FRA will also consider explanations regarding FRA-issued violations, as well as any mitigating action taken by the railroad to remedy the violations.

Paragraph (c)(2) would generally describe the qualitative assessment of railroads identified by the quantitative analysis. During the qualitative assessment, FRA would consider any information provided by a railroad or its employees pursuant to paragraph (c)(1) of this section, as well as any other pertinent information. FRA may communicate with the railroad during the assessment to clarify its understanding of any information the railroad may have submitted. Based upon the qualitative assessment, FRA would make a final determination regarding whether a railroad has inadequate safety performance no later than 90 days following FRA's initial notice to the railroad.

Paragraph (d) would state that FRA will provide a final notification to each railroad given an initial notification pursuant to paragraph (c) of this section, informing the railroad whether or not it has been found to have inadequate safety performance. A railroad with inadequate safety performance must develop and implement an RRP compliant with the proposed rule and must provide FRA an RRP plan no later than 90 days after receiving the final notification, as provided by proposed § 271.301(a).

The RRP Working Group advised FRA to allow a railroad with inadequate safety performance to choose to establish either an RRP in compliance with proposed part 271 or an SSP in compliance with proposed part 270. The Working Group believed that some railroads (particularly smaller railroads more in need of formal structures to help them improve safety) would elect to develop, with FRA assistance, an SSP rather than an RRP. While FRA supports providing additional flexibility to railroads with inadequate safety performance, this provision has not been included in the current rule text because an SSP rule has not yet taken effect. If the SSP rule goes into effect before the publication of an RRP final rule, FRA would review this section and could provide for the choice in the final rule, as advised by the Working Group. FRA is also soliciting additional public comment on such an approach.

Paragraph (e) would state that a railroad with inadequate safety performance would have to comply with the requirements of part 271 for at least five years, running from the date on which FRA approves the railroad's RRP plan. FRA believes a five-year compliance period provides the minimum amount of time necessary for an RRP to have a substantive effect on a railroad's safety performance, particularly if, pursuant to proposed § 271.221, the railroad has taken 36 months (3 years) to fully implement its RRP. An evaluation of an FRA C3RS demonstration site showed the following safety improvements after two and a half years: (1) A 31-percent increase in the number of cars moved between incidents; (2) improved labor-management relationships and employee engagement (*i.e.,* an improved safety culture); and (3) a reduction in discipline cases. FRA believes this evaluation shows that risk-reduction-type programs can successfully yield positive impacts within a period of only a few years. *See* Ranney, J. and Raslear, T., ''Derailments decrease at a C3RS site at midterm,'' FRA Research Results: RR12–04, April 2012, available at *http://www.fra.dot.gov/eLib/details/L01321.* The five-year minimum compliance period should create the time necessary to determine whether safety improvements achieved upon implementation of the RRP are sustainable. Furthermore, the initial development and implementation of an RRP requires the expenditure of resources, and as discussed in the Regulatory Impact Analysis for this proposed rule, FRA does not expect an RRP to create a full level of benefits until the RRP is fully implemented or no later than the fourth year after the implementation of the rule. A minimum five-year compliance period, therefore, provides time for a railroad to begin receiving the full benefits of its RRP investment, although fewer overall benefits could be received if the railroad had elected to take the entire three years provided to fully implement its RRP.

At the end of the five-year period, under proposed paragraph (f), the railroad could petition FRA, according to the procedures for waivers in 49 CFR part 211, for approval to discontinue compliance with part 271. Upon receiving a petition, FRA would evaluate the railroad's safety performance in order to determine whether the railroad's RRP has resulted in significant safety improvements, and whether these measured improvements are likely to be sustainable in the long term. FRA's evaluation would include a quantitative analysis as described in proposed paragraph (b). FRA would also examine qualitative factors and review information from FRA RRP audits and other relevant sources.

Analysis of the railroad's safety performance for purpose of deciding whether its petition should be granted will be driven by the unique characteristics of the railroad and its RRP; for this reason it is not possible to enumerate the types of data that will be examined in the context of a petition to discontinue compliance. In general, FRA would look at information to determine whether real and lasting changes to the operational safety and to the organizational safety culture had been made. The Safety Board will use staff recommendations and other information it deems necessary to make a final determination about whether granting a petition is in the interest of public safety. FRA seeks comment, however, on whether it should specify various factors, criteria, and data that should be considered to determine whether a waiver should be granted. If so, what should those factors, criteria, and data be? FRA may include any such standards in a final rule.

After completing the evaluation, FRA would notify the railroad in writing whether or not it would be required to continue compliance with part 271. FRA specifically requests public comment on whether railroads with inadequate safety performance should be required to comply with part 271 permanently. In general, RRPs are strategies for gradually improving railroad safety over the long-term. If a railroad discontinues an implemented RRP, this could result in the loss of many future safety improvements. Additionally, the development and implementation of an RRP require the expenditure of railroad resources. If an RRP is ended too soon, this might result in a railroad not obtaining the greatest benefit possible from its RRP investment. Requiring permanent compliance for railroads with inadequate safety performance, therefore, could maximize both the safety improvement and benefits of an RRP over the long-term. Furthermore, an inadequate safety performance railroad required to comply with part 271 permanently would also continue to receive the information protections provided for in proposed § 271.11. FRA requests comment on this approach and could elect to require continued compliance for inadequate safety performance railroads in a final rule.

FRA also specifically requests public comment on whether the five-year compliance period in proposed paragraph (e) should run from the date that the railroad's RRP is fully implemented—rather than the date on which FRA approved the railroad's RRP plan—in order to provide more time for the RRP to have a significant effect on the railroad's safety and for FRA to obtain more information in order to determine whether it should consider granting a petition for approval to discontinue compliance with this part. This alternative approach would also provide an incentive for a railroad to implement its RRP quickly, as doing so would then allow the railroad to terminate its RRP sooner as well.

FRA also specifically requests public comment on what should happen when FRA denies an inadequate safety performance railroad's petition to discontinue compliance with part 271. Should the railroad be permitted to submit a new petition as soon as it wishes, or should the regulations impose a new mandatory compliance period upon the railroad? In other words, should FRA permit the railroad to submit a new petition immediately or only after a certain period of time, such as one year or five years?

Railroads should note that § 271.223 proposes to give each affected railroad 36 months, running from the date FRA approves the railroad's RRP plan, to fully implement its RRP. If the final rule ultimately adopts this proposal, FRA anticipates that a petition for approval to discontinue compliance would most likely be unsuccessful if an inadequate safety performance railroad took the entire 36 months to achieve full implementation. In such a scenario, FRA would likely find that a petition could not be granted because it had only two years' worth of data to determine

whether the fully implemented RRP had been successful in improving the railroad's safety performance. FRA would be more likely to grant a petition, however, if the railroad had fully implemented its RRP before the 36-month deadline. FRA anticipates that many inadequate safety performance railroads, with systems significantly smaller than those of Class I railroads, would not require the full 36 months to implement an RRP.

FRA would encourage a railroad with inadequate safety performance to continue its RRP even if FRA grants its petition to discontinue compliance with part 271. If a railroad does continue its RRP, it could be considered a voluntarily-compliant railroad under proposed § 271.15, which would allow proposed § 271.11 to continue to protect information that continues to be compiled or collected pursuant to the railroad's RRP from discovery and admission as evidence in litigation. If a railroad decides not to continue with a part 271-compliant RRP, information that had been compiled or collected pursuant to the part 271-compliant RRP would remain protected under § 271.11. Any information compiled or collected pursuant to a non-compliant RRP, however, would not be protected under § 271.11.

Section 271.15—Voluntary Compliance

The RSIA provides that railroads not required to establish a railroad safety risk reduction program may nevertheless voluntarily submit for FRA approval a plan meeting the requirements of the statute. *See* 49 U.S.C. 20156(a)(4). Proposed § 271.15(a) would implement this language by permitting a railroad not otherwise subject to the proposed rule to voluntarily comply by establishing and fully implementing an RRP that meets the requirements of this part 271. Any such voluntary RRP must be supported by an RRP plan that has been submitted to FRA for approval pursuant to the requirements of proposed subpart D. Paragraph (a) would also clarify that following FRA's approval of the RRP plan for a voluntarily-compliant railroad, the railroad could be subject to civil penalties or other enforcement action if it then failed to comply with the part 271 requirements. It is important to ensure that voluntarily-compliant railroads meet the regulatory requirements because information compiled or collected pursuant to a voluntarily-compliant RRP would be protected from discovery or disclosure in litigation under proposed § 271.11. If the RRP information for a voluntarily-compliant railroad is protected, FRA believes such a railroad should be subject to civil penalties or other enforcement action for failing to comply with part 271. FRA specifically requests public comment on this proposal.

Paragraph (b) would specify that a voluntarily-compliant railroad would be required to comply with this part 271's requirements for a minimum period of five years, running from the date on which FRA approves the railroad's RRP plan. As explained above regarding railroads with inadequate safety performance, FRA believes that a minimum five-year period may provide time for a railroad to realize the safety improvements and benefits associated with its RRP investment. Under proposed paragraph (c), a voluntarily-compliant railroad would be able to petition FRA for approval to discontinue compliance with this part after the end of this five-year period. Any such petition would have to be filed in accordance with the procedures for waivers contained in 49 CFR part 211. This NPRM is not proposing any specific standards for the granting of such petitions other than what are currently found in part 211. FRA requests public comment, however, on whether it should establish such standards and, if so, what those standards should consist of. Furthermore, as with inadequate safety performance railroads, FRA specifically requests public comment on whether the minimum five-year compliance period should run from the date that a railroad's RRP is fully implemented, in order to provide more time for the RRP to have a significant effect on the railroad's safety.

Paragraph (d) would provide that the information protection provisions of proposed § 271.11 (Discovery and admission as evidence of certain information) would not apply to information that was compiled or collected pursuant to a voluntarily-compliant RRP that was not conducted in accordance with the provisions of this part 271. As discussed in the section-by-section analysis for § 271.11, voluntary risk reduction programs (such programs generated as part of a Short Line Safety Institute) would have to fully comply with an RRP final rule in order for the information generated to be protected from discovery and use as evidence in litigation.

During the RSAC process, FRA and the RRP Working Group discussed the possibility of permitting Class II or Class III railroads not otherwise required to comply with this proposed rule to voluntarily comply with an SSP rule instead of an RRP rule. While not proposed in this NPRM, as an SSP rule has not been finalized, FRA is specifically requesting public comment on whether railroads should be permitted to voluntarily comply with an SSP rule. The FRA may elect to either include such an approach in an RRP final rule or to amend an SSP final rule to provide for such.

Subpart B—Risk Reduction Program Requirements

Subpart B would contain the basic elements of an RRP required by the proposed rule. The proposed rule would provide a railroad significant flexibility in developing and implementing an RRP.

Section 271.101—Risk Reduction Programs

Proposed § 271.101 would contain general requirements regarding RRPs. Paragraph (a)(1) would require railroads to establish and fully implement an RRP meeting the requirements of this part 271. As specified by the RSIA, an RRP must systematically evaluate safety hazards on a railroad's system and manage risks associated with those hazards to reduce the number and rates of railroad accidents/incidents, injuries, and fatalities. *See* 49 U.S.C. 20156(a)(1)(A). FRA intends for an RRP to be scalable based upon the size of a railroad. For example, a large railroad would not be expected to identify every safety hazard on its system, but could take a more focused and project specific view of safety hazard identification. A railroad with a smaller system (*e.g.,* a Class II or III railroad determined to have inadequate safety performance), however, might be asked to take a closer look at specific safety hazards.

Paragraph (a) also clarifies that an RRP must be an ongoing program that supports continuous safety improvement. A railroad that conducts a one-time risk-based hazard analysis and does nothing further after addressing the results of that analysis will not have established a compliant RRP. Paragraph (a) would also list the necessary components that an RRP must contain, including: (1) A risk-based hazard management program (described in § 271.103); (2) a safety performance evaluation component (described in § 271.105); (3) a safety outreach component (described in § 271.107); (4) a technology analysis and technology implementation plan (described in § 271.109); and (5) RRP implementation and support training (described in § 271.111).

Paragraph (b) would require a railroad's RRP to be supported by an RRP plan, meeting the requirements of

proposed subpart C, that has been approved by FRA.

Paragraph (c) would address railroads subject to the RRP rule that host passenger train service for passenger railroads subject to the requirements of the proposed SSP rule. Under § 270.103(a)(2) of the proposed SSP rule, a passenger railroad must communicate with each host railroad to coordinate the portions of its SSP plan that are applicable to the host railroad. Paragraph (c) would require a host railroad, as part of its RRP, to participate in this communication and coordination with the passenger railroad.

Paragraph (d) would require a railroad to ensure that persons utilizing or performing on its behalf a significant safety-related service support and participate in the railroad's RRP. Such persons would include entities such as host railroads, contract operators, shared track/corridor operators, or other contractors utilizing or performing significant safety-related services, and must be identified by the railroad in its RRP plan pursuant to proposed § 271.205(b).

Section 271.103—Risk-Based Hazard Management Program

This proposed section would contain the requirements for each risk-based hazard management program (HMP). Proposed § 271.103(a)(1) would require a railroad's RRP to include a risk-based HMP that proactively identifies hazards and mitigates the risks associated with those hazards. A risk-based HMP must be integrated, system-wide, and ongoing. The scope of a risk-based HMP would be scalable based upon the size and extent of the railroad's system.

Paragraph (a)(2) proposes that a risk-based HMP must be fully implemented (*i.e.,* activities initiated) within 36 months after FRA approves a railroad's RRP plan. Full implementation means that a railroad should have completed its risk analysis and begun mitigation strategies within 36 months of plan approval. If a railroad elects to test a mitigation strategy in a pilot project (as permitted by proposed § 271.103(c)(2)), ''fully implemented'' means that the pilot project must be fully operational within 36 months.

Paragraph (b) would state that a railroad must conduct a risk-based hazard analysis as part of its risk-based HMP. The types of principles and processes that inform a successful risk-based hazard analysis have already been well-established by programs previously discussed in this preamble, such as MIL–STD–882, APTA's ''Manual for the Development of System Safety Program Plans for Commuter Railroads'', and FRA's ''Collision Hazard Analysis Guide.'' A railroad subject to a final RRP rule could use any of these programs for guidance on how to conduct a risk-based hazard analysis, pursuant to FRA's approval of the processes in the railroad's RRP plan under proposed § 271.211. As described in the ''Collision Hazard Analysis Guide,'' a risk-based hazard analysis is performed to identify hazardous conditions for the purpose of mitigation, and could include several analysis techniques applied throughout the lifetime of an RRP. *See* ''Collision Hazard Analysis Guide'' at 8. A full hazard analysis could consist of various analyses, including a Preliminary Hazard Analysis, Failure Modes and Effects Analysis, Operating Hazard Analysis, and others, although existing operations already designed, built, and operating may not require all these analyses. *Id.* FRA specifically requests public comment regarding what type of additional guidance would help railroads comply with the requirements of this proposed section.

Paragraph (b) specifies that, at a minimum, a risk-based hazard analysis must address the following components of a railroad's system: Infrastructure; equipment; employee levels and work schedules; operating rules and practices; management structure; employee training; and other areas impacting railroad safety that are not covered by railroad safety laws or regulations or other Federal laws or regulations.

While the RSIA directed railroads to address safety culture in their risk-based hazard analyses, FRA chose not to be prescriptive regarding this requirement, as prescribing how risk-based hazard analysis would identify hazards generated by a safety culture would be difficult. FRA would require railroads to measure their safety culture, however, in proposed § 271.105(a), and believes that this proposed approach would adequately address any related safety concerns presented by a railroad's safety culture. With respect to measuring safety culture, the proposed rule would permit railroads to identify the safety culture measurements methods that they find most effective and appropriate to their local conditions. When measuring safety culture, FRA would expect a railroad to use a method that was capable of correlating a railroad's safety culture with actual safety outcomes. For example, such measurement methods could include surveys that assess safety culture using validated scales, or some other method or measurement that accurately identifies aspects of the railroad's safety culture that correlate to safety outcomes. Ultimately, FRA would expect a railroad to demonstrate that improvements in the measured aspects of safety culture would reliably lead to reductions in accidents, injuries, and fatalities. FRA requests public comment on how a railroad should measure its safety culture as part of its RRP.

As further described in paragraph (b), a risk-based hazard analysis must identify hazards by analyzing the following: (1) Various aspects of the railroad's system (including any operational changes, system extensions, or system modifications); and (2) accidents/incidents, injuries, fatalities, and other known indicators of hazards (such as data compiled from a close call reporting program). A railroad must then calculate risk by determining and analyzing the likelihood and severity of potential events associated with the identified hazards. These risks must then be compared and prioritized for the purpose of mitigation.

Paragraph (c)(1) would require a railroad, based on its risk-based HMP, to design and implement mitigation strategies that improve safety by mitigating or eliminating aspects of a railroad's system that increase risks identified in the risk-based hazard analysis and enhancing aspects of a railroad's system that decrease risks identified in the risk-based hazard analysis. As provided in proposed paragraph (c)(2), a railroad could use pilot projects (including those conducted by other railroads) to determine whether quantitative data suggests that a particular mitigation strategy has potential to succeed on a full-scale basis. FRA anticipates that railroads will design and implement mitigation strategies that are either cost-beneficial or cost-neutral. FRA requests public comment on this assumption. FRA is specifically interested in the experience of any railroads that may have already utilized risk reduction strategies, and whether or not such railroads have realized cost benefits from the design and implementation of risk mitigation strategies. In railroads' experiences, how much have mitigation strategies related to risk reduction activities cost?

As discussed above in the analysis of the purpose and scope provisions of proposed § 271.1, FRA does not intend the proposed regulation to address hazards and risks that are completely unrelated to railroad safety and that would fall directly under the jurisdiction of either OSHA or the EPA. FRA would not, therefore, expect a risk-based HMP to address hazards and risks that go beyond the limits of FRA's railroad safety jurisdiction. A risk-based

HMP should, however, include railroad safety hazards and risks that could result in damage to the environment, such as a derailment that could result in a hazardous materials release. In such situations, the underlying hazard or risk would fall within FRA's railroad safety jurisdiction. FRA seeks public comment on whether this section should include a statement clarifying the railroad safety scope of the risk-based HMP.

Additionally, the proposed regulation does not define a level of risk that railroads must target with their risk-based HMPs. FRA's Passenger Equipment Safety Standards require passenger railroads, however, when procuring new passenger cars and locomotives, to ensure that fire safety considerations and features in the design of the equipment reduce the risk of personal injury caused by fire to an acceptable level using a formal safety methodology such as MIL–STD–882. *See* 49 CFR 238.103(c). Passenger railroads operating Tier II passenger equipment are also required to eliminate or reduce risks posed by identified hazards to an acceptable level. *See* 49 CFR 238.603(a)(3). FRA seeks comment on whether a final RRP rule should define levels of risks that a railroad's risk-based HMP must target.

Section 271.105—Safety Performance Evaluation

This section would contain requirements for safety performance evaluations. Safety performance evaluation is a necessary part of a railroad's RRP because it determines whether the RRP is effectively reducing risk. It also monitors the railroad's system to identify emerging or new risks. In this sense, it is essential for ensuring that a railroad's RRP is an ongoing process, and not merely a one-time exercise.

Paragraph (a) would require a railroad to develop and maintain ongoing processes and systems for evaluating the safety performance of a railroad's system. A railroad must also develop and maintain processes and systems for measuring its safety culture. For example, a railroad could measure its safety culture by surveying employees and management to establish an initial baseline safety culture, and then comparing that initial baseline to subsequent surveys. FRA would give a railroad substantial flexibility, however, to decide which safety culture measurement was the best fit for the organization. FRA's primary concern would be that the selected measurement would provide a way to demonstrate that an improvement in the safety culture measurement would reliably lead to a corresponding improvement in safety. Overall, a safety performance evaluation would consist of both a safety monitoring and a safety assessment component.

Paragraph (b) would establish the safety monitoring component by requiring a railroad to monitor the safety performance of its system. At a minimum, a railroad must do so by establishing processes and systems for acquiring safety data and information from the following sources: (1) Continuous monitoring of operational processes and systems (including any operational changes, system extensions, or system modifications); (2) periodic monitoring of the operational environment to detect changes that may generate new hazards; (3) investigations of accidents/incidents, injuries, fatalities, and other known indicators of hazards; (4) investigations of reports regarding potential non-compliance with Federal railroad safety laws or regulations, railroad operating rules and practices, or mitigation strategies established by the railroad; and (5) a reporting system through which employees can report safety concerns (including, but not limited to, hazards, issues, occurrences, and incidents) and propose safety solutions and improvements. The requirement for a reporting system would not require a railroad to establish an extensive program like FRA's Confidential Close Call Reporting System (C3RS). Rather, a railroad would have substantial flexibility to design a reporting system best suited to its own organization (or, if a railroad already has some sort of reporting system, to modify it to meet the needs of the railroad's RRP). For example, a railroad could decide whether or not it wanted its reporting system to be confidential or non-punitive.[13] Or, in the alternative, the reporting system could be something as simple as a suggestion box made available to employees.

Paragraph (c) would establish the safety assessment component, the purpose of which is to assess the need for changes to a railroad's mitigation strategies or overall RRP. To do so, a railroad must establish processes to analyze the data and information collected pursuant to the safety monitoring component of this section, as well as any other relevant data regarding the railroad's operations, products, and services. At a minimum, this safety assessment must: (1) Evaluate the overall effectiveness of the railroad's RRP in reducing the number and rates of railroad accidents/incidents, injuries, and fatalities; (2) evaluate the effectiveness of the railroad's RRP in meeting the goals described in its RRP plan pursuant to proposed § 271.203(c); (3) evaluate the effectiveness of risk mitigations in reducing the risk associated with an identified hazard (any hazards associated with ineffective mitigation strategies would be required to be reevaluated through the railroad's risk-based HMP); and (4) identify new, potential, or previously unknown hazards, which shall then be evaluated by the railroad's risk-based HMP.

Section 271.107—Safety Outreach

This section contains requirements regarding the safety outreach component of an RRP. Under proposed paragraph (a), an RRP must include a safety outreach component that communicates RRP safety information to railroad personnel (including contractors) as that information is relevant to their positions. At a minimum, a safety outreach program must: (1) Convey safety-critical information; (2) explain why RRP-related safety actions are taken; and (3) explain why safety procedures are introduced or changed.

Railroads should note that this section imposes only a general education and communication requirement (similar to a briefing), and not a training curriculum requirement that would require railroads to test and qualify employees on the information conveyed. The focus of this section would be limited to outreach and safety awareness. A limited one-time RRP training requirement for railroad employees who have significant responsibility for implementing and supporting a railroad's RRP is contained in proposed § 271.111, discussed below. Furthermore, this section would only require a railroad to communicate RRP safety information that is relevant to an employee's position. For example, a railroad could be expected to notify railroad employees of a mitigation strategy that is being implemented that requires employee participation (*e.g.,* a close call program). A railroad would also have to communicate safety information to employees who worked

[13] If a railroad elected to use a reporting system that was non-punitive in nature, FRA would expect it to contain certain limitations that would prevent the system from becoming a way for railroad employees to completely avoid culpability for any type of wrongdoing, such as willful misconduct. For example, FRA's C3RS pilot programs do not protect an employee from discipline under certain circumstances, including when: The employee's action or lack of action was intended to damage property, injure individuals, or place others in danger; the employee's action or lack of action involved a criminal defense; and the event resulted in an identifiable release of hazardous materials. FRA would expect any railroad non-punitive reporting system to have similar limitations.

in the implementation and support of the RRP, in addition to providing these employees the implementation and support training proposed in § 271.111. For example, a railroad would be expected to communicate the effect the RRP was having on the railroad's overall safety performance to employees who implemented and supported the railroad's RRP. This section would not, however, require a railroad to train all employees on RRP requirements and principles. This section would also not require a railroad to provide employees any sort of job-specific training.

Paragraph (b) would require a railroad to report the status of risk-based HMP activities to railroad senior management on an ongoing basis. A railroad would have flexibility in its RRP plan to specify what ''ongoing basis'' means.

Section 271.109—Technology Analysis and Technology Implementation Plan

This section would implement the RSIA requirement that an RRP include a technology analysis and a technology implementation plan. *See* 49 U.S.C. 20156(e).

Paragraph (a) would require a Class I railroad to conduct a technology analysis and to develop and adopt a technology implementation plan no later than three years after the publication date of the final rule. A railroad with inadequate safety performance shall conduct a technology analysis and develop and adopt a technology implementation plan no later than three years after receiving final written notification from FRA that it shall comply with this part, pursuant to § 271.13(e), or no later than three years after the publication date of the final rule, whichever is later. A railroad that the STB reclassifies or newly classifies as a Class I railroad shall conduct a technology analysis and develop or adopt a technology implementation plan no later than three years following the effective date of the classification or reclassification or no later than three years after the effective date of the final rule, whichever is later. A voluntarily-compliant railroad shall conduct a technology analysis and develop and adopt a technology implementation plan no later than three years after FRA approves the railroad's RRP plan. It is important to note that the technology implementation plan needs to be adopted within three years of the various events described in paragraph (a), not necessarily the actual technology. FRA understands that certain technologies may take longer than three years to properly implement, and the three year timeline in paragraph (a) does not apply to this technology. FRA would, however, expect a railroad to implement technology in a timely manner consistent with its implementation plan. Further, as addressed by paragraph (d), if a railroad implements technology pursuant to 49 CFR part 236, subpart I (Positive Train Control Systems), the railroad is required to comply with the timeline set forth in RSIA.

Under paragraph (b), a technology analysis must evaluate current, new, or novel technologies that may mitigate or eliminate hazards and the resulting risks identified through the risk-based hazard management program. The railroad would analyze the safety impact, feasibility, and costs and benefits of implementing technologies that will mitigate or eliminate hazards and the resulting risks. At a minimum, a technology analysis must consider processor-based technologies, positive train control (PTC) systems, electronically-controlled pneumatic brakes, rail integrity inspection systems, rail integrity warning systems, switch position monitors and indicators, trespasser prevention technology, and highway-rail grade crossing warning and protection technology. FRA specifically requests public comment on whether a technology analysis should be required to consider additional technologies, or whether some of the proposed technologies do not need to be addressed by the technology analysis.

Under paragraph (c), a railroad must develop, and periodically update as necessary, a technology implementation plan that contains a prioritized implementation schedule describing the railroad's plan for development, adoption, implementation, maintenance, and use of current, new, or novel technologies on its system over a 10-year period to reduce safety risks identified in the railroad's risk-based HMP. A railroad would not be required to include a certain number or type of technology in its plan, as this will depend upon the identified hazards. As proposed, the phrase ''periodically update as necessary'' means that a railroad's plan must be ongoing and continuous, rather than a one-time exercise. When a railroad updates its plan, it would be required to do so in a way that extended the plan 10 years from the date of the update. FRA is specifically requesting public comment on whether the phrase ''as necessary'' should be replaced by a definite requirement for a railroad to update its plan after a specific period of time. If so, how long should this time period be? For example, should a railroad be required to update its technology implementation plan annually?

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

Section 271.111—Implementation and Support Training

This proposed section would require a railroad to provide RRP training to each employee who has significant responsibility for implementing and supporting the railroad's RRP. This proposed training requirement would apply to any employee with such responsibility, including an employee of a person identified by a railroad's RRP plan under proposed § 271.205(a)(3) as utilizing or performing significant safety-related services on the railroad's behalf. While railroads will have some flexibility in identifying which employees have significant RRP responsibilities, the following two categories of employees are examples of who should be included: (1) Employees who hold positions of safety leadership (*e.g.,* corporate safety and operations officers); and (2) employees whose job duties primarily relate to developing and implementing an RRP (*e.g.,* employees tasked with conducting the mandatory risk-based hazard analysis or implementing mitigation measures). Railroad operating employees whose jobs are only tangentially related to RRP, such as locomotive engineers or dispatchers, would not be expected to have RRP training. FRA specifically requests public comment regarding which railroad employees should be provided RRP training.

This training would help ensure that personnel with significant RRP responsibilities are familiar with the elements of the railroad's program and have the knowledge and skills needed to fulfill their responsibilities. While this training requirement was not contained in the ''Recommendations to the Administrator'' document voted on by the RSAC RRP Working Group, FRA

believes the requirement is necessary to ensure the effectiveness of a railroad's RRP.[14] A railroad's RRP can be successful only if those who are responsible for implementing and supporting the program understand the requirements and goals of the program. Including an RRP training component in this NPRM is also necessary because such RRP training would not otherwise be required by FRA's training standards rule, published on November 7, 2014. *See* 79 FR 66460. In general, the training standards rule requires a railroad to develop and submit for FRA approval a training program for ''safety-related railroad employees.'' *Id.* Section 243.5 defines a ''safety-related railroad employee'' as follows:

Safety-related railroad employee means an individual who is engaged or compensated by an employer to: (1) Perform work covered under the hours of service laws found at *49 U.S.C. 21101, et seq.;* (2) Perform work as an operating railroad employee who is not subject to the hours of service laws found at *49 U.S.C. 21101, et seq.;* (3) In the application of parts 213 and 214 of this chapter, inspect, install, repair, or maintain track, roadbed, and signal and communication systems, including a roadway worker or railroad bridge worker as defined in § 214.7 of this chapter; (4) Inspect, repair, or maintain locomotives, passenger cars or freight cars; (5) Inspect, repair, or maintain other railroad on-track equipment when such equipment is in a service that constitutes a train movement under part 232 of this chapter; (6) Determine that an on-track roadway maintenance machine or hi-rail vehicle may be used in accordance with part 214, subpart D of this chapter, without repair of a non-complying condition; (7) Directly instruct, mentor, inspect, or test, as a primary duty, any person while that other person is engaged in a safety-related task; or (8) Directly supervise the performance of safety-related duties in connection with periodic oversight in accordance with § 243.205.

Because this definition focuses on railroad operating employees and those who directly train and supervise them, FRA assumes that it would not include the typical railroad employee who has significant responsibility for implementing and supporting a railroad's RRP, as FRA believes it is unlikely that employees with significant RRP responsibilities would also be engaged in performing operational duties or directly training or supervising those who do.[15] Therefore, railroad employees with significant RRP responsibilities are not likely to be covered by the requirements in the training standards final rule.

FRA is specifically requesting public feedback on this proposed RRP implementation and support training requirement. What topics should RRP implementation and support training cover? (For example, should employees with significant RRP responsibilities be trained in the principles and requirements of a final rule?) Also, should periodic or refresher training be provided?

Subpart C—Risk Reduction Program Plan Requirements

Subpart C would contain proposed requirements for RRP plans.

Section 271.201—General

Proposed § 271.201 would require a railroad to adopt and implement its RRP through a written RRP plan meeting the requirements of subpart C. This plan must be approved by FRA according to the requirements of subpart D.

Section 271.203—Policy, Purpose and Scope, and Goals

Proposed § 271.203 would contain requirements for policy, purpose and scope, and goals statements for an RRP plan. Under paragraph (a), an RRP plan must contain a policy statement, signed by the railroad's chief official (*e.g.,* Chief Executive Officer), endorsing the railroad's RRP. This signature endorsement would indicate that the railroad's chief official has reviewed and supports the policy statement, thereby demonstrating the importance of safety to the railroad. The RSAC Working Group recommended that FRA allow the safety policy statement to be signed by the railroad's chief safety officer. Prior experience with effective risk management programs, however, has demonstrated to FRA the importance of the active involvement of the highest officials in improving safety and safety culture. For this reason, FRA has determined that the chief official at the railroad should sign the safety policy. The policy statement should endorse the railroad's RRP and include a commitment to implement and maintain the RRP, as well as a commitment to the management of safety risk and a commitment to continuously seek improvements in the level of safety.

Paragraph (b) would require an RRP plan to include a statement describing the purpose and scope of the railroad's RRP. This statement must describe the railroad's safety philosophy and safety culture. A safety philosophy is what a railroad thinks about safety, while a safety culture is the railroad's practices and behaviors with respect to safety. This statement must also describe how the railroad promotes improvements to its safety culture, the roles and responsibilities of railroad personnel (including management) within the railroad's RRP, and how any person utilizing or performing on a railroad's behalf significant safety-related services (including host railroads, contract operators, shared track/corridor operators, or other contractors) will support and participate in the railroad's RRP.

Under paragraph (c), an RRP plan must contain a statement defining the railroad's goals for an RRP and describing clear strategies for reaching those goals. The central goal of an RRP is to manage or eliminate hazards and the resulting risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities. FRA believes one way to achieve this central goal is for a railroad to set forth goals that are designed in such a way that when the railroad achieves these goals, the central goal is achieved as well. These goals may not be merely vague aspirations towards general safety improvement. Rather, as described further below, the goals must be long-term, meaningful, measurable, and focused on the mitigation of risks associated with identified safety hazards.

- Long-term: Goals must be long-term so that they are relevant to the railroad's RRP. This does not mean that goals cannot have relevance in the short-term. Rather, goals must have significance beyond the short-term and must continue to contribute to the RRP.
- Meaningful: Goals must be meaningful so that they are not so broad

[14] A training component is also included in the SSP NPRM, published September 7, 2012. *See* 77 FR 55386–55387, 55404–55405. While the proposed RRP training requirement shares similarities with the SSP proposal, it has been modified to reflect what FRA believes to be the different training needs of the freight railroad industry.

[15] Furthermore, even if an RRP employee performed duties that fell within the proposed definition of ''safety-related railroad employee,'' the training standards NPRM only proposed to require training for a safety-related railroad employee to the extent that he or she is required to comply with a Federal mandate. *See* 77 FR 6420. For example, a railroad employee who is expected to perform any of the inspections, tests, or maintenance required by 49 CFR part 238 would be required to be trained in accordance with all Federal requirements for that work. *Id.* Because the RRP regulation proposed in this NPRM is performance-based and focuses on process, FRA would not consider it as containing specific mandates for the way in which a railroad employee with significant RRP responsibility has to perform his or her RRP duties. Therefore, even if an RRP employee also qualified as a ''safety-related railroad employee'' under the proposed training standards rule, the proposed training standards rule would not subject the employee to any additional RRP training requirement. FRA believes it would be inconsistent to apply the proposed training standards rule to some RRP employees and not others, based solely upon whether the employee performed safety-related duties that were subject to the training standards rule but otherwise unrelated to RRP.

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

• Measurable: Goals must be measurable so that they are designed in such a way that it is easily determined whether each goal is achieved or at least progress is being made to achieve the goal. A measurable goal is one which is supported by specific measurable objectives, which address activities and outcomes that help achieve the goals.

• The goals must be consistent with the overall goal of the RRP, in that they must be focused on the mitigation of risks arising from identified safety hazards.

For example, a railroad could have goals such as reducing the number of incidents involving run-through switches, reducing the number of injuries due to distraction, increasing the number of days between minor derailments, or identifying and eliminating or mitigating hazardous conditions with a railroad's processes and operations. Such goals must be supported by specific, measurable objectives. For example, the goal of identifying and eliminating or mitigating hazardous conditions with a railroad's processes and operations could be supported by the following objectives: (1) Increase safety hazard reporting by 10 percent over the next year; and (2) initiate mitigation of all unacceptable hazards within a certain numbers of months following the risk-based hazard analysis. Whatever the goal, there should be a specific measurable objective associated with it, and once mitigation has enabled a railroad to reach that goal, resources should be allowed to shift from mitigation to maintenance. This goal specificity is necessary so that a railroad may be able to determine whether its RRP is meeting these goals and effectively improving safety. Furthermore, the statement required by proposed paragraph (c) must describe clear strategies on how the railroad will achieve these goals. These strategies will be the railroad's opportunity to provide its vision on how these particular goals will ultimately reduce the number and rates of railroad accidents, incidents, injuries, and fatalities.

Section 271.205—System Description

This section would require an RRP plan to include a statement describing the characteristics of the railroad system. This section would not, however, require a railroad to describe every facet of its system in minute detail. Rather, the description should be sufficient to support the identification of hazards by establishing a basic understanding of the scope of the railroad's system. For example, the description should contain information such as the general geographic scope of the railroad's system, the total miles of track that the railroad operates, and which track segments the railroad shares with other railroads. More specifically, the statement must describe the following:

• A brief history of the railroad, including when and how the railroad was established and the major milestones in the railroad's history. Safety culture, operating rules, and practices have been affected by railroad mergers and other significant events, and this information will provide background as to the railroad's organizational history and how it may have shaped the way in which the railroad addresses safety risk;

• The railroad's operations (including any host operations), including the roles, responsibilities, and organization of the railroad operating departments;

• The scope of the service the railroad provides, including the number of routes, the major types of freight the railroad transports (including intermodal and hazardous materials), and their respective traffic proportions. The railroad may also provide a system map;

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

• A brief description of the railroad's maintenance activities and the type of maintenance required by the railroad's operations and facilities;

• Identification of the size and location of the railroad's physical plant, including major physical assets such as maintenance facilities, offices, and large classification yards; and

• Any other aspects of the railroad pertinent to the railroad's operations.

The system description must also identify all persons that utilize or perform on the railroad's behalf significant safety-related services (including entities such as host railroads, contract operations, shared track/corridor operators, or other contractors). FRA would give a railroad significant discretion to identify which persons utilize or provide on its behalf significant safety-related services. In interpreting this proposed provision, emphasis would be placed upon the words ''significant'' and ''safety-related.'' FRA does not expect a railroad to identify every contractor that provides services. For example, a railroad would be expected to identify a signal contractor that routinely performed services on its behalf, but not a contractor hired on a one-time basis to pave a grade crossing. Generally, this section would require identification of those persons whose significant safety-related services or utilization would be affected by the railroad's RRP.

Section 271.207—Consultation Process Description

Section 271.207 would implement section 103(g)(1) of the RSIA, which states that a railroad required to establish an RRP must ''consult with, employ good faith and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, on the contents of the safety risk reduction program.'' 49 U.S.C. 20156(g)(1). This section would also implement section 103(g)(2) of the RSIA, which further provides that if a ''railroad carrier and its directly affected employees, including any nonprofit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, cannot reach consensus on the proposed contents of the plan, then directly affected employees and such organizations may file a statement with the Secretary explaining their views on the plan on which consensus was not reached.'' 49 U.S.C. 20156(g)(2). The RSIA requires FRA to consider these views during review and approval of a railroad's RRP plan.

As discussed above in section III.B of the preamble, the proposed language is essentially identical to that proposed in the separate SSP NPRM, published on September 7, 2012, except that it contains additional language applying specifically to the unique situations of railroads with inadequate safety performance, railroads that have been reclassified or newly classified as Class I railroads by the STB, and voluntarily-compliant railroads. While the RSAC did not provide recommended language for this section, FRA worked with the System Safety Task Group to receive input regarding how the consultation process should be addressed, with the understanding that the language would be provided in both the RRP and SSP NPRMs for review and comment. Therefore, FRA seeks comment on this rule's proposal regarding the consultation requirement set forth in sec. 103(g) of the RSIA. Furthermore,

while this NPRM does not respond to comments already received in response to the already-published SSP NPRM, FRA will consider comments submitted to both the SSP and RRP NPRMs regarding the consultation process requirements when developing an RRP final rule. FRA requests comments on all aspects of the proposed provisions, and is specifically interested in comment regarding the proposed timelines for meeting with directly affected employees.

Paragraph (a)(1) would implement sec. 103(g)(1) of the RSIA by requiring a railroad to consult with its directly affected employees on the contents of its RRP plan, including any non-profit employee labor organization representing a class or craft of the railroad's directly affected employees. As part of that consultation, a railroad must utilize good faith and best efforts to reach agreement with its directly affected employees on the contents of its plan.

Paragraph (a)(2) would specify that a railroad that consults with a non-profit employee labor organization is considered to have consulted with the directly affected employees represented by that organization.

Paragraph (a)(3) would require a Class I railroad to meet with its directly affected employees to discuss the consultation process no later than 240 days after the publication date of the final rule. This meeting will be the Class I railroads' and directly affected employees' opportunity to schedule, plan, and discuss the consultation process. FRA does not expect a Class I railroad to discuss any substantive material until the information protection provisions of § 271.11 become applicable. Rather, this initial meeting should be more administrative in nature so that both parties understand the consultation process as they go forward and so that they may engage in substantive discussions as soon as possible after the applicability date of § 271.11. This will also be an opportunity to educate the directly affected employees on risk reduction and how it may affect them. The Class I railroad will be required to provide notice to the directly affected employees no less than 60 days before the meeting is scheduled.

Paragraph (a)(4) would require a railroad with inadequate safety performance to meet no later than 30 days following FRA's notification with its directly affected employees to discuss the consultation process. The inadequate safety performance railroad would have to notify the employees of this meeting no less than 15 days before it is scheduled. Under paragraph (a)(5), a railroad reclassified or newly classified by the STB would have to meet with its directly affected employees to discuss the consultation process no later than 30 days following the effective date of the classification or reclassification. The reclassified or newly classified Class I railroad would also be required to notify its directly affected employees of the meeting no less than 15 days before it is scheduled. FRA specifically requests public comment on whether this schedule allows railroads with inadequate safety performance or reclassified or newly classified Class I railroads sufficient time to consult with directly affected employees.

Paragraph (a)(6) would clarify that while a voluntarily-compliant railroad must also consult with its directly affected employees using good faith and best efforts, there are no timeline requirements governing when such meetings must take place.

Paragraph (a)(7) would direct readers to proposed appendix B for additional guidance on how a railroad might comply with the consultation requirements of this section. Appendix B is discussed later in this preamble.

Paragraph (b) would require a railroad to submit, together with its RRP plan, a consultation statement. The purpose of this consultation statement would be twofold: (1) To help FRA determine whether the railroad has complied with § 271.207(a) by, in good faith, consulting and using its best efforts to reach agreement with its directly affected employees on the contents of its RRP plan; and (2) to ensure that the directly affected employees with which the railroad has consulted were aware of the railroad's submission of its RRP plan to FRA for review. The consultation statement must contain specific information described in proposed paragraphs (b)(1) through (4) of this section.

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

If the railroad is unable to reach agreement with its directly affected employees on the contents of its RRP plan, paragraph (b)(2) would require that the consultation statement identify any areas of non-agreement and provide the railroad's explanation for why it believed agreement was not reached. A railroad could specify, in this portion of the statement, whether it was able to reach agreement on the contents of its RRP plan with certain directly affected employees, but not others.

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

Under proposed paragraph (b)(4), the consultation statement must include a service list containing the names and contact information for the international/national president of any non-profit employee labor organization representing directly affected employees and any directly affected employee not represented by a non-profit employee labor organization who significantly participated in the consultation process. If an international/national president did not participate in the consultation process, the service list must also contain the name and contact information for a designated representative who participated on his or her behalf. This paragraph would also require a railroad (at the same time it submits its proposed RRP plan and consultation statement to FRA) to provide individuals identified in the service list a copy of the RRP plan and consultation statement. Railroads could provide the documents to the identified individuals electronically, or using other means of service reasonably calculated to succeed (*e.g.,* sending identified individuals a hyperlink to a copy of the submitted RRP plan). This service list would help FRA determine whether the railroad had complied with the § 271.207(a) requirement to consult with its directly affected employees. Requiring the railroad to provide individuals identified in the service list with a copy of its submitted plan and consultation statement would also notify those individuals that they now have 60 days under § 271.207(c)(2) (discussed below) to submit a statement to FRA if they are not able to come to reach agreement with the railroad on the contents of the RRP plan.

Paragraph (c)(1) would implement sec. 103(g)(2) of the RSIA by providing that, if a railroad and its directly affected employees cannot reach agreement on the proposed contents of an RRP plan, then a directly affected employee may file a statement with the

FRA Associate Administrator for Railroad Safety/Chief Safety Officer explaining his or her views on the plan on which agreement was not reached. *See* 49 U.S.C. 20156(g)(2). The FRA Associate Administrator for Railroad Safety/Chief Safety Officer will consider any such views during the plan review and approval process.

Paragraph (c)(2) would specify, as also provided in § 271.301(a)(1), that a railroad's directly affected employees have 60 days following the railroad's submission of its proposed RRP plan to submit the statement described in paragraph (c)(1) of this section. FRA believes 60 days would provide directly affected employees sufficient time to review a railroad's proposed RRP plan and to draft and submit to FRA a statement if they were not able to come to agreement with the railroad on the contents of that plan. In order to provide directly affected employees the opportunity to submit a statement, FRA would not approve or disapprove a railroad's proposed RRP plan before the conclusion of this 60-day period.

Section 271.209—Consultation on Amendments

This section would describe the consultation requirements for amendments to a railroad's RRP plan. Under this section, an RRP plan would be required to include a description of the process the railroad will use to consult with its directly affected employees on any substantive amendments to the railroad's RRP plan. Examples of substantive amendments could include the following: the addition of new stakeholder groups (or the removal of a stakeholder group); major changes to the processes employed, including changes to the frequency of governing body meetings; or changing the organizational level of the manager responsible for the RRP (*e.g.,* changing from the Chief Safety Officer to someone who reports to the Chief Safety Officer). Non-substantive amendments could include changes that update any names or addresses included in the plan. As with its initial RRP plan, a railroad would be required to use good faith and best efforts to reach agreement with directly affected employees on any substantive amendments to that plan. Requiring a railroad to detail that process in its plan would facilitate the consultation by establishing a known path to be followed. A railroad that did not follow this process when substantively amending its RRP plan could then be subject to penalties for failing to comply with the provisions of its plan. This requirement would not apply to non-substantive amendments (*e.g.,* amendments updating names and addresses of railroad personnel).

Section 271.211—Risk-Based Hazard Management Program Process

This section would require an RRP plan to describe the railroad's process for conducting an HMP. As previously discussed, railroads could look to well-established safety management systems for guidance on how to describe the process for conducting an HMP, such as MIL–STD–882, APTA's *Manual for the Development of System Safety Program Plans for Commuter Railroads,* and FRA's *Collision Hazard Analysis Guide.* While FRA understands that railroads subject to a final RRP rule would likely need to develop processes unique to their own operations, FRA would expect a railroad's HMP process to use techniques similar to those used by these types of current safety management systems. FRA specifically requests public comment on what type(s) of guidance could help a railroad comply with the requirements of this proposed section.

This section also specifies certain information that must be contained in an RRP plan's description of a railroad's HMP process. Under paragraph (a), this description must specify: (1) The railroad's processes for identifying hazards and the risks associated with those hazards; (2) the sources the railroad will use to support the ongoing identification of hazards and the risks associated with those hazards; and (3) the railroad's processes for comparing and prioritizing the identified risks for mitigation purposes.

Paragraph (b) would require an RRP plan to describe the railroad's processes for identifying and selecting mitigation strategies and for monitoring an identified hazard through the mitigation of the risk associated with that hazard.

Section 271.213—Safety Performance Evaluation Process

This section would require an RRP plan to describe the railroad's processes for measuring its safety culture pursuant to § 271.105, monitoring safety performance pursuant to § 271.105(b), and conducting safety assessments pursuant to § 271.105(c). Regarding the requirement for a railroad to describe its processes for measuring safety culture, this would require a railroad's plan to explain its definition of safety culture and how the railroad measures whether that definition is being achieved. For example, a railroad could define the parameters by which it measures its safety culture, and then measure changes to its safety culture relative to that initial baseline. Overall, FRA would give a railroad substantial flexibility in determining what safety culture definition and measurement processes worked best for its organization.

Section 271.215—Safety Outreach Process

This section would require an RRP plan to describe a railroad's process for communicating safety information to railroad personnel and management pursuant to § 271.107.

Section 271.217—Technology Implementation Plan Process

This section would require an RRP plan to describe a railroad's processes for conducting a technology analysis pursuant to § 271.109(b) and for developing a technology implementation plan pursuant to § 271.109(c).

Section 271.219—Implementation and Support Training Plan

Paragraph (a) of this section would require an RRP plan to contain a training plan describing the railroad's processes for training, pursuant to § 271.111, employees with significant responsibility for implementing and supporting the RRP (including employees of a person identified pursuant to § 271.205(a)(3) as utilizing or performing significant safety-related services on the railroad's behalf who have significant responsibility for implementing and supporting the railroad's RRP).

Paragraph (b) would require the training plan to specifically describe the frequency and content of the RRP training for each position or job function identified pursuant to § 271.223(b)(3) as having significant responsibilities for implementing the RRP.

Section 271.221—Internal Assessment Process

Paragraph (a) of this section would require an RRP plan to describe a railroad's processes for conducting an internal assessment of its RRP pursuant to proposed subpart E. At a minimum, this description must contain the railroad's processes for: (1) Conducting an internal RRP assessment; (2) internally reporting the results of its internal assessment to railroad senior management; and (3) developing improvement plans, including developing and monitoring recommended improvements (including any necessary revisions or updates to its RRP plan) for fully implementing its RRP, complying with the implemented elements of the RRP plan, or achieving the goals identified in the railroad's RRP

plan pursuant to § 271.203(c). Paragraph (b) would be reserved.

Section 271.223—RRP Implementation Plan

Paragraph (a) of this section would require an RRP plan to describe how the railroad would implement its RRP. A railroad may implement its RRP in stages, so long as the RRP is fully implemented within 36 months of FRA's approval of the plan. Under paragraph (b), this implementation plan must cover the entire implementation period and contain a timeline (beginning with the date FRA approved the railroad's RRP plan) describing when certain specific and measurable implementation milestones will be achieved. The implementation plan must also describe the roles and responsibilities of each position or job function with significant responsibility for implementing the railroad's RRP or any changes to the railroad's RRP (including any such positions or job functions held by an entity or contractor that utilizes or performs on the railroad's behalf significant safety-related services). An implementation plan must also describe how significant changes to the railroad's RRP will be made.

Subpart D—Review, Approval, and Retention of Risk Reduction Program Plans

The RSIA requires a railroad to submit its RRP, including any of the required plans, to the Administrator (as delegate of the Secretary) for review and approval. *See* 49 U.S.C. 20156(a)(1)(B). Subpart D, Review, Approval, and Retention of System Safety Program Plans, would contain requirements addressing this mandate.

Section 271.301—Filing and Approval

This section would contain requirements for the filing of an RRP plan and FRA's approval process.

Paragraph (a) would require a Class I railroad to submit one copy of its RRP plan to the FRA Associate Administrator for Railroad Safety/Chief Safety Officer no later than 545 days after the publication date of the RRP final rule. A railroad with inadequate safety performance would be required to submit its RRP plan no later than 90 days after it receives final written notification from FRA that it is required to comply with the RRP rule pursuant to proposed § 271.13(e), or no later than 545 days after the publication date of the RRP final rule, whichever is later. A railroad that the STB reclassifies or newly classifies as a Class I railroad shall submits its RRP plan no later than 90 days following the effective date of the classification or reclassification, or no later than 545 days after the publication date of the RRP final rule, whichever is later. A voluntarily-compliant railroad could submit an RRP plan at any time. FRA specifically requests public comment on whether electronic submission of an RRP plan should be permitted and, if so, what type of process FRA should use to accept such submissions.

A railroad would be required to provide certain additional information as part of its submission. Under paragraph (a)(1), a submitted RRP plan would be required to include the signature, name, title, address, and telephone number of the chief official responsible for safety and who bears the primary managerial authority for implementing the submitting railroad's safety policy. By signing, the chief official responsible for safety is certifying that the contents of the RRP plan are accurate and that the railroad will implement the contents of the program as approved by FRA.

Paragraph (a)(2) would require a submitted RRP plan to contain the contact information for the primary person responsible for managing the RRP for the railroad. This person may be the same person as the chief official responsible for safety and who bears the primary managerial authority for implementing the submitting railroad's safety policy. If it is not the same person, however, the contact information for both must be provided. The contact information for the primary person managing the RRP is necessary so that FRA knows who to contact regarding any issues with the railroad's RRP.

Under paragraph (a)(3), the submitted RRP plan would have to contain the contact information for the senior representatives of the persons that the railroad has determined utilize or provide significant safety-related services (including entities such as host railroads, contract operators, shared track/corridor operators, and other contractors). This contact information is necessary so that FRA is aware of which persons will be involved in implementing and supporting the railroad's RRP.

Finally, paragraph (a)(4) would reference proposed § 271.207(b) and require a railroad to submit the consultation statement describing how it consulted with its directly affected employees on the contents of the RRP plan. When the railroad provides the consultation statement to FRA, proposed § 271.207(b)(4) would also require the railroad to provide a copy of the statement to directly affected employees identified in a service list. Directly affected employees could then file a statement within 60 days after the railroad filed its consultation statement, as discussed in proposed § 271.207(c).

Paragraph (b) would describe FRA's process for approving a railroad's RRP plan. Within 90 days of receipt of an RRP plan, or within 90 days of receipt of each RRP plan submitted prior to the commencement of railroad operations, FRA would review the proposed RRP plan to determine if the elements required by part 271 are sufficiently addressed, and whether the processes and resources described by the plan are sufficient to support effective implementation of the required RRP elements. This review would also consider any statement submitted by directly affected employees pursuant to proposed § 271.207(c). This process would involve continuous communication between FRA and the railroad, and FRA intends to work with a railroad when reviewing its plan and to keep directly affected employees informed of this process. If this communication process results in substantively significant changes to the railroad's submitted RRP plan, FRA may direct the railroad to consult further with its directly affected employees before FRA approves the plan.

Railroads should note the FRA will not be approving specific mitigation measures as part of a railroad's RRP plan. Rather, a railroad's RRP plan should only describe the processes and procedures the railroad will use to develop and implement its RRP, including the processes and procedures that will be used to identify and mitigate or eliminate hazards and risks. FRA does not expect railroads to have already identified and analyzed hazards and risks, and to have developed specific mitigation strategies, at the time FRA approves the railroad's RRP plan.

Once FRA determines whether a railroad's RRP plan complies with the requirements of part 271, FRA would provide the railroad's primary contact person written notification of whether the railroad's RRP plan is approved or not. If FRA does not approve a plan, it would inform the railroad of the specific points in which the plan is deficient. FRA would also provide written notification to each individual identified in the service list accompanying the consultation statement required under proposed § 271.207(b)(4). If a railroad receives notification that the plan is not approved (including notification of the specific points in which the plan is deficient), the railroad would have 60

days to correct all of the deficiencies and resubmit the plan to FRA. If these corrections are substantively significant, FRA will inform the railroad that it must consult further with its directly affected employees about the corrections and submit an updated consultation statement with its corrected RRP plan. Directly affected employees would also be afforded the opportunity to submit a statement in response to the substantively significant corrections. Directly affected employees would not be given a second opportunity, however, to address plan provisions that were unrelated to the substantively significant corrections.

Paragraph (c) would specify that all documents required to be submitted to FRA under this part may be submitted electronically pursuant to the procedures in proposed appendix C to this part.

Section 271.303—Amendments

This section would address the process a railroad must follow whenever it amends its FRA-approved RRP plan, regardless of whether the amendments are substantive or non-substantive. If a railroad makes substantive amendments, however, it would be required to follow the process described in its RRP plan (pursuant to § 271.209) for consulting with its directly affected employees. A railroad must submit the amended RRP plan to FRA not less than 60 days prior to the proposed effective date of the amendment(s). Along with the amended RRP plan, the railroad must also file a cover letter outlining the proposed change(s) to the original, approved RRP plan. The cover letter should provide enough information so that FRA knows what is being added or removed from the original approved RRP. These requirements would not apply if the proposed amendment is limited to adding or changing a name, title, address, or telephone number of a person, although the railroad would still be required to file the amended RRP plan with FRA's Associate Administrator for Railroad Safety/Chief Safety Officer. Such amendments would be implemented by the railroad upon filing with FRA.

FRA would review the proposed amended RRP plan within 45 days of receipt. FRA would then notify the railroad's primary contact person whether the amended plan has been approved. If the amended plan is not approved, FRA would inform the railroad of the specific points in which the proposed amendment is deficient. In some instances, FRA may not be able to complete its review in 45 days. In these cases, if FRA fails to timely notify the railroad, the railroad may implement the amendment(s) to the plan, which may be subject to change once FRA completes its review. Within 60 days of receiving notification from FRA that a proposed amendment has not been approved, a railroad must provide FRA either a corrected copy of the amendment, addressing all deficiencies noted by FRA, or notice that the railroad is retracting the amendment. (Railroads should note that a retracted amendment would be covered by the information protections provisions of proposed § 271.11, as the amendment would have been information compiled for the sole purpose of developing an RRP.) Through its general oversight, FRA may also determine that amendments to the RRP plan are necessary. In these cases, the FRA would follow the process set forth in proposed § 271.305.

This section does not propose a provision for amendments that a railroad may deem safety-critical. Because a railroad's RRP plan would only explain the processes and procedures for the program, FRA is uncertain whether a railroad would ever need to amend the plan in order to address a specific safety-critical concern. Rather, FRA believes that any such safety-critical concern would require changes in the way the RRP is implemented and maintained, rather than changes in the processes and procedures outlined in the plan. FRA is specifically requesting public comment, however, on whether an RRP plan would ever need to be amended in a way that is safety-critical, so that it would be impractical for a railroad to submit the amendment 60 days before its proposed effective date. If so, FRA would likely include in a final rule a provision stating that a railroad must provide FRA a safety-critical amendment as soon as possible, instead of 60 days before its proposed effective date.

Section 271.305—Reopened Review

Proposed § 271.305 would provide that, for cause stated, FRA could reopen consideration of an RRP plan or amendment (in whole or in part) after approval of the plan or amendment. For example, FRA could reopen review if it determines that the railroad has not been complying with its plan/amendment or if information has been made available that was not available when FRA originally approved the plan or amendment. The determination of whether to reopen consideration would be solely within FRA's discretion and made on a case-by-case basis.

Section 271.307—Retention of RRP Plans

Proposed § 271.307 would contain requirements related to a railroad's retention of its RRP plan. A railroad would be required to retain at its system and various division headquarters a copy of its RRP plan and a copy of any amendments to the plan. A railroad may comply with this requirement by making an electronic copy available. The railroad must make the plan and any amendments available to representatives of FRA or States participating under part 212 of this chapter for inspection and copying during normal business hours.

In its tentative agreement document, the RSAC Working Group advised FRA to permit only specific RRP-trained FRA representatives to have the authority to request access to a railroad's RRP plan. FRA is not including this suggestion in the proposed rule, however, because it has concerns regarding how it could be implemented. For example, how could a railroad know whether or not an FRA representative has been trained in RRP? FRA also believes that rule text may not be the appropriate place for such a distinction, as the question of which inspectors have authority to conduct inspections is an internal FRA matter. FRA nevertheless is specifically requesting public comment on both the proposed rule text and the Working Group's suggestion, and the final rule may contain the Working Group's suggestion. FRA would also be interested in any suggested alternate approaches that may be included in the final rule.

Subpart E—Internal Assessments

In order to help ensure that an RRP is properly implemented and effective, a railroad would need to evaluate its program on an annual basis. Subpart E would contain provisions requiring a railroad to conduct an internal assessment of its RRP.

Section 271.401—Annual Internal Assessments

This section would describe the processes a railroad must use to evaluate its RRP. Because this evaluation is an internal assessment, a railroad could tailor the processes to its specific operations, and FRA would work with the railroad to determine the best method to internally measure the implementation and effectiveness of the railroad's RRP.

Paragraph (a) would require a railroad to conduct an annual (once every calendar year) internal assessment of its RRP. If desired, a railroad could audit

its program more than once a year. This internal assessment must begin in the first calendar year after the calendar year in which FRA approves the railroad's RRP plan. The internal assessment would determine the extent to which the railroad has: (1) Achieved the implementation milestones described in its RRP plan pursuant to proposed § 271.223(b); (2) complied with the elements of its approved RRP plan that have already been implemented; (3) achieved the goals described in its RRP plan pursuant to proposed § 271.203(c); (4) implemented previous internal assessment improvement plans pursuant to proposed § 271.403; and (5) implemented previous external audit improvement plans pursuant to § 271.503. A properly executed internal assessment would provide the railroad with detailed knowledge of the status of its program implementation and the degree to which the program is effectively reducing risk. The railroad would be required to ensure that the results of the assessment of these various elements are internally reported to the railroad's senior management.

Section 271.403—Internal Assessment Improvement Plans

Paragraph (a) of this section would require a railroad, within 30 days of completing its internal assessment, to develop an improvement plan addressing the results of its internal assessment. Paragraph (b) would require the improvement plan to have at least four elements. First, the improvement plan must describe the recommended improvements that address the findings of the internal assessment for fully implementing the railroad's RRP, complying with the elements of the RRP that are already implemented, or achieving the goals identified in the RRP plan pursuant to § 271.203(c). These improvements would include any necessary revisions or updates to the RRP plan, which would have to be made pursuant to the amendment process in proposed § 271.303. Second, the improvement plan must identify by position title the individual who is responsible for carrying out the recommended improvements. Third, the improvement plan must set forth a timeline that establishes when specific and measurable milestones for implementing the recommended improvements would be achieved. Finally, the improvement plan must specify the process for monitoring and evaluating the effectiveness of the recommended improvements. FRA believes that if a railroad's internal assessment improvement plan contains these four elements, the railroad would effectively identify any areas in which the RRP is either improperly implemented or ineffective at reducing risk, and could adequately address those deficiencies.

Section 271.405—Internal Assessment Reports

Paragraph (a) of this section would require a railroad to submit a copy of its internal assessment report to the FRA Associate Administrator for Railroad Safety/Chief Safety Officer. The railroad must submit this report within 60 days of completing its internal assessment. Under paragraph (b), the report must be signed by the railroad's chief official responsible for safety who bears primary managerial authority for implementing that railroad's safety policy and contain at least four elements. First, the report must describe the railroad's internal assessment, including a description of how the railroad satisfied the requirements set forth in proposed § 271.401(b)(1) through (3). Second, the report must describe the findings of the internal assessment. Third, the report must specifically describe the recommended improvements set forth in the railroad's improvement plan pursuant to proposed § 271.403. Fourth, the report must describe the status of the recommended improvements that were set forth in the railroad's recent internal assessment improvement plan and any outstanding recommended improvements from previous internal assessment improvement plans.

Subpart F—External Audits

This subpart would address FRA's process for conducting audits of the railroad's RRP and establish requirements regarding the actions a railroad must take in response to FRA's audits. FRA's audits would focus on reviewing the railroad's RRP process and ensuring that the railroad is following the processes and procedures described in its FRA-approved RRP plan.

Section 271.501—External Audits

As described in this section, FRA would conduct (or cause to be conducted) external audits of a railroad's RRP. These audits would focus on RRP process, evaluating the railroad's compliance with the RRP elements required by this part, as supported by the railroad's approved RRP plan. Because the railroad's RRP plan and any amendments would have already been approved by FRA, this section would permit FRA to focus on the extent to which the railroad is complying with the processes and procedures in its own plan.

Similar to the review process for RRP plans, FRA would not audit a railroad's RRP in a vacuum. Rather, FRA would communicate with the railroad during the audit and attempt to resolve any issues before its completion. Once the audit is completed, FRA would provide the railroad with written notification of the audit results. For example, these results would identify any areas where the railroad was not properly complying with its RRP plan, any areas that needed to be addressed by the railroad's RRP but were not, or any other areas in which FRA found that the railroad and its program were not in compliance with this part.

Section 271.503—External Audit Improvement Plans

This section would establish requirements for railroad improvement plans responding to the results of FRA's external audit. If the results of the audit require the railroad to take any corrective action, paragraph (a) would provide the railroad 60 days to submit for FRA approval an improvement plan addressing any such instances of deficiency or non-compliance. At a minimum, paragraph (b) would require the improvement plan to: (1) Describe the improvements the railroad would implement to address the audit findings; (2) identify by position title the individual who would be responsible for carrying out the improvements necessary to address the audit findings; and (3) contain a timeline describing when specific and measurable milestones for implementing the recommended improvements would be achieved. Specification of milestones is important because it would allow the railroad to determine the appropriate progress of the improvements, while also allowing FRA to gauge the railroad's compliance with its improvement plan.

Under paragraph (c), if FRA does not approve a railroad's improvement plan, FRA would notify the railroad of the plan's specific deficiencies. The railroad would then have no more than 30 days to amend the improvement plan to correct the deficiencies identified by FRA and provide FRA a copy of the amended improvement plan. Paragraph (d) would require a railroad to provide FRA for review, upon the request of the FRA Associate Administrator for Railroad Safety/Chief Safety Office, a status report on the implementation of the improvements contained in the improvement plan.

Appendix A to Part 271—Schedule of Civil Penalties

Appendix A to part 271 would contain a schedule of civil penalties for use in connection with this part. Because such penalty schedules are statements of agency policy, notice and comment are not required prior to their issuance. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless, commenters are invited to submit suggestions to FRA describing the types of actions or omissions for each proposed regulatory section that would subject a person to the assessment of a civil penalty. Commenters are also invited to recommend what penalties may be appropriate, based upon the relative seriousness of each type of violation.

Appendix B to Part 271—Federal Railroad Administration Guidance on the Risk Reduction Program Consultation Process

Appendix B would contain guidance on how a railroad could comply with § 271.207, which states that a railroad must in good faith consult with and use its best efforts to reach agreement with all of its directly affected employees on the contents of the RRP plan. The appendix begins with a general discussion of the terms ''good faith'' and ''best efforts,'' explaining that they are separate terms and that each has a specific and distinct meaning. For example, the good faith obligation is concerned with a railroad's state of mind during the consultation process, and the best efforts obligation is concerned with the specific efforts made by the railroad in an attempt to reach agreement with its directly affected employees. The appendix also explains that FRA will determine a railroad's compliance with the § 271.207 requirements on a case-by-case basis and outlines the potential consequences for a railroad that fails to consult with its directly affected employees in good faith and using best efforts.

The appendix also contains specific guidance on the process a railroad may use to consult with its directly affected employees. This guidance would not establish prescriptive requirements with which a railroad must comply, but would provide a road map for how a railroad may conduct the consultation process. The guidance also distinguishes between employees who are represented by a non-profit employee labor organization and employees who are not, as the processes a railroad may use to consult with represented and non-represented employees could differ significantly. Overall, however, the appendix stresses that there are many compliant ways in which a railroad may choose to consult with its directly affected employees and that FRA believes, therefore, that it is important to maintain a flexible approach to the § 271.207 consultation requirements, so a railroad and its directly affected employees may consult in the manner best suited to their specific circumstances.

Appendix C to Part 271—Procedures for Submission of Railroad Risk Reduction Program Plans and Statements From Directly Affected Employees

Proposed Appendix C would provide railroads and directly affected employees the option to file RRP plans or consultation statements electronically. FRA intends to create a secure document submission site and would need basic information from railroads or directly affected employees before setting up a user's account. In order to provide secure access, information regarding the points of contact would be required. It is anticipated that FRA would be able to approve or disapprove all or part of a program and generate automated notifications by email to a railroad's points of contact. Thus, FRA would want each point of contact to understand that by providing any email addresses, the railroad would be consenting to receive approval and disapproval notices from FRA by email. Railroads that allow notice from FRA by email would gain the benefit of receiving such notices quickly and efficiently. FRA specifically requests public comment on whether to allow electronic submission, and on what electronic formats might be practical and acceptable.

While the proposed appendix would request the names and contact information for two individuals who would be the railroad's or directly affected employees' points of contact and who would be the only individuals allowed access to FRA's document submission site, FRA specifically requests public comment on whether this is a sufficient number of points of contact, or whether more would be necessary, particularly for railroads with multiple non-profit labor organizations.

Those railroads that would choose to submit printed materials to FRA would be required to deliver them directly to the specified address. Some railroads may choose to deliver a CD, DVD, or other electronic storage format to FRA rather than requesting access to upload the documents directly to the secure electronic database. Although that would be an acceptable method of submission, FRA would encourage each railroad to utilize the electronic submission capabilities of the system. Of course, if FRA does not have the capability to read the type of electronic storage format sent, FRA would be able to reject the submission.

FRA may be able to develop a secure document submission site so that confidential materials would be identified and not shared with the general public. However, FRA does not expect the information in an RRP plan to be of such a confidential or proprietary nature, particularly since each railroad is required to share the submitted RRP plan with individuals identified in the service list pursuant to § 271.107(b)(4). RRP records in FRA's possession are also exempted from disclosure under the Freedom of Information Act pursuant to sec. 109(a) of the RSIA, and FRA is proposing in § 271.11 of this NPRM to protect any information compiled or collected solely for the purpose of developing, implementing, or evaluating an RRP from discovery, admission into evidence, or consideration for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, and property damage. Accordingly, FRA does not at this time believe it is necessary to develop a document submission system which addresses confidential materials at this time.

IX. Regulatory Impact and Notices

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

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

This NPRM directly responds to the Congressional mandate of sec. 103 of the RSIA, which states that FRA shall require each Class I railroad and railroads with inadequate safety performance to establish a railroad safety risk reduction program. *See* 49 U.S.C. 20156(a)(1). This NPRM proposes to implement this mandate by requiring each Class I railroad and railroad with inadequate safety performance to develop and implement a RRP to improve the safety of their operations. FRA believes that all of the requirements of the NPRM are directly or implicitly required by the RSIA.

The costs for this proposed regulation basically stem from the requirements to have a fully developed and implemented RRP that is supported by an RRP plan. The primary costs come from the development of an ongoing risk-based HMP, the ongoing evaluation of safety performance, and the safety outreach component of the RRP. In addition, there are costs for the development of a technology implementation plan, the consultation process, and internal assessments.

In analyzing this proposed rule, FRA has applied DOT's updated ''Guidance on the Economic Value of a Statistical Life in US Department of Transportation Analyses,'' published in March 2013. This policy updated the Value of a Statistical Life (VSL) from $6.2 million to $9.1 million and revised guidance used to compute benefits based on injury and fatality avoidance in each year of the analysis based on forecasts from the Congressional Budget Office of a 1.07 percent annual growth rate in median real wages over a 30 year period (2013–2043). FRA also adjusted wage based labor costs in each year of the analysis accordingly. Real wages represent the purchasing power of nominal wages. Non-wage inputs are not impacted. The primary cost and benefit drivers for this analysis are labor costs and avoided injuries and fatalities, both of which in turn depend on wage rates.

The total cost for this proposed regulation is $18.6 million, undiscounted. The discounted costs over 10 years are $12.7 million, using a 7 percent discount rate, and $15.7 million, using a 3 percent discount rate. The annualized costs are $1.81 million at a 7% discount rate and $1.84 million at a 3% discount rate.

TABLE 1—COSTS (10 YEARS)

RRP NPRM				
Costs	Class I railroads	Railroads with inadequate safety performance	Total for all railroads	Annualized
Subpart A: General	$0	$10,194	$10,194	
Subpart B: RR Programs	14,352,029	2,008,553	16,360,582	
Subpart C: RRP Plans	791,776	743,231	1,535,007	
Subpart D: Review and Approval of Plans	2,387	6,362	8,750	
Subpart E: Internal Assessments	253,369	388,140	641,509	
Subpart F: External Audits	42,647	25,690	68,337	
Total Cost	15,442,208	3,182,169	18,624,377	$1,862,438
(PV 7)	10,699,013	2,039,639	12,738,652	1,813,698
(PV 3)	13,095,827	2,610,750	15,706,578	1,841,290

RRPs create benefits through several mechanisms. RRPs identify potential hazards at an early stage, so that expenditures can be made with a view to avoiding the hazards, making expenditures more effective. Because of these characteristics RRPs identify a wide array of potential safety issues, and potential solutions, so that railroads can use their available resources where the effect will be most beneficial per dollar spent. In addition, RRPs help maintain safety gains over time. When railroads adopt countermeasures to safety problems, they may over time lose the focus that made those countermeasures effective. With RRP plans, those safety gains are likely to continue for longer time periods. Because of these characteristics of RRP, safety is improved, while at the same time costs of countermeasures are reduced. RRPs can also be instrumental in addressing hazards that are not well-addressed through conventional safety programs, such as minor injuries and incidents, or risks that occur because safety equipment is not used correctly or continuously.

It is difficult, if not impossible, to segregate totally railroad expenses that go to enhance safety from other railroad expenses. Track, vehicle, and signal maintenance expenses all contribute to safety on a railroad. Every operational and maintenance employee, as well as track or signal inspector, performs duties with few functions that do not work to enhance safety. Every capital expenditure is likely to have a safety component, whether for equipment, right-of-way, signal, or facility. RRPs can increase the safety return on any investment related to the operation and maintenance of the railroad. FRA believes a very conservative estimate of investment expenditures by all Class I railroads is $42.7 billion per year. For purposes of this analysis, FRA assumes that RRPs will not create benefits until they are fully implemented by the railroad, after the third year, and so cannot improve the effectiveness of investments until Year 4, after which they will affect investments through Year 10. Improved effectiveness of investment benefits can reasonably be expected to impact between $188 billion (discounted at 7 percent) and $244 billion (discounted at 3 percent) over the next ten years.

Another way to look at the benefits that might accrue from RRPs is to look at total Class I freight operation-related accident/incident costs. For the time-period 2001–2010 the total number of accidents/incidents (excluding grade crossing incidents and platform accidents/incidents) involving Class I freight railroads was 66,116, which resulted in 6,956 fatalities and 42,289 injuries. For purposes of this NPRM's RIA, FRA used the averages from 2008–2010 which had 5,325 incidents, 602 fatalities and 3,428 injuries. Of course, these accidents/incidents also caused damage to other property, delays on both railroads and highways, response costs, and many other costs. Applying the same methodology used in other analyses, FRA has found that the total societal cost of a serious accident/incident is at least 1.97 times the fatality costs.[16] Societal accident costs include fatality costs, injury costs, delay costs, response costs, damage to equipment, damage to track and structures, and equipment clearing, although there may

[16] *See* DOT/FRA—''Positive Train Control Systems, Final Rule, Regulatory Impact Analysis,'' Document FRA 2008–0132–0060, available at *http://www.regulations.gov/#!documentDetail;D=FRA-2008-0132-0060*. The RIA for FRA's Positive Train Control System final rule originally found that the total societal cost of serious accidents and incidents is at least 2.33 times the fatality costs. Due to the revised approach for assessing VSL over time in accordance with DOT's Guidance, discussed above, this number has been revised to 1.97 times the fatality costs.

be other societal costs not accounted for. Those accidents/incidents that are serious enough to result in fatalities can result in broader societal costs, as noted above. Further, some accidents/incidents, such as grade crossing accidents, can be quite severe, resulting in very serious injuries but not a fatality, resulting in costs per fatality of grade crossing accidents being more than the costs of those accidents that result only in fatalities. FRA believes multiplying societal costs of fatalities times a factor of 1.97 to derive total societal cost of serious accidents/incidents is conservative. In this case, if the fatality costs are $9.1 million per fatality, and the average number of fatalities per year is 602, then the societal cost of fatalities is $5.5 billion per year, and the total societal cost of freight operation related serious accidents/incidents is $10.8 billion for the base year of 2012. According to the DOT Guidance issued in March 2013, the VSL is expected to increase annually based on an expected 1.07 percent annual growth rate in median real wages. As noted above, for purposes of this analysis, FRA assumes that RRP implementation will not result in benefits until railroads are required to fully implement their RRPs, after the third year, and so cannot reduce accidents until Year 4, and then will affect accidents through Year 10. Total ten-year accident safety costs total between $77.7 billion (discounted at 7 percent) and $102.3 billion (discounted at 3 percent).

FRA analyzed what percentage of the potential accident reduction benefit pools would have to be saved in order for the NPRM to have accident reduction benefits at least equal to costs that apply to existing Class I railroads. The results are presented in Table 2 below, which shows the percentage of the total benefit pools that would need to be saved in order for the rule to break even. FRA believes that such savings are more than attainable. Please note that the rule would break even if it met either percentage by itself, and that the rule would not need to meet both percentages.

TABLE 2—TEN-YEAR COSTS AS PERCENT OF BENEFIT POOLS FOR CLASS I FREIGHT RAILROADS

Benefit pool	Current dollar value	Discounted value 7%	Discounted value 3%
Railroad Investment	0.0062	0.0068	0.0065
Railroad Incidents	0.0146	0.0164	0.0154

With the new VSL policy, DOT also recommends a sensitivity analysis be considered using a VSL of $5.2 million and $12.9 million. Using a VSL of $5.2 million, FRA estimates the break-even point is less than 3 hundredths of a percent, and using a VSL of $12.9 million the break-even point is approximately 1.1 hundredths of a percent.

In conclusion, FRA is confident that the accident reduction and cost effectiveness benefits together would justify the $12.7 million (discounted at 7 percent) to $15.7 million (discounted at 3 percent) implementation cost over the first ten years of the rule as proposed.

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

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

For the railroad industry over a 10-year period, FRA estimates that the total cost for the proposed rule will be $18.6 million, undiscounted; $12.7 million, discounted at 7 percent; or $15.7 million, discounted at 3 percent.[17] Based on information currently available, FRA estimates that less than 17 percent of the total railroad costs associated with implementing the proposed rule would be borne by small entities.

A Class II or III railroad may be brought under FRA's proposed RRP regulation if FRA determines that the railroad has inadequate safety performance. This determination would be made according to proposed § 271.13. Based on an initial review and evaluation, FRA estimates that approximately 10 railroads that are considered small entities for the purpose of this analysis would be found to have inadequate safety performance in the initial year of the rule, and would therefore be required to comply with FRA's RRP requirements. On average, FRA estimates that five additional Class III railroads with inadequate safety performance would be added incrementally per annum after the first full year of implementation, and that the number of railroads with inadequate safety performance would reach a maximum of 40 to 45 railroads around the tenth year of the rule. Together, these railroads do not compose a substantial number of the 629 Class III railroads, which potentially fall under this proposed rule and would be evaluated for inadequate safety performance, and a minor percentage of the railroad operations impacted directly by this proposed regulation, as measured by total employees. Thus, a very few number of small entities in this sector would be impacted. In order to get a better understanding of the total costs for the entire freight railroad industry (which forms the basis for the estimates in this IRFA), or for more cost detail on any specific requirement, please see the Regulatory Impact Analysis (RIA) that FRA has placed in the docket for this rulemaking.

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

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

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

3. A description—and, where feasible, an estimate of the number—of small

[17] FRA's estimates follow Office of Management and Budget (OMB) guidance in OMB Circular A–94 to use real discount rates of 7 and 3 percent for regulatory analysis.

entities to which the proposed rule will apply.

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

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

1. Reasons for Considering Agency Action

FRA has proposed this part 271 in order to comply with sec. 103 and sec. 109 of the RSIA. The RSIA states, in part, that FRA shall require each Class I railroad and railroad with ''inadequate safety performance'' to establish a railroad safety risk reduction program.[18] *See* 49 U.S.C. 20156, 20118, and 20119. This proposed rule sets forth RRP requirements for Class I freight railroads and railroads with inadequate safety performance.

2. The Proposed Rule: Objectives and Legal Basis

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

The proposed rule would prescribe minimum Federal safety standards for the preparation, adoption, and implementation of RRPs. The proposed rule does not restrict railroads from adopting and enforcing additional or more stringent requirements not inconsistent with this proposed rule.

The Secretary has delegated the responsibility to carry out his responsibilities under both sec. 103 and sec. 109 of RSIA, as well as the general responsibility to conduct rail safety rulemakings, codified at 49 U.S.C. 20103, to the Administrator of FRA. *See* 49 CFR 1.89(m) and (oo).

The proposed rulemaking would add to FRA's regulations a new part 271. Part 271 would satisfy the RSIA mandate that FRA require safety risk reduction programs for Class I freight railroads and railroads with inadequate safety performance. *See* 49 U.S.C. 20156(a)(1). It would also include protection from admission or discovery of certain information compiled or collected pursuant to a safety RRP. *See* 49 U.S.C. 20119.

3. Descriptions and Estimates of Small Entities to Which the Proposed Rule Would Apply

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

A ''small entity'' is defined in 5 U.S.C. 601(3) as having the same meaning as ''small business concern'' under sec. 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Title 49 U.S.C. 601(4) likewise includes within the definition of small entities non-profit enterprises that are independently owned and operated, and are not dominant in their field of operation.

The U.S. Small Business Administration (SBA) stipulates in its size standards that the largest a ''for-profit'' railroad business firm may be, and still be classified as a small entity, is 1,500 employees for ''line haul operating railroads'' and 500 employees for ''switching and terminal establishments.'' Additionally, 5 U.S.C. 601(5) defines as small entities governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final Statement of Agency Policy that formally establishes small entities or small businesses as being railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is $20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. *See* 68 FR 24891, May 9, 2003 (codified as appendix C to 49 CFR part 209). The $20 million limit is based on the Surface Transportation Board's revenue threshold for a Class III railroad. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1–1. This definition is what FRA is proposing to use for the rulemaking.

Railroads

Class I freight railroads and railroads with inadequate safety performance would have to comply with all of the proposed provisions of part 271. However, the amount of effort to comply with the proposed rule is commensurate with the size of the entity.

In the universe of railroads for potential compliance under this proposed rule, there are 7 Class I railroads, 10 Class II railroads (1 of which is classified as a passenger railroad that would be excepted from the proposed rule), and 629 Class III freight railroads. Railroads with tourist operations are excluded, and these comprise approximately 90 of the total 719 Class III railroads.

To identify the non-Class I railroads that must comply with the proposed rule, FRA will annually conduct a two-phase analysis to determine which railroads have inadequate safety performance. This is accomplished by the following: (1) A statistically-based quantitative analysis of fatalities, FRA-reportable injuries/illnesses, FRA-reportable accidents/incidents, and FRA safety violations; and (2) a qualitative assessment that includes input from affected railroads and their employees. (*See* § 271.13 of the proposed rule for a full description of the process used to determine inadequate safety performance.)

As FRA's initial inadequate safety performance analysis would occur at least one year after an RRP final rule goes into effect, it is impossible to tell how many railroads with inadequate safety performance would be required to comply with the RRP regulation, and consequently how many of those might be small businesses. However, using a recent 3-year rolling average of safety data to test the selection analytical process, and accounting for those that might seek relief through the qualitative review process, FRA would expect between 7 and 13 Class III railroads to qualify initially for the program, or a simple average of 10; and between 3 and 7, incrementally, per annum thereafter, or a simple average of 5. FRA expects the number of inadequate safety performance railroads to grow each year by 4 or 5 to a maximum of 40 to 45 by year 9 or 10, at which point it should flatten out or actually decline. This declining involvement is due to several factors: (1) Safety performance will improve; (2) after 7 years, some railroads will seek and receive relief

[18] As discussed elsewhere in this NPRM, the RSIA mandate to require safety risk reduction programs for passenger railroads is being addressed in a separate SSP rulemaking.

from being in the program; (3) the size of the railroad pool being examined for inadequate safety performance would shrink as more railroads are required to comply with part 271; and (4) railroads will observe the positive behaviors and results of those railroads with RRPs and will embrace the better safety practices of those railroads as a model. FRA does not find this number of small railroads to be a substantial number of small entities when compared with the 629 small railroads that could potentially be impacted (*i.e.,* Class III railroads) in the industry.

FRA intends to provide assistance to railroads, including small business entities, in the development of their RRPs, starting at the planning phase and continuing through the implementation phase. The proposed rule is also scalable in nature, and FRA would provide assistance to those railroads so that the scope and content of their RRPs are proportionate to their size and the nature of their operation.

As indicated above, FRA would assist a small entity in preparing its RRP program and plan. FRA anticipates that the RRP plan for such an entity would be a very concise and brief document.

FRA requests comments on these findings and conclusions.

Contractors

Some railroads use contractors to perform many different functions on their railroads. For some of these railroads, contractors perform safety-related functions, such as operating trains. For the purpose of assessing the impact of an RRP, contractors fall into two groups: Larger contractors who perform a primary operating or maintenance function for the railroads, and smaller contractors who perform ancillary functions to the primary operations. Larger contractors are typically large private companies, such as Sperry Rail Service, or part of an international conglomerate such as Balfour Beatty. Smaller contractors may perform such duties as brush clearing, painting facilities, etc.

Safety-related policies, work rules, guidelines, and regulations are imparted to the small contractors today as part of their contractual obligations and qualification to work on the Class I freight railroads, and potentially to work for railroads with inadequate safety performance. FRA sees minimal additional burden to imparting the same type of information under each railroad's RRP. A very small administrative burden may result.

Under the proposed rule, contractors (small or large) who provide significant safety-related services are not required to do anything under the rule. While the proposed rule requires the railroad to involve the persons that provide significant safety-related services in the railroad's RRP, it doesn't require the entity to do any training. Thus, any burdens imposed on contractors would be indirect or taken into account in the contract with the pertinent railroad or both. FRA requests comment on these findings and conclusions.

4. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule

There are reporting, recordkeeping, and compliance costs associated with the proposed regulation.

FRA believes that the added burden is marginal due to the proposed NPRM requirements. The total 10-year cost of this proposed rulemaking is $18.6 million, of which FRA estimates $3.2 million or less will be attributable to small entities ($3.2 million in current dollars, $2 million at a 7-percent discount rate, or $2.6 million at a 3-percent discount rate.) Based on FRA's RIA, which has been placed in the docket for this proposed rulemaking, the average railroad with inadequate safety performance would incur an average of $13,500 (non-discounted) of burden per year. If on average railroads with inadequate safety performance were in the RRP for eight years, then the life-time cost would be approximately $108,000. Previously, FRA sampled small railroads and found that revenue averaged approximately $4.7 million (not discounted) in 2006. One percent of average annual revenue per small railroad, or $47,000, is more than three times the average annual cost that these railroads will incur because of this proposed rule. FRA realizes that some railroads will have lower revenue than $4.7 million. However, FRA believes that this average provides a good representation of the small railroads, in general.

Overall, FRA believes that the proposed regulation would not be a significant economic burden for small entities. However, due to the small number of small railroads that are estimated to be impacted by this proposed rule, the cost per railroad could be found to be significant. For a thorough presentation of cost estimates, please refer to the RIA, which has been placed in the docket for this proposed rulemaking. FRA expects that most of the skills necessary to comply with the proposed regulation would be professional hazard assessment personnel, and recordkeeping and reporting personnel.

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

- Subpart A—General: Risk Reduction Program Regulation

The policy, purpose, and definitions outlined in subpart A, alone, would not impose a significant burden on small railroads. However, there is the small requirement for notifying employees of the railroad that FRA has found that the railroad may have inadequate safety performance. This subpart of the proposed rule would impose less than 1 percent of the total burden for small entities.

- Subpart B—Risk Reduction Program Requirements

Subpart B of the proposed rule would have a more or less proportional effect directly related to the size and complexity of a railroad. This subpart of the proposed rule would impose approximately 63 percent of the total burden for small entities. The proposed requirements in this subpart describe what must be developed and placed in the RRP to properly implement the RRP. More specifically, it requires the development of the risk-based hazard analysis, risk-based hazard management processes, and technology implementation plans. Because of the scalable nature of the proposed rule, the requirements of an RRP would be much less complex for a small railroad than they would be for a Class I railroad. This is due to several characteristics of small railroads, such as the concentrated geography of operation in a small area, the short distance of operation, and a non-fragmented and non-diffused work force (in other words, most employees of a small railroad are located in one place). Hence, the number and types of hazards for a small railroad should be limited. Also, such RRP requirements as technology plans should not be burdensome. A small railroad is very limited in the investments it can place in new technologies, and what they do invest in would quite likely be a tried-and-true technology that has been thoroughly tested elsewhere.

- Subpart C—Risk Reduction Program Plan Requirements

Subpart C of the proposed rule would have a more or less proportional effect directly related to the size and complexity of a railroad. In other words, it would have less impact on small entities than it would on Class I railroads. This subpart of the proposed rule would impose approximately 23 percent of the total burden for small

entities. These proposed requirements describe what must be developed and placed in the RRP plan to properly implement the RRP. Specifically, it requires a plan statement on each element of the RRP, including safety policy and goals, system description, consultation process, risk-based hazard management processes, technology plans, internal assessment process, and an RRP implementation plan. This proposed subpart is primarily the paperwork or written plan that supports the processes and programs in the RRP.

• Subpart D—Review, Approval, and Retention of Risk Reduction Program Plans

Subpart D of the proposed rule would impose less than 1 percent of the total burden for small entities. The proposed requirements of this subpart are for the initial delivery and review of the RRP plan, as well as delivery of any ongoing amendments. Since this is initially only expected to have 10 small railroads submitting plans for approval and approximately 5 railroads each year thereafter, this subpart should have a very small economic impact.

• Subpart E—Internal Assessments

Subpart E of the proposed rule would impose approximately 12 percent of the total burden for small entities. This burden is for the ongoing cost for the small railroads to perform an internal assessment and report on internal audits on annual basis. As noted above, initially very few small railroads would be performing internal assessments, which would serve to minimize the economic impact on small railroads.

• Subpart F—External Audits

Subpart F of the proposed rule would impose approximately 1 percent of the total burden for small entities. This burden is for the ongoing cost for the small railroads to host an external audit by FRA or its designees on a periodic basis. This includes the burden to produce an improvement plan if such were required as a result of the external audit findings. FRA does not expect more than five of these railroads to receive an external audit for any given year.

Market and Competition Considerations

The railroad industry has several significant barriers to entry, such as the need to own or otherwise obtain access to rights-of-way and the high capital expenditure needed to purchase a fleet, as well as track and equipment. Furthermore, the small railroads under consideration would potentially be competing only with the trucking industry and typically deal with the transport of commodities or goods that are not truck-friendly. Thus, while this proposed rule would have an economic impact on Class I freight railroads and railroads with inadequate safety performance, it should not have an impact on the competitive position of small railroads. FRA requests comment on these findings and conclusions.

5. Identification of Any Duplicative, Overlapping, or Conflicting Federal Rules

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

The Federal Transit Administration (FTA) first implemented requirements similar to an RRP in 49 CFR part 659 in 1995, and its requirements can be much more systemic and encompassing. However, FTA's part 659 program applies to only rapid transit systems, or portions thereof, that are not subject to FRA's rules. *See* 49 CFR 659.3 and 659.5. Therefore, FTA's part 659 does not apply to any of the railroads that are within the scope of the proposed RRP rule.

FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of the proposals in this NPRM. As noted above FRA has estimated that railroads with inadequate safety performance would incur less than 12 percent of the total cost of this proposed rule. Based on FRA's RIA, the average railroad with inadequate safety performance would incur an average of $13,500 (non-discounted) of burden per year. If on average railroads with inadequate safety performance were in the RRP for eight years, then the life-time cost would be approximately $108,000. Previously, FRA sampled small railroads and found that revenue averaged approximately $4.7 million (not discounted) in 2006. One percent of average annual revenue per small railroad, or $47,000, is more than three times the average annual cost that these railroads will incur because of this proposed rule. FRA realizes that some railroads will have lower revenue than $4.7 million. However, FRA believes that this average provides a good representation of the small railroads, in general. FRA specifically requests comments as to whether small railroads would incur a significant economic impact from this proposed rule. FRA will consider all comments received in the public comment process when making a final determination regarding the economic impact on small entities.

C. Federalism

Executive Order 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that the proposed rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that this proposed rule will not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

This NPRM proposes to add part 271, Risk Reduction Programs. FRA is not aware of any State having regulations similar to proposed part 271. However, FRA notes that this part could have preemptive effect by the operation of law under a provision of the former Federal Railroad Safety Act of 1970, repealed and codified at 49 U.S.C. 20106 (Sec. 20106). Sec. 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the

Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the ''essentially local safety or security hazard'' exception to Sec. 20106. Although FRA is proposing to specify in proposed § 271.11(c) that state discovery rules and sunshine laws that could be used to require the disclosure of information protected by § 271.11(a) are preempted, the purpose of this language is only to clarify the preemptive effect of Sec. 20106, and is not intended to have preemptive effect that goes beyond the operation of Sec. 20106. The proposed information protection provisions clearly relate to matters of railroad safety because, as previously discussed, 49 U.S.C. 20119(b) authorizes FRA to issue a rule governing the discovery and use of risk analysis information in litigation.

In sum, FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this proposed rule has no federalism implications, other than preemption of State laws under 49 U.S.C. 20106 and 20119. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

D. International Trade Impact Assessment

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

E. Paperwork Reduction Act

The information collection requirements in this proposed rule 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 are duly designated, and the estimated time to fulfill each requirement is as follows:

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
271.7—Waiver Petitions to FRA	22 railroads	1 petition	80 hours	80
271.13—Determination of Inadequate Safety Performance (ISP)—Notice to Employees of ISP Designation by FRA.	22 railroads	120 notices	30 minutes	60
—Employee Confidential Comments to FRA regarding RR ISP Designation.	100 employees	10 comments	30 minutes	5
—RR Documentation to FRA Refuting ISP Designation.	10 railroads	10 document	8 hours	80
271.101(a)—Risk Reduction Programs (RRPs)—Class I Railroads.	7 railroads	7 RRPs	6,987 hours	48,910
—Risk Reduction Programs (RRPs)—Inadequate Safety Performance (ISP) Railroads.	10 railroads	10 RRPs	343 hours	3,430
(c)—Communication by RRs that host passenger train service with Class I RRs subject to FRA System Safety Program Requirements.	7 railroads	40 consults	2 hours	80
(d)—RR Identification/Communication with railroads performing significant safety-related services—Class I RRs.	7 railroads	318 consults	2 hours	636
—RR Identification/Communication with contractors performing significant safety related services.	7 railroads	1,488 consult	1 hour	1,488
(d)—ISP RRs identification/communication w/entities performing significant safety-related services.	10 railroads	10 consults	4 hours	40
271.107—Reporting to management risk-based HMP Activities—Class I.	7 railroads	84 reports	30 minutes	42
—Reporting to management—ISP RRs	10 railroads	120 reports	3 hours	360
271.111—Implementation Training.				
—Employee RRP training—Class I RR	150,000 employees	1,400 worker	2 hours	2,800
—Replacement/new employees: Class I	150,000 employees	140 workers	2 hours	280
—Employee RRP training—ISP RRs	1,000 employees	100 workers	2 hours	200
—Employee RRP training records (Class I RRs + ISP RRs).	17 railroads	1,640 records	3 minutes	82
271.201/203—Written Risk Reduction Plans (RRPs)—Adoption and Implementation of RRP Plans—Class I.	7 railroads	7 RRP Plans	1,152 hours	8,064
—Written RRP Plans—ISP RRs	10 railroads	10 RRP Plans	240 hours	2,400
271.207—RR Good Faith Consultation w/Directly Affected Employees—Class I RRs.	7 Railroads	7 consults	200 hours	1,400
—RR Good Faith Consultations—ISP RRs	10 Railroads	10 consults	20 hours	200
—RR Notification to Employees of Consultation Meeting—Class I RRs.	7 Railroads	2 notices	8 hours	16
—ISP RR Notification to Employees	10 Railroads	1 notice	30 minutes	1

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Voluntarily compliant RR consultation with directly affected employees on RRP Plan contents.	72 railroads	1 consult/statement	20 hours	20
—Copy of RRP Plan/Consultation Statement to General Chair of Labor Union and to Individuals Identified in RRP Plan Service List.	7 Railroads	380 plan copies + 380	2 minutes	25
—Statements from Directly Affected Employees—Class I RRs.	10 Labor Unions	3 statements	6 hours	18
271.209—Substantive Amendments to RRP Plan—Class I RRs.	7 Railroads	7 amended plans	40 hours	280
Substantive Amendments to RRP Plan—ISP RRs.	10 Railroads	10 amended plans	4 hours	40
271.301—Filing of RRP Plan w/FRA—Class I RRs + ISP RRs.	17 railroads	17 filed plans	2 hours	34
—Class I RR corrected RRP Plan	7 railroads	2 RRP plans	2 hours	4
—FRA requested Class I RR consultation with directly affected employees regarding substantive corrections/changes to RRP Plan.	7 railroads	2 consulting statements	3 hours	6
271.303—*Amendments* Consultation w/Directly Affected Employees on Substantive Amendments to RRP Plan—Class I RRs + ISP RRs.	17 railroads	2 consults	60 minutes	2
—Amended RRP Plan—Class I RRs	7 railroads	7 plans	6 hours	42
—Amended RRP Plan—ISP RRs	10 railroads	1 plan	1 hour	1
—Amended RRP Plan Disapproved by FRA and Requiring Correction.	7 Railroads	1 corrected RRP Plan	80 hours	80
271.307—Retention of RRP Plans—Copies of RRP Plan/Amendments by RR at System/Division Headquarters.	17 railroads	34 plan copies	10 minutes	6
217.401/403—RR Internal Assessment/Improvement Plans—Class I RRs.	7 railroads	7 plans	120 hours	840
—ISP RR Improvement Plans	10 railroads	10 plans	32 hours	320
271.405—Internal Assessment Report Copy to FRA—Class I RRs.	7 railroads	7 reports/copies	8 hours	56
—Internal Assessment Report Copy to FRA—ISP RRs.	10 railroads	10 reports/copies	2 hours	20
271.503—External Audit Improvement Plans—Submission of Improvement Plans upon FRA Written Notice of Agency Audit Results—Class I RRs.	7 railroads	2 plans	40 hours	80
—External Audit Improvement Plans—Submission of Improvement Plans upon FRA Written Notice of Agency Audit Results—Class I RRs.	10 railroads	1 plan	4 hours	4
—Submission of Amended Improvement Plan after FRA Disapproval.	7 railroads	1 plan	8 hours	8
—Status Report Requested by FRA concerning Implementation of Improvements in Improvement Plan.	7 railroads	1 status report	8 hours	8
Appendix B—Request by FRA for Additional Information/Documents to determine whether Railroad has met Good Faith and Best Efforts Consultation Requirements of Section 271.207.	7 railroads	3 documents	40 hours	120
—Further Railroad Consultation w/employees after determination by FRA that railroad did not use Good Faith/Best Efforts.	7 railroads	1 consult	8 hours	8
—Meeting to discuss Administrative Details of Consultation Process during the time between Initial Meeting and Applicability Date—Class I RRs.	7 railroads	7 meetings/consults	2 hours	14
—Meeting to discuss Administrative Details of Consultation Process during the time between Initial Meeting and Applicability Date –ISP RRs.	10 railroads	10 meetings/consults	1 hour	10
—Draft RRP Plan Proposal to Employees—ISP RRs.	10 railroads	2 proposals/copies	20 hours	40
—Employee comments on RRP Plan Draft Proposal.	100 Employees	6 comments	1 hour	6

The estimates in this table are based upon FRA's general experience and expertise regarding the railroad industry and the development of plans. All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C.

3506(c)(2)(B), FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202–493–6292, or Ms. Kimberly Toone at 202–493–6132.

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

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

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

F. Environmental Assessment

FRA has evaluated this proposed rule in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this proposed rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. *See* 64 FR 28547, May 26, 1999. Section 4(c)(20) reads as follows: ''(c) Actions categorically excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. * * * The following classes of FRA actions are categorically excluded: * * * (20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions or air or water pollutants or noise or increased traffic congestion in any mode of transportation.''

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

G. Unfunded Mandates Reform Act of 1995

Pursuant to sec. 201 of the Unfunded Mandates Reform Act of 1995 (Public Law 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. For the year 2010, this monetary amount of $100,000,000 has been adjusted to $143,100,000 to account for inflation. This proposed rule would not result in the expenditure of more than $143,100,000 by the public sector in any one year, and thus preparation of such a statement is not required.

H. Energy Impact

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

I. Privacy Act Statement

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy*.

List of Subjects in 49 CFR Part 271

Penalties; Railroad safety; Reporting and recordkeeping requirements; and Risk reduction.

The Proposal

In consideration of the foregoing, FRA proposes to add part 271 to chapter II, subtitle B of title 49, Code of Federal Regulations, to read as follows:

PART 271—RISK REDUCTION PROGRAM

Subpart A—General

Sec.
271.1 Purpose and scope.
71.3 Application.
71.5 Definitions.
271.7 Waivers.

Authority: 49 U.S.C. 20103, 20106–20107, 20118–20119, 20156, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

Subpart A—General

§ 271.1 Purpose and scope.

(a) The purpose of this part is to improve railroad safety through structured, proactive processes and procedures developed and implemented by railroads. Each railroad subject to this part must establish a Risk Reduction Program (RRP) that systematically evaluates railroad safety hazards on its system and manages the risks associated with those hazards in order to reduce the number and rates of railroad accidents/incidents, injuries, and fatalities.

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

(c) This part prescribes the protection of information generated solely for the purpose of developing, implementing, or evaluating an RRP under this part.

(d) An RRP required by this part is not intended to address and should not address the safety of employees while performing inspections, tests, and maintenance, except where FRA has already addressed workplace safety issues, such as blue signal protection in part 218 of this chapter. FRA does not intend to approve any specific portion of an RRP plan that relates to employee working conditions.

§ 271.3 Application.

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

(1) Class I railroads;

(2) Railroads determined to have inadequate safety performance pursuant to § 271.13; and

(3) Railroads that voluntarily comply with the requirements of this part pursuant to § 271.15.

(b) This part does not apply to:

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

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

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

(4) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.,* plant railroads, as defined in § 271.5); and

(5) Commuter or intercity passenger railroads that are subject to Federal system safety program requirements.

§ 271.5 Definitions.

As used in this part only—

Accident/incident means—

(1) Any impact between railroad on-track equipment and a highway user at a highway-rail grade crossing. The term ''highway user'' includes automobiles, buses, trucks, motorcycles, bicycles, farm vehicles, pedestrians, and all other modes of surface transportation (motorized and un-motorized);

(2) Any collision, derailment, fire, explosion, act of God, or other event involving operation of railroad on-track equipment (standing or moving) that results in reportable damages greater than the current reporting threshold identified in part 225 of this chapter to railroad on-track equipment, signals, track, track structures, and roadbed;

(3) Each death, injury, or occupational illness that is a new case and meets the general reporting criteria listed in § 225.19(d)(1) through (6) of this chapter if any event or exposure arising from the operation of a railroad is a discernible cause of a significant aggravation to a pre-existing injury or illness. The event or exposure arising from the operation of a railroad need only be one of the discernible causes; it need not be the sole or predominant cause.

Administrator means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

FRA means the Federal Railroad Administration.

FRA Associate Administrator means the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, or the Associate Administrator's delegate.

Fully implemented means that all elements of an RRP as described in the RRP plan are established and applied to the safety management of the railroad.

Hazard means any real or potential condition that can cause injury, illness, or death; damage to or loss of a system, equipment, or property; or damage to the environment.

Inadequate safety performance means safety performance that FRA has determined to be inadequate based on the criteria described in § 271.13.

Mitigation strategy means an action or program intended to reduce or eliminate the risk associated with a hazard.

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

Pilot project means a limited scope project used to determine whether

quantitative proof suggests that a particular system or mitigation strategy has potential to succeed on a full-scale basis.

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

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

Railroad means—

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

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

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

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

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

Risk-based HMP means a risk-based hazard management program.

Risk reduction means the formal, top-down, organization-wide approach to managing safety risk and assuring the effectiveness of safety risk mitigation strategies. It includes systematic procedures, practices, and policies for the management of safety risk.

RRP means a Risk Reduction Program.

RRP plan means a Risk Reduction Program plan.

Safety culture means the shared values, actions, and behaviors that demonstrate a commitment to safety over competing goals and demands.

Safety performance means a realized or actual safety accomplishment relative to stated safety objectives.

Safety outreach means the communication of safety information to support the implementation of an RRP throughout a railroad.

Senior management means personnel at the highest level of a railroad's management who are responsible for making major policy decisions and long-term business plans regarding the operation of the railroad.

STB means the Surface Transportation Board of the United States.

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

§ 271.7 Waivers.

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

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

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

§ 271.9 Penalties and responsibility for compliance.

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

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

§ 271.11 Discovery and admission as evidence of certain information.

(a) Any information (including plans, reports, documents, surveys, schedules, lists, or data) compiled or collected for the sole purpose of developing, implementing, or evaluating an RRP under this part, including a railroad carrier's analysis of its safety risks conducted pursuant to § 271.103(b) and a statement of the mitigation measures with which it would address those risks created pursuant to § 271.103(c), shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage.

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

(1) Existed prior to [365 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**];

(2) Was compiled or collected prior to [365 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE

IN THE **FEDERAL REGISTER**] and that continues to be compiled or collected; or

(3) Is compiled or collected after [365 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**].

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

§ 271.13 Determination of inadequate safety performance.

(a) *General.* (1) This section describes FRA's methodology for determining which railroads are required to establish an RRP because they have inadequate safety performance. FRA's methodology will consist of a two-phase annual analysis, comprised of both a quantitative analysis and qualitative assessment, which will include all railroads except for:

(i) Railroads excluded from this part under § 271.3(b);

(ii) Railroads already required to comply with this part;

(iii) Railroads that are voluntarily complying with this part under § 271.15; and

(iv) Except as provided in paragraph (a)(2) of this section, new start-up railroads that have reported accident/incident data to FRA pursuant to part 225 of this chapter for fewer than three years.

(2) Notwithstanding paragraph (a)(1)(iv) of this section, railroads formed through amalgamation of operations (for example, railroads formed through consolidations, mergers, or acquisitions of control) will be included in the analysis using the combined data of the pre-amalgamation entities.

(b) *Quantitative analysis.* (1) *Methodology.* The first phase of FRA's annual analysis will be a statistically-based quantitative analysis of each railroad within the scope of the analysis, using historical safety data maintained by FRA for the three most recent full calendar years. The purpose of the quantitative analysis is to make a threshold identification of railroads that possibly have inadequate safety performance. This quantitative analysis will calculate the following four factors:

(i) A railroad's number of on-duty employee fatalities during the 3-year period, calculated using ''Worker on Duty-Railroad Employee (Class A)'' information reported on FRA Form 6180.55a pursuant to FRA's accident/incident reporting regulations in part 225 of this chapter;

(ii) A railroad's on-duty employee injury/illness rate, calculated using ''Worker on Duty-Railroad Employee (Class A)'' information reported on FRA Forms 6180.55a and 6180.55 pursuant to FRA's accident/incident reporting regulations in part 225 of this chapter. This rate will be calculated using the following formula, which gives the rate of employee injuries and occupational illnesses per 200,000 employee hours over a 3-year period:

Injury/Illness Rate = (Total FRA Reportable On-Duty Employee Injuries + Total FRA Reportable On-Duty Employee Occupational Illnesses over a 3-year period) ÷ (Total Employee Hours over a 3-year period/200,000)

(iii) A railroad's rail equipment accident/incident rate, calculated using information reported on FRA Forms 6180.54 and 6180.55 pursuant to FRA's accident/incident reporting regulations in part 225 of this chapter. This rate will be calculated using the following formula, which gives the rate of rail equipment accidents/incidents per 1,000,000 train miles over a 3-year period:

Rail Equipment Accident/Incident Rate = Total FRA Reportable Rail Equipment Accidents/Incidents over a 3-year period ÷ (Total Train Miles over a 3-year period/1,000,000)

(iv) A railroad's violation rate. This rate will be calculated using the following formula, which gives the rate of violations issued by FRA to a railroad per 1,000,000 train miles over a 3-year period:

Violation Rate = Total FRA Violations over a 3-year period ÷ (Total Train Miles over a 3-year period/1,000,000)

(2) *Identification.* The quantitative analysis will identify railroads as possibly having inadequate safety performance if at least one of the following two conditions exists within the scope and timeframe of the analysis:

(i) A railroad has one or more fatality; or

(ii) A railroad is at or above the 95th percentile in at least two of three factors described in paragraphs (b)(1)(ii) through (iv) of this section.

(c) *Qualitative assessment.* The second phase of FRA's analysis will be a qualitative assessment of railroads identified in the quantitative analysis as possibly having inadequate safety performance.

(1) *Notification and railroad/employee comment.* FRA will notify a railroad in writing if it will be subject to a qualitative assessment because it was identified in the quantitative analysis as possibly having inadequate safety performance.

(i) No later than 15 days after receiving FRA's written notice, a railroad shall notify its employees of FRA's written notice. This employee notification shall be posted at all locations where the railroad reasonably expects its employees to report and to have an opportunity to observe the notice. The notification shall be posted and remain continuously displayed until 45 days after FRA's initial written notice. Employees who do not have a regular on-duty point for reporting to work shall be notified by other means, in accordance with the railroad's standard practice for communicating with employees. The notification shall inform railroad employees that they may confidentially submit comments to FRA regarding the railroad's safety performance for a period of 45 days following FRA's initial written notice, and shall contain instructions for doing so.

(ii) No later than 45 days after receiving FRA's written notice, a railroad may provide FRA documentation supporting any claims that the railroad does not have inadequate safety performance.

(2) *Methodology.* No later than 90 days after providing the initial notice to a railroad identified by the quantitative analysis, FRA will conduct a qualitative assessment of the identified railroad and make a final determination regarding whether it has inadequate safety performance. The qualitative assessment will consider any documentation provided by the railroad, comments submitted by railroad employees, and any other pertinent information.

(d) *Final notification and compliance.* FRA will provide a final written notice to each railroad that receives an initial written notice, informing the railroad whether or not FRA determines that the railroad has demonstrated inadequate safety performance. A railroad with inadequate safety performance shall develop and implement an RRP meeting the requirements of this part. As provided by § 271.301(a), a railroad with inadequate safety performance shall submit to FRA an RRP plan no later than 90 days after receiving final written notice from FRA that it shall comply with this part, or no later than [545 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], whichever is later.

(e) *Compliance.* A railroad with inadequate safety performance shall comply with the requirements of this part for a minimum period of five years, running from the date on which FRA approves the railroad's RRP plan pursuant to subpart D of this part.

(f) *Petition.* After the five-year compliance period, the railroad may petition FRA for approval to discontinue compliance with this part. A petition shall be filed according to the procedures for waivers contained in part 211 of this chapter. Upon receiving a petition, FRA will reevaluate the railroad's safety performance for the purpose of determining whether the railroad's RRP has resulted in significant and sustained safety improvements, and whether these measured improvements are likely sustainable in the long term. FRA's evaluation will include a quantitative analysis as described in paragraph (b) of this section. FRA will also examine qualitative factors and review information from FRA RRP audits and other relevant sources. After completing its evaluation, FRA will notify the railroad in writing whether or not it shall be required to continue compliance with this part.

§ 271.15 Voluntary compliance.

(a) *General.* A railroad not otherwise subject to this part may voluntarily comply by establishing and fully implementing an RRP meeting the requirements of this part. A voluntary RRP shall be supported by an RRP plan that has been submitted to FRA for approval pursuant to the requirements of subpart D of this part. After FRA has approved its RRP plan, a voluntarily-compliant railroad could be subject to civil penalties or other enforcement action for failing to comply with the requirements of this part.

(b) *Duration.* A voluntarily-compliant railroad will be required to comply with the requirements of this part for a minimum period of five years, running from the date on which FRA approves the railroad's plan pursuant to subpart D of this part.

(c) *Petition.* After this five-year period, a voluntarily-compliant railroad may petition FRA for approval to discontinue compliance with this part. This petition shall be filed according to the procedures for waivers contained in part 211 of this chapter.

(d) *Discovery and admission as evidence of certain information.* The information protection provisions found in § 271.11 apply only to information compiled or collected pursuant to a voluntary RRP that is conducted in accordance with the requirements of this part.

Subpart B—Risk Reduction Program Requirements

§ 271.101 Risk reduction programs.

(a) *Program required.* Each railroad shall establish and fully implement an RRP meeting the requirements of this part. An RRP shall systematically evaluate safety hazards on a railroad's system and manage the resulting risks to reduce the number and rates of railroad accidents/incidents, injuries, and fatalities. An RRP is not a one-time exercise, but an ongoing program that supports continuous safety improvement. An RRP shall include the following:

(1) A risk-based hazard management program, as described in § 271.103;

(2) A safety performance evaluation component, as described in § 271.105;

(3) A safety outreach component, as described in § 271.107;

(4) A technology analysis and technology implementation plan, as described in § 271.109; and

(5) RRP implementation and support training, as described in § 271.111.

(b) *RRP plans.* A railroad's RRP shall be supported by an FRA-approved RRP plan meeting the requirements of subpart C of this part.

(c) *Host railroads and system safety programs.* As part of its RRP, each railroad that hosts passenger train service for a railroad subject to FRA system safety program requirements shall communicate with the railroad that provides or operates such passenger service and coordinate the portions of the system safety program applicable to the railroad hosting the passenger train service.

(d) *Persons that utilize or perform significant safety-related services.* Under § 271.205(b), a railroad's RRP plan shall identify persons utilizing or performing on the railroad's behalf significant safety-related services (including entities such as host railroads, contract operators, shared track/corridor operators, or other contractors utilizing or performing significant safety-related services). A railroad shall ensure that these persons utilizing or performing significant safety-related services on its behalf support and participate in its RRP.

§ 271.103 Risk-based hazard management program.

(a) *General.* (1) An RRP shall include an integrated, system-wide, and ongoing risk-based hazard management program (HMP) that proactively identifies hazards and mitigates the risks resulting from those hazards.

(2) A risk-based HMP shall be fully implemented (*i.e.,* activities initiated) within 36 months after FRA approves a railroad's RRP plan pursuant to § 271.301(b).

(b) *Risk-based hazard analysis.* As part of its risk-based HMP, a railroad shall conduct a risk-based hazard analysis that addresses, at a minimum, the following aspects of a railroad's system: Infrastructure; equipment; employee levels and work schedules; operating rules and practices; management structure; employee training; and other areas impacting railroad safety that are not covered by railroad safety laws or regulations or other Federal laws or regulations. A railroad shall make the results of its risk-based hazard analysis available to FRA upon request. At a minimum, a risk-based hazard analysis shall:

(1) Identify hazards by analyzing:

(i) Aspects of the railroad's system, including any operational changes, system extensions, or system modifications; and

(ii) Accidents/incidents, injuries, fatalities, and other known indicators of hazards;

(2) Calculate risk by determining and analyzing the likelihood and severity of potential events associated with identified risk-based hazards; and

(3) Compare and prioritize the identified risks for mitigation purposes.

(c) *Mitigation strategies.* (1) As part of its risk-based HMP, a railroad shall design and implement mitigation strategies that improve safety by:

(i) Mitigating or eliminating aspects of a railroad's system that increase risks identified in the risk-based hazard analysis; and

(ii) Enhancing aspects of a railroad's system that decrease risks identified in the risk-based hazard analysis.

(2) A railroad may use pilot projects, including pilot projects conducted by other railroads, to determine whether quantitative data suggests that a particular mitigation strategy has potential to succeed on a full-scale basis.

§ 271.105 Safety performance evaluation.

(a) *General.* As part of its RRP, a railroad shall develop and maintain ongoing processes and systems for evaluating the safety performance of its system and measuring its safety culture. A railroad's safety performance evaluation shall consist of both a safety monitoring and a safety assessment component.

(b) *Safety monitoring.* A railroad shall monitor the safety performance of its system by, at a minimum, establishing processes and systems to acquire safety data and information from the following sources:

(1) Continuous monitoring of operational processes and systems (including any operational changes, system extensions, or system modifications);

(2) Periodic monitoring of the operational environment to detect changes that may generate new hazards;

(3) Investigations of accidents/incidents, injuries, fatalities, and other known indicators of hazards;

(4) Investigations of reports regarding potential non-compliance with Federal railroad safety laws or regulations, railroad operating rules and practices, or mitigation strategies established by the railroad; and

(5) A reporting system through which employees can report safety concerns (including, but not limited to, hazards, issues, occurrences, and incidents) and propose safety solutions and improvements.

(c) *Safety assessment.* For the purpose of assessing the need for changes to a railroad's mitigation strategies or overall RRP, a railroad shall establish processes to analyze the data and information collected pursuant to paragraph (b) of this section (as well as any other relevant data regarding its operations, products, and services). At a minimum, this assessment shall:

(1) Evaluate the overall effectiveness of the railroad's RRP in reducing the number and rates of railroad accidents/incidents, injuries, and fatalities;

(2) Evaluate the effectiveness of the railroad's RRP in meeting the goals described by its RRP plan (*see* § 271.203(c));

(3) Evaluate the effectiveness of risk mitigations in reducing the risk associated with an identified hazard. Any hazards associated with ineffective mitigation strategies shall be reevaluated through the railroad's risk-based HMP, as described in § 271.103; and

(4) Identify new, potential, or previously unknown hazards, which shall then be evaluated by the railroad's risk-based HMP, as described in § 271.103.

§ 271.107 Safety outreach.

(a) *Outreach.* An RRP shall include a safety outreach component that communicates RRP safety information to railroad personnel (including contractors) as that information is relevant to their positions. At a minimum, a safety outreach program shall:

(1) Convey safety-critical information;

(2) Explain why RRP-related safety actions are taken; and

(3) Explain why safety procedures are introduced or changed.

(b) *Reporting to management.* The status of risk-based HMP activities shall be reported to railroad senior management on an ongoing basis.

§ 271.109 Technology analysis and technology implementation plan.

(a) *General.* As part of its RRP, a Class I railroad shall conduct a technology analysis and develop and adopt a technology implementation plan no later than [1095 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]. A railroad with inadequate safety performance shall conduct a technology analysis and develop and adopt a technology implementation plan no later than three years after receiving final written notification from FRA that it shall comply with this part, pursuant to § 271.13(e), or no later than [1095 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], whichever is later. A railroad that the STB reclassifies or newly classifies as a Class I railroad shall conduct a technology analysis and develop and adopt a technology implementation plan no later than three years following the effective date of the classification or reclassification or no later than [1155 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], whichever is later. A voluntarily-compliant railroad shall conduct a technology analysis and develop and adopt a technology implementation plan no later than three years after FRA approves the railroad's RRP plan.

(b) *Technology analysis.* A technology analysis shall evaluate current, new, or novel technologies that may mitigate or eliminate hazards and the resulting risks identified through the risk-based hazard management program. The railroad shall analyze the safety impact, feasibility, and costs and benefits of implementing technologies that will mitigate or eliminate hazards and the resulting risks. At a minimum, the technologies a railroad shall consider as part of its technology analysis are: processor-based technologies, positive train control systems, electronically-controlled pneumatic brakes, rail integrity inspection systems, rail integrity warning systems, switch position monitors and indicators, trespasser prevention technology, and highway-rail grade crossing warning and protection technology.

(c) *Technology implementation plan.* A railroad shall develop, and periodically update as necessary, a technology implementation plan that contains a prioritized implementation schedule describing the railroad carrier's plan for development, adoption, implementation, maintenance, and use of current, new, or novel technologies on its system over a 10-year period to reduce safety risks identified in the railroad's risk-based hazard management program.

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

§ 271.111 Implementation and support training.

(a) A railroad shall provide RRP training to each employee, including an employee of any person identified by the railroad's RRP plan pursuant to § 271.205(a)(3) as utilizing or performing significant safety-related services on the railroad's behalf, who has significant responsibility for implementing and supporting the railroad's RRP. This training shall help ensure that all personnel with significant responsibility for implementing and supporting the RRP understand the goals of the program, are familiar with the elements of the railroad's program, and have the requisite knowledge and skills to fulfill their responsibilities under the program.

(b) A railroad shall keep a record of training conducted under this section and update that record as necessary.

(c) Training under this section may include, but is not limited to, interactive computer-based training, video conferencing, or formal classroom training.

Subpart C—Risk Reduction Program Plan Requirements

§ 271.201 General.

A railroad shall adopt and implement its RRP through a written RRP plan containing the elements described in this subpart. A railroad's RRP plan shall be approved by FRA according to the requirements contained in subpart D of this part.

§ 271.203 Policy, purpose and scope, and goals.

(a) *Policy statement.* An RRP plan shall contain a policy statement endorsing the railroad's RRP. This statement shall be signed by the chief official at the railroad (*e.g.,* Chief Executive Officer).

(b) *Purpose and scope.* An RRP plan shall contain a statement describing the purpose and scope of the railroad's RRP.

This purpose and scope statement shall describe:

(1) The railroad's safety philosophy and safety culture;

(2) How the railroad promotes improvements to its safety culture;

(3) The roles and responsibilities of railroad personnel (including management) within the railroad's RRP; and

(4) How any person that utilizes or provides significant safety-related services to a railroad (including host railroads, contract operators, shared track/corridor operators, or other contractors) will support and participate in the railroad's RRP.

(c) *Goals.* An RRP plan shall contain a statement that defines the specific goals of the RRP and describes clear strategies for reaching those goals. These goals shall be long-term, meaningful, measurable, and focused on the mitigation of risks arising from identified safety hazards.

§ 271.205 System description.

(a) An RRP plan shall contain a description of the characteristics of the railroad's system. At a minimum, the system description shall:

(1) Support the identification of hazards by establishing a basic understanding of the scope of the railroad's system;

(2) Include components briefly describing the railroad's history, operations, scope of service, maintenance, physical plant, and system requirements; and

(3) Identify all persons that utilize or perform significant safety-related services on the railroad's behalf (including entities such as host railroads, contract operations, shared track/corridor operators, or other contractors).

(b) [Reserved]

§ 271.207 Consultation process description.

(a) *General duty.* (1) Each railroad required to establish an RRP under this part shall in good faith consult with, and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit labor organization representing a class or craft of directly affected employees, on the contents of the RRP plan.

(2) A railroad that consults with a non-profit employee labor organization is considered to have consulted with the directly affected employees represented by that organization.

(3) A Class I railroad shall meet no later than [240 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] with its directly affected employees to discuss the consultation process. The Class I railroad shall notify the directly affected employees of this meeting no less than 60 days before it is scheduled.

(4) A railroad determined to have inadequate safety performance shall meet no later than 30 days following FRA's notification with its directly affected employees to discuss the consultation process. The inadequate safety performance railroad shall notify the directly affected employees of this meeting no less than 15 days before it is scheduled.

(5) A railroad that the STB reclassifies or newly classifies as a Class I railroad shall meet with its directly affected employees to discuss the consultation process no later than 30 days following the effective date of the classification or reclassification. The reclassified or newly classified Class I railroad shall notify the directly affected employees of this meeting no less than 15 days before it is scheduled.

(6) A voluntarily-compliant railroad shall in good faith consult with, and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit labor organization representing a class or craft of directly affected employees, on the contents of the RRP plan. However, as there is no deadline for a voluntarily-compliant railroad to file an RRP plan with FRA, there is also no requirement for a voluntarily-compliant railroad to meet with its directly affected employees within a certain timeframe.

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

(b) *Railroad consultation statements.* A railroad required to submit an RRP plan under § 271.301(a) shall also submit, together with that plan, a consultation statement that includes the following information:

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

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

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

(4) A service list containing the names and contact information for the international/national president of any non-profit employee labor organization representing a class or craft of the railroad's directly affected employees and any directly affected employee not represented by a non-profit employee labor organization who significantly participated in the consultation process. If an international/national president did not participate in the consultation process, the service list shall also contain the name and contact information for a designated representative who participated on his or her behalf. When a railroad submits its RRP plan and consultation statement to FRA, it shall also send a copy of these documents to all individuals identified in the service list. A railroad may send the documents to the identified individuals via electronic means or utilizing other service means reasonably calculated to succeed.

(c) *Statements from directly affected employees.* (1) If a railroad and its directly affected employees cannot reach agreement on the proposed contents of an RRP plan, then directly affected employees may file a statement with the FRA Associate Administrator explaining their views on the plan on which agreement was not reached. The FRA Associate Administrator shall consider any such views during the plan review and approval process.

(2) As provided in § 271.301(a)(4), a railroad's directly affected employees have 60 days following the railroad's submission of a proposed RRP plan to submit the statement described in paragraph (c)(1) of this section.

§ 271.209 Consultation on amendments.

A railroad's RRP plan shall include a description of the process the railroad will use to consult with its directly affected employees on any subsequent substantive amendments to the railroad's system safety program. The requirements of this paragraph do not apply to non-substantive amendments (*e.g.,* amendments that update names and addresses of railroad personnel).

§ 271.211 Risk-based hazard management program process.

(a) *Risk-based hazard analysis.* An RRP plan shall describe the railroad's method for conducting its risk-based hazard analysis pursuant to § 271.103(b). The description shall specify:

(1) The processes the railroad will use to identify hazards and the risks associated with those hazards;

(2) The sources the railroad will use to support the ongoing identification of

hazards and the risks associated with those hazards; and

(3) The processes the railroad will use to compare and prioritize identified risks for mitigation purposes.

(b) *Mitigation strategies.* An RRP plan shall describe the railroad's processes for:

(1) Identifying and selecting mitigation strategies; and

(2) Monitoring an identified hazard through the mitigation of the risk associated with that hazard.

§ 271.213 Safety performance evaluation process.

An RRP plan shall describe a railroad's processes for measuring its safety culture pursuant to § 271.105(a), monitoring safety performance pursuant to § 271.105(b), and conducting safety assessments pursuant to § 271.105(c).

§ 271.215 Safety outreach process.

An RRP plan shall describe a railroad's process for communicating safety information to railroad personnel and management pursuant to § 271.107.

§ 271.217 Technology implementation plan process.

(a) An RRP plan shall contain a description of the railroad's processes for:

(1) Conducting a technology analysis pursuant to § 271.109(b); and

(2) Developing a technology implementation plan pursuant to § 271.109(c).

(b) [Reserved]

§ 271.219 Implementation and support training plan.

(a) An RRP plan shall contain a training plan describing the railroad's processes, pursuant to § 271.111, for training employees with significant responsibility for implementing and supporting the RRP (including employees of a person identified pursuant to § 271.205(a)(3) as utilizing or performing significant safety-related services on the railroad's behalf who have significant responsibility for implementing and supporting the railroad's RRP).

(b) The training plan shall describe the frequency and content of the RRP training for each position or job function identified pursuant to § 271.223(b)(3) as having significant responsibilities for implementing the RRP.

§ 271.221 Internal assessment process.

(a) An RRP plan shall describe the railroad's process for conducting an internal assessment of its RRP pursuant to subpart E of this part. At a minimum, this description shall contain the railroad's processes used to:

(1) Conduct an internal assessment of its RRP;

(2) Internally report the results of its internal assessment to railroad senior management; and

(3) Develop improvement plans, including developing and monitoring recommended improvements (including any necessary revisions or updates to the RRP plan) for fully implementing the railroad's RRP, complying with the implemented elements of the RRP plan, or achieving the goals identified in the railroad's RRP plan pursuant to § 271.203(c).

(b) [Reserved]

§ 271.223 RRP implementation plan.

(a) An RRP plan shall describe how the railroad will implement its RRP. A railroad may implement its RRP in stages, so long as the entire RRP is fully implemented within 36 months of FRA's approval of the plan.

(b) At a minimum, a railroad's implementation plan shall:

(1) Cover the entire implementation period;

(2) Contain a timeline describing when certain implementation milestones will be achieved. Implementation milestones shall be specific and measurable;

(3) Describe the roles and responsibilities of each position or job function that has significant responsibility for implementing the railroad's RRP or any changes to the railroad's RRP (including any such positions or job functions held by an entity or contractor that utilizes or performs on the railroad's behalf significant safety-related services); and

(4) Describe how significant changes to the RRP may be made.

Subpart D—Review, Approval, and Retention of Risk Reduction Program Plans

§ 271.301 Filing and approval.

(a) *Filing.* A Class I railroad shall submit one copy of its RRP plan to the FRA Associate Administrator for Railroad Safety/Chief Safety Officer at Mail Stop 25, 1200 New Jersey Avenue SE., Washington, DC, 20590, no later than [545 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**]. A railroad with inadequate safety performance shall submit its RRP plan no later than 90 days after receiving final written notification from FRA that it shall comply with this part, pursuant to § 271.13(d), or no later than [545 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], whichever is later. A railroad that the STB reclassifies or newly classifies as a Class I railroad shall submit its RRP plan no later than 90 days following the effective date of the classification or reclassification or no later than [545 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], whichever is later. A voluntarily-compliant railroad may submit an RRP plan at any time. A railroad's submitted RRP plan shall include:

(1) The signature, name, title, address, and telephone number of the chief official responsible for safety and who bears the primary managerial authority for implementing the submitting railroad's safety policy. By signing, this chief official is certifying that the contents of the RRP plan are accurate and that the railroad will implement the contents of the program as approved by FRA;

(2) The contact information for the primary person responsible for managing the RRP;

(3) The contact information for the senior representatives of the persons that the railroad has determined utilize or provide significant safety-related services (including host railroads, contract operators, shared track/corridor operators, and other contractors); and

(4) As required by § 271.207(b), a statement describing how it consulted with its directly affected employees on the contents of its RRP plan. Directly affected employees have 60 days following the railroad's submission of its proposed RRP plan to file a statement in accordance with § 271.207(c).

(b) *Approval.* (1) Within 90 days of receipt of an RRP plan, or within 90 days of receipt of each RRP plan submitted prior to the commencement of railroad operations, FRA will review the proposed RRP plan to determine if it sufficiently addresses the required elements. This review will also consider any statement submitted by directly affected employees pursuant to § 271.207(c).

(2) FRA will notify the primary contact person of the submitting railroad in writing whether FRA has approved the proposed plan and, if not approved, the specific points in which the RRP plan is deficient. FRA will also provide this notification to each individual identified in the service list accompanying the consultation statement required under § 271.207(b)(4).

(3) If FRA does not approve an RRP plan, the submitting railroad shall amend the proposed plan to correct all identified deficiencies and shall provide FRA a corrected copy no later than 60

days following receipt of FRA's written notice that the submitted plan was not approved. If FRA determines that the necessary corrections are substantively significant, it will direct the railroad to consult further with its directly affected employees regarding the corrections. If the corrections are substantively significant, a railroad will also be required to include an updated consultation statement, along with its resubmitted plan, pursuant to § 217.107(b). Directly affected employees will also have 30 days following the railroad's resubmission of its proposed RRP plan to file a statement addressing the substantively significant changes in accordance with § 271.207(c).

(c) *Electronic Submission.* All documents required to be submitted to FRA under this part may be submitted electronically pursuant to the procedures in Appendix C to this part.

§ 271.303 Amendments.

(a) *Consultation requirements.* For substantive amendments, a railroad shall follow the process, described in its RRP plan pursuant to § 271.209, for consulting with its directly affected employees.

(b) *Filing.* (1) A railroad shall submit any amendment(s) to its approved RRP plan to FRA's Associate Administrator not less than 60 days prior to the proposed effective date of the amendment(s). The railroad shall file the amendment(s) with a cover letter outlining the proposed change(s) to the approved RRP plan.

(2) If the proposed amendment is limited to adding or changing a name, title, address, or telephone number of a person, FRA approval is not required under the process of this section, although the railroad shall still file the amended RRP plan with FRA's Associate Administrator for Railroad Safety/Chief Safety Officer. These proposed amendments may be implemented by the railroad upon filing with FRA. All other proposed amendments must comply with the formal approval process described by this section.

(c) *Review.* (1) FRA will review a proposed amendment to an RRP plan within 45 days of receipt. FRA will then notify the primary contact person of the railroad, whether the proposed amendment has been approved by FRA. If not approved, FRA will inform the railroad of the specific points in which the proposed amendment is deficient.

(2) If FRA has not notified the railroad by the proposed effective date of the amendment whether the amendment has been approved or not, the railroad may implement the amendment, subject to FRA's decision.

(3) If a proposed RRP plan amendment is not approved by FRA, no later than 60 days following the receipt of FRA's written notice, the railroad shall either provide FRA a corrected copy of the amendment that addresses all deficiencies noted by FRA or notice that the railroad is retracting the amendment.

§ 271.305 Reopened review.

Following approval of an RRP plan or an amendment to such a plan, FRA may reopen consideration of the plan or amendment, in whole or in part, for cause stated.

§ 271.307 Retention of RRP plans.

(a) *Railroads.* A railroad shall retain at its system and division headquarters one copy of its RRP plan and each subsequent amendment(s) to that plan. A railroad may comply with this requirement by making an electronic copy available.

(b) *Inspection and copying.* A railroad shall make a copy of the RRP plan available to representatives of the FRA or States participating under part 212 of this chapter for inspection and copying during normal business hours.

Subpart E—Internal Assessments

§ 271.401 Annual internal assessments.

(a) Beginning with the first calendar year after the calendar year in which FRA approves a railroad's RRP plan pursuant to § 271.301(b), the railroad shall annually (*i.e.,* once every calendar year) conduct an internal assessment of its RRP.

(b) The internal assessment shall determine the extent to which the railroad has:

(1) Achieved the implementation milestones described in its RRP plan pursuant to § 271.223(b);

(2) Complied with the implemented elements of the approved RRP plan;

(3) Achieved the goals described in its RRP plan pursuant to § 271.203(c);

(4) Implemented previous internal assessment improvement plans pursuant to § 271.403; and

(5) Implemented previous external audit improvements plans pursuant to § 271.503.

(c) A railroad shall ensure that the results of its internal assessments are internally reported to railroad senior management.

§ 271.403 Internal assessment improvement plans.

(a) Within 30 days of completing its internal assessment, a railroad shall develop an improvement plan that addresses the findings of its internal assessment.

(b) At a minimum, a railroad's improvement plan shall:

(1) Describe recommended improvements (including any necessary revisions or updates to the RRP plan, which would be made through the amendment process described in § 271.303) that address the findings of the internal assessment for fully implementing the railroad's RRP, complying with the implemented elements of the RRP plan, achieving the goals identified in the railroad's RRP plan pursuant to § 271.203(c), and implementing previous internal assessment improvement plans and external audit improvement plans;

(2) Identify by position title the individual who is responsible for carrying out the recommended improvements;

(3) Contain a timeline describing when specific and measurable milestones for implementing the recommended improvements will be achieved; and

(4) Specify processes for monitoring the implementation and evaluating the effectiveness of the recommended improvements.

§ 271.405 Internal assessment reports.

(a) Within 60 days of completing its internal assessment, a railroad shall submit a copy of an internal assessment report to the FRA Associate Administrator for Railroad Safety/Chief Safety Officer at Mail Stop 25, 1200 New Jersey Avenue SE., Washington, DC, 20590.

(b) This report shall be signed by the railroad's chief official responsible for safety and who bears primary managerial authority for implementing the railroad's safety policy. The report shall include:

(1) A description of the railroad's internal assessment;

(2) The findings of the internal assessment;

(3) A specific description of the recommended improvements contained in the railroad's internal assessment improvement plan, including any amendments that would be made to the railroad's RRP plan pursuant to § 271.303; and

(4) The status of the recommended improvements contained in the railroad's internal assessment improvement plan and any outstanding recommended improvements from previous internal assessment improvement plans.

Subpart F—External Audits

§ 271.501 External audits.

FRA will conduct (or cause to be conducted) external audits of a railroad's RRP. Each audit shall evaluate the railroad's compliance with the elements of its RRP required by this part. FRA will provide a railroad written notice of the audit results.

§ 271.503 External audit improvement plans.

(a) *Submission.* Within 60 days of receiving FRA's written notice of the audit results, if necessary, a railroad shall submit for approval an improvement plan addressing any instances of deficiency or non-compliance found in the audit to the FRA Associate Administrator for Railroad Safety/Chief Safety Officer at Mail Stop 25, 1200 New Jersey Avenue SE., Washington, DC, 20590.

(b) *Requirements.* At a minimum, an improvement plan shall:

(1) Describe the improvements the railroad will implement to address the audit findings;

(2) Identify by position title the individual who is responsible for carrying out the improvements necessary to address the audit findings; and

(3) Contain a timeline describing when milestones for implementing the recommended improvements will be achieved. These implementation milestones shall be specific and measurable.

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

(d) *Status reports.* Upon the request of the FRA Associate Administrator, a railroad shall provide FRA for review a status report on the implementation of the improvements contained in the improvement plan.

Appendix A to Part 271—Schedule of Civil Penalties

[Reserved]

Appendix B to Part 271—Federal Railroad Administration Guidance on the Risk Reduction Program Consultation Process

A railroad required to develop a risk reduction program (RRP) under this part shall in good faith consult with and use its best efforts to reach agreement with its directly affected employees on the contents of the RRP plan. *See* § 271.207(a)(1). This appendix discusses the meaning of the terms ''good faith'' and ''best efforts,'' and provides guidance on how a railroad could comply with the requirement to consult with directly affected employees on the contents of its RRP plan. Specific guidance will be provided for employees who are represented by a non-profit employee labor organization and employees who are not represented by any such organization.

I. The Meaning of ''Good Faith'' and ''Best Efforts''

''Good faith'' and ''best efforts'' are not interchangeable terms representing a vague standard for the § 271.207 consultation process. Rather, each term has a specific and distinct meaning. When consulting with directly affected employees, therefore, a railroad shall independently meet the standards for both the good faith and best efforts obligations. A railroad that does not meet the standard for one or the other will not be in compliance with the consultation requirements of § 271.207.

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

On the other hand, ''best efforts'' establishes a higher standard than that imposed by the good faith obligation, and describes the diligent attempts that a railroad shall pursue to reach agreement with its employees on the contents of its RRP plan. While the good faith obligation is concerned with the railroad's state of mind during the consultation process, the best efforts obligation is concerned with the specific efforts made by the railroad in an attempt to reach agreement. This would include considerations such as whether a railroad had held sufficient meetings with its employees, or whether the railroad had made an effort to respond to feedback provided by employees during the consultation process. For example, a railroad would not meet the best efforts obligation if it did not initiate the consultation process in a timely manner, and thereby failed to provide employees sufficient time to engage in the consultation process. A railroad would also likely not meet the best efforts obligation if it presented employees with an RRP plan and only permitted the employees to express agreement or disagreement on the plan (assuming that the employees had not previously indicated that such a consultation would be acceptable). A railroad may, however, wish to hold off substantive consultations regarding the contents of its RRP plan until one year after publication of the rule in order to ensure that information generated as part of the process is protected from discovery and admissibility into evidence under § 271.11 of the rule. Generally, best efforts are measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take. Therefore, the standard imposed by the best efforts obligation may vary with different railroads, depending on a railroad's size, resources, and number of employees.

When reviewing RRP plans, FRA will determine on a case-by-case basis whether a railroad has met its § 271.207 good faith and best efforts obligations. This determination will be based upon the consultation statement submitted by the railroad pursuant to § 271.207(b) and any statements submitted by employees pursuant to § 271.207(c). If FRA finds that these statements do not provide sufficient information to determine whether a railroad used good faith and best efforts to reach agreement, FRA may investigate further and contact the railroad or its employees to request additional information. (FRA also expects a railroad's directly affected employees to utilize good faith and best efforts when negotiating on the contents of an RRP plan. If FRA's review and investigation of the statements submitted by the railroad under § 271.207(b) and the directly affected employees under § 271.207(c) reveal that the directly affected employees did not utilize good faith and best efforts, FRA could consider this as part of its approval process.)

If FRA determines that a railroad did not use good faith and best efforts, FRA may disapprove the RRP plan submitted by the railroad and direct the railroad to comply with the consultation requirements of § 271.207. Pursuant to § 271.301(b)(3), if FRA does not approve the RRP plan, the railroad will have 60 days, following receipt of FRA's written notice that the plan was not approved, to correct any deficiency identified. In such cases, the identified deficiency would be that the railroad did not use good faith and best efforts to consult and reach agreement with its directly affected employees. If a railroad then does not submit to FRA within 60 days

an RRP plan meeting the consultation requirements of § 271.207, the railroad could be subject to penalties for failure to comply with § 271.301(b)(3).

II. Guidance on How a Railroad May Consult With Directly Affected Employees

Because the standard imposed by the best efforts obligation will vary depending upon the railroad, there may be countless ways for various railroads to comply with the consultation requirements of § 271.207. Therefore, FRA believes it is important to maintain a flexible approach to the § 271.207 consultation requirements, in order to give a railroad and its directly affected employees the freedom to consult in a manner best suited to their specific circumstances.

FRA is nevertheless providing guidance in this appendix as to how a railroad may proceed when consulting (utilizing good faith and best efforts) with employees in an attempt to reach agreement on the contents of an RRP plan. FRA believes this guidance may be useful as a starting point for railroads that are uncertain about how to comply with the § 271.207 consultation requirements. This guidance distinguishes between employees who are represented by a non-profit employee labor organization and employees who are not, as the processes a railroad may use to consult with represented and non-represented employees could differ significantly.

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

(a) Employees Represented by a Non-Profit Employee Labor Organization

As provided in § 271.207(a)(2), a railroad consulting with the representatives of a non-profit employee labor organization on the contents of an RRP plan will be considered to have consulted with the directly affected employees represented by that organization.

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

(1) Pursuant to § 271.207(a)(3), a railroad shall meet with representatives from a non-profit employee labor organization (representing a class or craft of the railroad's directly affected employees) within 240 days from [THE DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**] to begin the process of consulting on the contents of the railroad's RRP plan. A railroad should provide notice at least 60 days before the scheduled meeting.

(2) During the time between the initial meeting and the applicability date of § 271.11 the parties may meet to discuss administrative details of the consultation process as necessary.

(3) Within 60 days after [365 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], a railroad should have a meeting with the representatives of the directly affected employees to discuss substantive issues with the RRP plan.

(4) Within 180 days after [365 DAYS AFTER THE DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], a railroad would file its RRP plan with FRA.

(5) As provided by § 271.207(c), if agreement on the contents of an RRP plan could not be reached, a labor organization (representing a class or craft of the railroad's directly affected employees) could file a statement with the FRA Associate Administrator explaining its views on the plan on which agreement was not reached.

(b) Employees Who Are Not Represented by a Non-Profit Employee Labor Organization

FRA recognizes that some (or all) of a railroad's directly affected employees may not be represented by a non-profit employee labor organization. For such non-represented employees, the consultation process described for represented employees may not be appropriate or sufficient. For example, FRA believes that a railroad with non-represented employees shall make a concerted effort to ensure that its non-represented employees are aware that they are able to participate in the development of the railroad's RRP plan. FRA therefore is providing the following guidance regarding how a railroad may utilize good faith and best efforts when consulting with non-represented employees on the contents of its RRP plan.

(1) Within 120 days from [THE DATE OF PUBLICATION OF THE FINAL RULE IN THE **FEDERAL REGISTER**], a railroad should notify non-represented employees that—

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

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

(C) If a railroad is unable to reach agreement with its directly affected employees on the contents of the proposed RRP plan, an employee may file a statement with the FRA Associate Administrator explaining his or her views on the plan on which agreement was not reached.

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

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

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

(C) By providing all non-represented employees a hard copy of the notification.

A railroad could use any or all of these methods of communication, so long as the notification complies with the railroad's obligation to utilize best efforts in the consultation process.

(3) Following the initial notification (and before the railroad submits its RRP plan to FRA), a railroad should provide non-represented employees a draft proposal of its RRP plan. This draft proposal should solicit additional input from non-represented employees, and the railroad should provide non-represented employees 60 days to submit comments to the railroad on the draft.

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

(5) As provided by § 271.207(c), if agreement on the contents of an RRP plan cannot be reached, then a non-represented employee may file a statement with the FRA Associate Administrator explaining his or her views on the plan on which agreement was not reached.

Appendix C to Part 271—Procedures for Submission of Railroad Risk Reduction Program Plans and Statements From Directly Affected Employees

This appendix establishes procedures for the submission of a railroad's RRP plan and statements by directly affected

employees in accordance with the requirements of this part.

Submission by a Railroad and Directly Affected Employees

(a) As provided for in § 271.101, each railroad must establish and fully implement an RRP that continually and systematically evaluates railroad safety hazards on its system and manages the resulting risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities. The RRP shall be fully implemented and supported by a written RRP plan. Each railroad must submit its RRP plan to FRA for approval as provided for in § 271.201.

(b) As provided for in § 271.207(c), if a railroad and its directly affected employees cannot come to agreement on the proposed contents of the railroad's RRP plan, the directly affected employees have 30 days following the railroad's submission of its proposed RRP plan to submit a statement to the FRA Associate Administrator for Railroad Safety/Chief Safety Officer explaining the directly affected employees' views on the plan on which agreement was not reached.

(c) The railroad's and directly affected employees' submissions shall be sent to the Associate Administrator for Railroad Safety/Chief Safety Officer, FRA. The mailing address for FRA is 1200 New Jersey Avenue SE., Washington, DC 20590. When a railroad submits its RRP plan and consultation statement to FRA pursuant to § 270.201, it must also simultaneously send a copy of these documents to all individuals identified in the service list pursuant to § 271.107(b)(4).

(d) Each railroad and directly affected employee is authorized to file by electronic means any submissions required under this part. Prior to any person submitting anything electronically, the person shall provide the Associate Administrator with the following information in writing:

(1) The name of the railroad or directly affected employee(s);

(2) The names of two individuals, including job titles, who will be the railroad's or directly affected employees' points of contact and will be the only individuals allowed access to FRA's secure document submission site;

(3) The mailing addresses for the railroad's or directly affected employees' points of contact;

(4) The railroad's system or main headquarters address located in the United States;

(5) The email addresses for the railroad's or directly affected employees' points of contact; and

(6) The daytime telephone numbers for the railroad's or directly affected employees' points of contact.

(e) A request for electronic submission or FRA review of written materials shall be addressed to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Upon receipt of a request for electronic submission that contains the information listed above, FRA will then contact the requestor with instructions for electronically submitting its program or statement. A railroad that electronically submits an initial RRP plan or new portions or revisions to an approved program required by this part shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email. FRA may electronically store any materials required by this part regardless of whether the railroad that submits the materials does so by delivering the written materials to the Associate Administrator and opts not to submit the materials electronically. A railroad that opts not to submit the materials required by this part electronically, but provides one or more email addresses in its submission, shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email or mail.

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Sarah Feinberg,

Acting Administrator.

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