

**DEPARTMENT OF TRANSPORTATION****Federal Railroad Administration****49 CFR Parts 214, 232, and 243**

[Docket No. FRA-2009-0033, Notice No. 3]

RIN 2130-AC06

**Training, Qualification, and Oversight for Safety-Related Railroad Employees****AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).**ACTION:** Final rule.

**SUMMARY:** FRA is establishing minimum training standards for all safety-related railroad employees, as required by the Rail Safety Improvement Act of 2008 (RSIA). The final rule requires each railroad or contractor that employs one or more safety-related railroad employee to develop and submit a training program to FRA for approval and to designate the minimum training qualifications for each occupational category of employee. The rule also requires most employers to conduct periodic oversight of their own employees and annual written reviews of their training programs to close performance gaps. The rule also contains specific training and qualification requirements for operators of roadway maintenance machines that can hoist, lower, and horizontally move a suspended load. Finally, the rule clarifies the existing training requirements for railroad and contractor employees that perform brake system inspections, tests, or maintenance.

**DATES:** This regulation is effective January 6, 2015. Petitions for reconsideration must be received on or before December 29, 2014. Petitions for reconsideration will be posted in the docket for this proceeding. Comments on any submitted petition for reconsideration must be received on or before February 10, 2015.

**ADDRESSES:** Petitions for reconsideration or comments on such petitions: Any petitions and any comments to petitions related to Docket No. FRA-2009-0033 may be submitted by any of the following methods:

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

- **Fax:** 202-493-2251.

- **Mail:** Docket Management Facility, U.S. DOT, 1200 New Jersey Avenue SE, W12-140, Washington, DC 20590.

- **Hand Delivery:** Room W12-140 on the Ground level of the West Building,

1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except federal holidays.

**Instructions:** All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. All petitions and comments received will be posted without change to <http://www.regulations.gov>; this includes any personal information. Please see the Privacy Act heading in the “SUPPLEMENTARY INFORMATION” section of this document for Privacy Act information related to any submitted petitions 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 to Room W12-140 on the Ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:**

Robert J. Castiglione, Staff Director—Technical Training, U.S. Department of Transportation, Federal Railroad Administration, 4100 International Plaza, Suite 450, Fort Worth, TX 76109-4820 (telephone: 817-447-2715); or Alan H. Nagler, Senior Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, RCC-10, Mail Stop 10, West Building 3rd Floor, Room W31-309, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 202-493-6038).

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**I. Executive Summary***Purpose of the Regulatory Action and Legal Authority*

FRA is issuing regulations establishing minimum training standards for each category and subcategory of safety-related railroad employee and the submission of training plans from railroad carriers, contractors, and subcontractors for the Secretary of Transportation (Secretary) approval, as required by section 401(a) of the RSIA, Public Law 110-432, 122 Stat. 4883, (Oct. 16, 2008), codified at 49 U.S.C. 20162. The Secretary delegated this authority to the Federal Railroad Administrator. 49 CFR 1.89(b). The statutory provisions are summarized below.

Section 20162(a)(1) mandates that the employers of each safety-related railroad employee be required “to qualify or otherwise document the proficiency of such employees in each such class and craft regarding their knowledge of, and ability to comply with, Federal railroad safety laws and regulations and railroad carrier rules and procedures promulgated to implement those Federal railroad safety laws and regulations.” Paragraph (a)(2) of the statute mandated a requirement for employers to “submit training and qualification plans . . . for approval.” In paragraph (a)(3), the statute requires that the Secretary ensure that the employer submitted programs specifically address the training of safety-related railroad employees

charged with the inspection of track or railroad equipment so that these employees are qualified to assess railroad compliance with Federal standards, not only to identify and correct defective conditions, but to initiate immediate remedial action to correct critical safety defects that are known to contribute to derailments, accidents, incidents, or injuries. Furthermore, paragraphs (b) and (c) of the statute set out the method of the plan approval and permit the Secretary to exempt employers from submitting plans previously approved.

The scientific literature on training, in general, and FRA's own experience with training in the railroad industry show a clear link between the quality of training programs—including whether training is engaging or “hands-on”—and safety. Even though rail transportation in the United States is generally an extremely safe mode of transportation, and rail safety has been improving, well-designed training programs have the potential to further reduce safety risk in the railroad environment. FRA believes that better designed training can reduce the number of accidents and incidents.

*Summary of the Major Provisions of the Regulatory Action in Question*

FRA is requiring that each employer of one or more safety-related railroad employees (whether the employer is a railroad, contractor, or subcontractor) train and qualify each such employee on the Federal railroad safety laws, regulations, and orders that the employee is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. The final rule also requires that the training program developed by each employer be submitted to FRA for approval. FRA is proposing a holistic approach including minimum training and qualification standards, maximum refresher training intervals, review and oversight of the training programs, and performance standards. The approach consists of three main components:

1. A requirement that all employers produce and submit a training program for FRA approval.
2. A requirement that all employers implement this training program in the initial and ongoing training for all safety-critical railroad employees.
3. A requirement that certain employers monitor the outcomes of their training programs and revise the programs if and when evidence arises of the need for revision.

FRA believes that well-designed training programs have the potential to reduce risk in the railroad environment, therefore reducing the frequency and severity of accidents. FRA's expectation is that the programs submitted for approval will reflect the insights of training models that are recognized and generally accepted by the academic and training communities for formal initial training, on-the-job training (OJT), and refresher training. Furthermore, FRA expects that these training programs will use “hands-on” or engaging training methods where practicable and appropriate.<sup>1</sup> These programs will include: Initial, ongoing, and OJT criteria; testing and skills evaluation measures designed to ensure continual compliance with applicable Federal standards; and the identification of critical safety defects and plans for immediate remedial actions to correct them. The rule also contains specific training and qualification requirements for operators of roadway maintenance machines that can hoist, lower, and horizontally move a suspended load. Finally, the rule clarifies the existing training requirements for railroad and contractor employees that perform brake system inspections, tests, or maintenance.

*Costs and Benefits*

In analyzing the final rule, FRA has applied updated “Guidance on the Economic Value of a Statistical Life in US Department of Transportation Analyses,” March 2013. This policy updates the Value of a Statistical Life (VSL) from \$6.2 million to \$9.1 million and revises 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 (CBO) of a 1.07% annual growth rate in median real wages over the next 30 years (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 RIA are labor costs and avoided

injuries and fatalities, both of which in turn depend on wage rates.

Based on the new DOT guidance and CBO wage forecast, the total non-discounted cost of the final rule over the 20-year period analyzed is approximately \$389.9 million. Present discounted costs evaluated over the first 20 years of the final rule equal about \$290.9 million at a 3% discount rate and about \$207.1 million at a 7% discount rate. The annualized costs are \$26.2 million at a 3% discount rate and \$36.8 million at a 7% discount rate.

Additionally, FRA has performed a break-even analysis of the final rule, estimating the reduction in railroad-related accidents and incidents that will be required in order for the benefits of the final rule to offset the costs. FRA believes the final rule will reduce rail-related accidents and incidents, and associated fatalities, injuries, and property damage, through implementation of the hands-on and other enhanced training methods.<sup>2</sup> Table 1 shows the total present discounted annual costs of accidents and incidents that would be incurred over the next 20 years, where injuries and fatalities have been monetized according to U.S. Department of Transportation (DOT) policies; and shows the percent reduction in accidents and incidents that would be necessary for the monetized reduction in fatalities, injuries, and property damages caused by these accidents to justify implementation of this final rule. These calculations take into account various recent and concurrent initiatives to address accidents, including implementation of Positive Train Control (PTC) systems, issuance of passenger hours of service regulations, development of conductor certification standards, a rule to provide protection to roadway workers working next to adjacent track, and the implementation of programs to address fatigue and electronic device distraction, among others.

Using the 2013 VSL guidance, FRA estimates that this final rule will break even if it results in a 20-year total reduction in relevant railroad accidents and incidents of 4.59% using a 3% discount rate, and 4.59% using a 7% discount rate. Another way to look at this break even reduction is to describe it in terms of how many accidents or

<sup>1</sup> In the background of this final rule, FRA uses the terms “hands-on training” and “hands-on training components.” These terms are not meant to signify a type of formal training, but a technique used during some types of formal training (most commonly, classroom and on-the-job). Hands-on training include one or more activities in which there is an opportunity for learners to touch the items to be used to perform the task, and to attempt, practice, or perform portions of the task being learned. On-the-job (OJT) training allows the learner to actually do the tasks required on a job, under the close scrutiny of a qualified person. See § 243.201(c)(2).

<sup>2</sup> Hands-on training is generally used by instructors/trainers to re-enforce new skills to the learner. Hands-on can be a simulated exercise in a laboratory, classroom, or it can be used in the actual work environment similar to OJT. Hands-on activity enables the trainer/instructor to objectively assess learning transfer based on successful completion of the task to be performed.

incidents need to be avoided for the final rule to be worth the costs associated with it. In viewing the reduction in this manner, the break-even point corresponds to approximately 118 accidents and incidents per year on average over the 20-year period. Of course, no accident or incident is “average” and there are far fewer major accidents, fatalities, and severe injuries reported to FRA than there are other accidents/incidents meeting the reporting requirements. Of

the 118 accidents and incident reductions necessary to break even annually, FRA considered that those would likely include at least one severe injury and many incidents that result in relatively minor, yet still reportable injuries.<sup>3</sup> Another way this rule would break even is by preventing one fatality and 86 injuries per year. Between 2001 and 2010, the number of accidents and incidents<sup>4</sup> decreased throughout the railroad industry due to various safety initiatives. During this same time

period, there has been a significant growth in passenger and freight traffic. This new regulation on training standards should further contribute toward the decreasing trend of railroad accidents throughout the country in a more challenging, and higher traffic environment.

The following table summarizes estimates using the revised DOT guidance and CBO real wage rate forecasts.

TABLE 1—SUMMARY OF BREAK-EVEN ANALYSIS  
[2013 VSL guidance]

Present value of potential annual benefits (3% discount rate)	Total present discounted costs (3% discount rate)	Percent reduction for breakeven (3% discount rate)	Present value of potential annual benefits (7% discount rate)	Total present discounted costs (7% discount rate)	Percent reduction for breakeven (7% discount rate)
\$6,333,998,623	\$290,932,418	4.59	\$4,507,378,459	\$207,068,184	4.59

## II. RSIA Requirement

Section 20162 of 49 U.S.C. requires the Secretary of Transportation (Secretary) to establish minimum training standards for safety-related railroad employees and the submission of training plans from railroad carriers, contractors, and subcontractors for the Secretary’s approval. The Secretary delegated this authority to the Federal Railroad Administrator. 49 CFR 1.89(b).

FRA quoted the relevant provisions of Section 20162 in the proposed rule, 77 FR 6412, 6413–6414 (Feb. 7, 2012), and those provisions are summarized here. In paragraph (a)(1), the statute contained a mandate that the employers of each safety-related railroad employee be required “to qualify or otherwise document the proficiency of such employees in each such class and craft regarding their knowledge of, and ability to comply with, Federal railroad safety laws and regulations and railroad carrier rules and procedures promulgated to implement those Federal railroad safety laws and regulations.” Paragraph (a)(2) of the statute mandated a requirement for employers to “submit training and qualification plans . . . for approval.” In paragraph (a)(3), the statute requires that the Secretary ensure that the employer submitted programs specifically address the training of safety-related railroad employees charged with the inspection of track or railroad equipment so that these employees are qualified to assess railroad compliance with Federal

standards, not only to identify and correct defective conditions, but to initiate immediate remedial action to correct critical safety defects that are known to contribute to derailments, accidents, incidents, or injuries. Furthermore, paragraphs (b) and (c) of the statute set out the method of the plan approval and permit the Secretary to exempt employers from submitting plans previously approved.

Please also note that there is a statutory definition of “safety-related railroad employee.” 49 U.S.C. 20102. That definition was quoted in the NPRM. 77 FR 6414. The preamble and section-by-section analysis of both the NPRM and this final rule explain how FRA has interpreted that statutory definition.

Although the legislative history does not offer an explanation regarding why the statute requires that the rule should address contractors and subcontractors, FRA surmises that Congress recognizes that the railroad workforce consists of safety-related railroad employees, some of which are employed by railroads and others by contractors. These employees are side-by-side, often doing the same work, or doing work that was previously thought to be exclusively reserved for employees of a railroad. Contractors and subcontractors can be found on railroads of all sizes and kinds, from shortlines to major freight railroads, as well as passenger railroads. Given the statutory construction, Congress apparently recognized the need for FRA oversight of each contractor’s training program and did not make an exception

for small employers specifically. FRA has no evidence to suggest the risk posed by each safety-related employee differs by contractor size. This is especially so given the risks associated with working for a major railroad that operates trains in close proximity to one another, for long distances, at high speeds, and with heavy tonnage and train length. The same is true for the increased risks associated with employees of a contractor or subcontractor working for a commuter railroad where the protection of passengers and the general public at grade crossings is paramount.

## III. RSAC Overview

In March 1996, FRA established the Railroad Safety Advisory Committee (RSAC), which provides a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency’s major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. In the NPRM, FRA provided a list of RSAC members. 77 FR 6414. The membership list did not change between the NPRM and the end of the comment period.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by

<sup>3</sup> Accidents/incidents are reportable to FRA, and the requirements for when injuries reach the reportable threshold are found in 49 CFR part 225.

For instance, nearly all accidents/incidents arising from the operation of a railroad that result in a death, injury, or occupational illness are reportable.

<sup>4</sup> In 2010, railroads reported to FRA 1,874 train accidents and 6,644 incidents.

consensus. The working group may establish one or more task forces or other subgroups to develop facts and options on a particular aspect of a given task. The task force, or other subgroup, reports to the working group. If a working group comes to consensus on recommendations for action, the package is presented to RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation.

Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, and because the RSAC recommendation constitutes the consensus of some of the industry's leading experts on a given subject, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goals, is soundly supported, and is in accordance with applicable policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on recommendations for action, FRA would explain in the rulemaking documents that RSAC did not make a consensus recommendation on a particular issue. Of course, whether FRA receives an RSAC recommendation or not, FRA is free to use information collected from RSAC participants as a basis for any of its decisions during the rulemaking action.

#### IV. RSAC Training Standards and Plans Working Group

As discussed in the NPRM, this proposal was based primarily on the consensus recommendations of RSAC. 77 FR 6415. The NPRM was published for comment on February 7, 2012 and provided background on the task statement, the organizations and businesses that participated as the Working Group, and the number of meetings held. The docket contains minutes from those meetings.

In order to further benefit from the input of the RSAC, FRA held a meeting with the Working Group on May 8, 2012 in Washington, DC. The purpose of the meeting was to allow the Working Group's members to provide further written or oral comment on the public

comments on the NPRM. Although FRA was interested in areas of agreement, FRA did not take the further step of bringing any issues to the full RSAC for a formal recommendation as the issues in disagreement did not appear to substantially impact the prior consensus-based recommendations. Minutes from this meeting are part of the docket in this proceeding and are available for public inspection.

#### V. Discussion of Specific Comments and Conclusions

FRA received written comments in response to the NPRM from a number of interested parties. As previously mentioned, FRA discussed these comments with the Working Group to allow RSAC commenters an opportunity to elaborate on any comments filed, including their own. FRA did not receive a request for a public hearing and none was provided.

Most of the comments are discussed in the Section-by-Section Analysis or in the Regulatory Impact and Notices portion of this final rule directly with the provisions and statements to which they specifically relate. Other comments apply more generally to the final rule as a whole, and FRA is discussing them here. Please note that the order in which the comments are discussed in this document, whether by issue or by commenter, is not intended to reflect the significance of the comment raised or the standing of the commenter.

##### A. Implementation Dates and Incentives for Early Filing of Programs

In the NPRM, FRA identified a major issue under the heading "Incentives for Early Filing of Program." FRA's intent was to encourage interested parties to file comments regarding how to make the training program submission and review process quicker and more efficient. FRA raised several proposals and explained that the agency was willing to consider any incentives or approaches that are intended to encourage early submission and improve the efficiency and effectiveness of the review process. The paramount issue was whether the proposed implementation schedule provided model program developers with sufficient time to develop programs and receive FRA approval, keeping in mind that employers would not use those model programs unless the employers were provided with a reasonable amount of time to consider using those programs prior to the employer's deadline for implementation.

#### Reaction to the NPRM

The following is a summary of the comments received on this issue. No commenter took the position that the NPRM provided an employer with sufficient time to consider model programs and develop a program. Nearly every comment focused on the proposed existing employer's burden to meet the implementation deadline of one year and 120 days after the effective date of the rule. Only a few comments focused on the incentives for early filing of programs suggested by FRA in the NPRM.

The National Railroad Construction and Maintenance Association (NRC) states that the NPRM does not afford adequate time for model programs to be developed. NRC requests that model program development be completed within three years of the effective date of the final rule and that each contractor then have two additional years to gain approval of and implement its program. Thus, NRC requests five years for contractors to implement training programs rather than the proposed requirement of one year and 120 days after the effective date of the rule.

AAR agrees that the time frames in the NPRM are aggressive and provides several reasons why they should be extended. AAR explains that railroads will need to craft training programs and establish new processes for retention of training records and related information, including new or revised IT programs. FRA will need time to review and approve each program. After approval, railroads will need time to implement the programs during the regular training cycle in the first half of each calendar year. AAR suggests that the effective date for providing training under the rule be January 1 three years after publication of the final rule. AAR also reminds FRA to ensure that all of its compliance deadlines are consistent, including the date by which refresher training must begin.

ASLRRA mentions that it urges the adoption of AAR's recommendation to extend the filing date for each railroad's training program to three years and contractor programs to five years. ASLRRA explains that it does not currently have the financial or personnel resources to create model programs. Even with FRA's help, ASLRRA envisions that it will take at least two years to create and obtain approval of any model programs. Because ASLRRA considers three years to be a very aggressive schedule, it appears to suggest in its comment that it would be amenable if FRA were to

provide short line railroads with even more time to submit a training program.

APTA recommends that FRA extend implementation dates for passenger rail systems to six years. APTA believes passenger railroads could begin phasing in new training in three years, but would not complete training until year six. APTA states that phasing in the development and implementation of training is more realistic in consideration of the complexities of the public funding and public budget processes to which nearly all commuter railroads are subject. Likewise, the Metropolitan Transportation Authority (MTA), which includes LIRR and MNCW, recommends that the implementation schedule provide at least three years to implement a program. MTA raised the additional concern that it be provided with the flexibility to start a new training program at the beginning of the calendar year.

REB states that it would be helpful for the employers' implementation date to be pushed back at least one year after the implementation date for training organizations and learning institutions. REB believes this one year extension would provide an employer with sufficient time to consider whether it can use a specific solution from an outside training organization or learning institution. Without this extra time, REB maintains that an employer may be thrown into a situation where it has to develop its own material or seek a solution from other training vendors quickly.

One commenter recommends pushing back the deadline for a small employer to at least one year after the submission deadline for model programs submitted by other entities. FRA notes that neither the proposed rule nor final rule contains a deadline for model program submission. Another commenter does not believe FRA would have the time to examine all the initial training courses and conduct continual yearly inspections.

#### FRA's Response

Throughout the RSAC and rulemaking processes, FRA has continuously recognized the importance of providing employers, and every other type of entity that must file a training program, with sufficient time to consider all options and draft the required programs. FRA is acutely aware of the annual training cycle followed by the major railroads and the agency does not intend to disrupt that cycle by any requirement promulgated in this rule. Furthermore, in the NPRM, FRA raised the topic of incentives for early filing of programs

due to the concern that the agency's program review process could be time consuming and resource intensive. Thus, the comments echo many of the same concerns that FRA raised in the proposal, and confirm the need to provide more generous implementation deadlines than those proposed.

The NPRM's preamble discussion included several suggestions involving how to encourage the filing of programs that have the benefit of being used by multiple employers. For instance, in § 243.105, FRA proposed an option for any organization, business, or association to develop one or more model training programs that could be used by multiple employers and that option has been retained in the final rule. Likewise, in § 243.111, FRA proposed an option for programs to be filed by training organizations and learning institutions, and that option has also been retained in the final rule. FRA expects that most class III railroads and contractors, and some class II railroads, would prefer to utilize one of these options.

In the NPRM, one of FRA's suggestions was to encourage model program developers to file early. The comments received suggested that those organizations most likely to develop model programs believe that development of such programs will be more difficult than originally contemplated. Consequently, the commenters do not believe model programs can be developed on a more compressed schedule. The comments suggest that the incentives to file early are unlikely to work and the employers that are most likely to benefit from model programs would be left scrambling to cobble together individual programs. If the commenters are right, a tight implementation schedule would defeat other provisions that appear to provide choices and flexibility in adopting a training program developed by an entity other than the employer.

In order to solve this dilemma, FRA is turning to an option it suggested in the NPRM. In the proposed rule, FRA stated that the deadline for an employer submission, under § 243.101(a), could be pushed back so that the deadline would be at least one year after the submission deadline for an existing training organization or learning institution under § 243.111(b), instead of the proposed 120 days. REB commented that it agreed with this suggestion. Obviously, if employers are provided with more time to consider model programs, as well as programs of training organizations and learning institutions, the employers are more likely to find such programs suitable for

use either off the shelf or with some tailoring to fit the employer's individual needs. Thus, FRA has decided to extend the deadline to file a program until January 1, 2018, for an existing employer conducting operations subject to this part with 400,000 total employee work hours annually or more. FRA also plans to issue a compliance guide, that can be used by all employers, but written with a primary emphasis on assisting small entities. The compliance guide will also help model program developers in drafting programs to be adopted by small railroads and contractors. Thus, for an existing employer with less than 400,000 total employee work hours, FRA has decided to extend the deadline to file a program until January 1, 2019 or four years from the date of issuance of FRA's Interim Final Compliance Guide, whichever is later. For an employer with less than 400,000 total employee work hours annually that commences operations subject to this part after January 1, 2018, but prior to the date that similarly sized small employers will be required to submit a program, the regulation permits the employer to abide by the later deadline of January 1, 2019 or four years from the date of issuance of FRA's Interim Final Compliance Guide, whichever is later, rather than adopting and complying with a training program upon commencing operations. These extended deadlines are found in § 243.101(a)(1), (a)(2), and (b) of this final rule respectively. Please note that FRA considered an NRC comment described in the agency's final policy statement concerning small entities subject to the railroad safety laws, 68 FR 24891 (May, 9, 2003), when considering how to define small entities under this rulemaking. In response to that interim policy statement, NRC requested that FRA define contractor small entities as those entities having less than a total of 400,000 total employee work hours annually without any qualifier such as limiting small entities to those with \$20 million or less in annual operating revenues. In the policy statement, FRA explained that it would retain the ability to use different criteria to tailor the applicability of the rule to address a specific problem, e.g., a problem related to defining small contractors, and that limiting small entities by total employee work hours annually, as FRA has done here, is appropriate under this type of circumstance.

An employer's initial program is considered approved upon submission and therefore it may be implemented immediately upon submission, but certainly must be implemented no later

than the applicable deadline. These extensions, from the proposed implementation date of one year and 120 days from the rule's effective date, will provide each employer with at least three years (or at least four years, if a small entity employer) to develop its own program or adopt a program developed by other entities. The significantly longer implementation period is consistent with the requests made by AAR and MTA, as well as ASLRRA's request for an extension for railroads. APTA and NRC requested a bit more time, but FRA does not believe that employers will need five or six years to develop training programs, especially when these employers will be able to adopt previously approved model programs or seek help from training organizations and learning institutions with approved programs.

Although there is no deadline for filing a model program under § 243.105, model programs will generally not be adopted by employers unless they are developed and made available well before an employer's program is due. FRA addressed a portion of this problem by proposing to extend the deadline for an employer to file. However, the proposed rule also created uncertainty for developers of model programs regarding when the developers could expect to receive approval or disapproval of a submitted model program. To combat this uncertainty, FRA has adopted another of the agency's suggestions from the NPRM. Thus, in this final rule FRA is adding paragraph (a)(3) to § 243.105 so that model program developers can be assured that each model training program submitted to FRA prior to May 1, 2017, will be considered approved and may be implemented 180 days after the date of submission unless FRA advises the organization, business, or association that developed and submitted the program that all or part of the program does not conform. By adding this condition, model program developers can be assured that they may begin marketing their model programs 180 days after filing such a program with FRA unless the agency explicitly disapproves any portion of the program. This implicit approval process also encourages FRA to more quickly review model programs and a byproduct may be that FRA is able to approve some model programs in less than 180 days. Please note that model programs could be filed after May 1, 2017, but FRA will be under no obligation to review and approve those programs in a set period of time, nor would most employers that are likely to use model programs be able

to use such a program if it is not approved ahead of the deadline established in § 243.101(a)(2).<sup>5</sup>

AAR also recommends that FRA ensure that all of its compliance deadlines are consistent, including the date by which refresher training must begin. FRA presumes that AAR wants the implementation dates to be consistent with one another so that the timeline for action has a logical flow, and the agency agrees with this approach. Consequently, the final rule contains a number of corresponding implementation date adjustments. For example, each employer with 400,000 total employee work hours annually or more under § 243.201(a)(1), will be required to designate each of its existing safety-related railroad employees by occupational category or subcategory, and only permit designated employees to perform safety-related service in that occupational category or subcategory as of September 1, 2018, which therefore provides 8 months from the date that the employer's program is due under § 243.101(a)(1). A similar deadline change is being made by creating a separate requirement in § 243.201(a)(2), for small entity employers, so that it corresponds with the, deadline contained in § 243.101(a)(2).

AAR also specifically raised the issue that the proposed period for initially implementing refresher training should be extended. Again, FRA agrees. The NPRM proposed that employers begin refresher training beginning on January 1, two years after the effective date of the final rule. If FRA had left the proposal intact, refresher training would be required starting January 1, 2017. However, the final rule will not require employers to file programs until January 1, 2018, at the earliest, so the proposed deadline clearly would not work. Given the extended deadlines for filing programs, corresponding changes were made in setting the final rule's deadlines for beginning the implementation of a mandatory refresher training program. Thus, each employer with 400,000 total employee work hours annually or more must have a refresher training program in place on January 1, 2020 and, likewise, each employer with less than 400,000 total employee work hours annually must have a refresher training program in

place on January 1, 2022 or six years from the date of issuance of FRA's Interim Final Compliance Guide, whichever is later. These deadlines for "beginning" to deliver refresher training are not deadlines for "completing" that refresher *training* for each existing employee. FRA has set deadlines for completing refresher training for each existing employee: December 31, 2022 for each employer with 400,000 total employee work hours annually or more, and December 31, 2023 for each employer with less than 400,000 total employee work hours annually. Otherwise, when an employee is due for refresher training will depend on when that employee last had initial or refresher training covering the subject matter.

During Working Group meetings and in the NPRM, FRA expressed the opinion that a grace period should be provided for starting refresher training as well as credit provided for any training provided in the last three years, even though that training might have been conducted prior to the adoption of the training program required by this part. FRA reviewed the refresher training deadline proposal and found that it was too constricting. The proposed refresher training concept would not have granted an employer a reasonable grace period when many employers will train one-third of their workforce each year. In order to provide some kind of grace period that would accommodate the typical refresher training cycle, the rule would need to stretch the refresher training deadline to more than three years after the deadline for adoption of a program. Thus, the final rule is extending the deadline for completing mandatory refresher training to December 31, 2022, for each employer with 400,000 total employee work hours annually or more, and to December 31, 2023, for each employer with less than 400,000 total employee work hours annually. This means that whether an employer is large, medium, or small, the employer will have two calendar years from its program submission deadline to begin implementing a refresher training program and an additional three calendar years to complete providing refresher training to all safety-related railroad employees who have not had a relevant training event per the employee's designation in an occupational category or subcategory within the past three calendar years. FRA's expectation is that the relaxation of the implementation schedule should make it easier for employers to comply with the rule.

<sup>5</sup> In the Regulatory Impact Analysis filed in the docket, FRA estimates that 1,459 employers with less than 400,000 total annual work hours annually may choose to adopt a model program rather than develop their own program. FRA estimates that an additional 11 employers with more than 400,000 total annual work hours annually may choose to adopt a model program and would need to meet the earlier January 1, 2018 deadline for program submission found in § 243.101(a)(1).

FRA notes its disagreement with the commenter that contended that FRA would not have the time to examine all the initial training courses and conduct continual yearly inspections. The relaxation of the implementation dates should lead to greater use of model programs and the use of training organizations and learning institutions. FRA approval of those programs first should ease FRA's program review burden. Meanwhile, FRA has already begun the process of considering how to allocate its resources to accomplish training program reviews and audits. Finally, FRA notes that it is not under any legal mandate to conduct yearly inspections or audits of every employer covered by this rule.

#### B. Hazmat Employees Not Covered

FRA received two comments requesting that the rule contain explicit language that hazardous materials training is not covered by this rule. AAR recommends that FRA clearly state in the purpose and scope section that hazardous materials training is not covered by these regulations because the NPRM was not clear enough on this point. A second commenter recommends that FRA specify in the regulation that hazmat employees, hazmat employers, and hazmat training organizations and learning institutions be explicitly excluded from the regulation.

#### FRA's Response

FRA generally agrees with the commenters that it is better to include an explicit statement regarding the scope of the rule than to leave that issue to the preamble. However, FRA was not ambiguous in the NPRM regarding whether the proposed rule covered hazardous materials training. In the section-by-section analysis for proposed § 243.5, definition of safety-related railroad employee, FRA stated that the NPRM did not address the training of hazmat employees even though the statutory definition of safety-related railroad employee covers a hazmat employee of a railroad carrier as defined in 49 U.S.C. 5102(3). FRA proposed to decline regulating the training of hazmat employees in this rule as that training is already extensively covered by DOT regulations promulgated by the Pipeline and Hazardous Materials Safety Administration (PHMSA). *See e.g.*, 49 CFR part 172, subpart H. The hazmat training required by PHMSA for hazmat employees mandates general familiarity with hazmat requirements, especially when the employee's duties may impact emergency responses, self-protection measures and accident prevention

methods and procedures. *See* 49 CFR 172.200(b). FRA is satisfied that the training requirements are sufficiently addressed by PHMSA and does not believe that Congress intended for FRA to overcomplicate the existing rules governing hazmat training.

Despite the agency's clarity on this issue in the NPRM, FRA has decided to address the issue by adding a paragraph (e) to § 243.1 of this final rule that explicitly excludes hazmat training for hazmat employees and clarifies that such training can be found in 49 CFR part 172, subpart H. Paragraph (e) states that “[t]he requirements in this part do not address hazardous materials training of ‘hazmat employees’ as defined in 49 CFR 171.8.” However, this exclusion does not mean that a hazmat employee would not be covered under any circumstances. The definition of hazmat employees in PHMSA's regulation is so broad that it encompasses railroad signalmen, railroad maintenance-of-way employees, and even locomotive engineers if they operate a vehicle used to transport hazmats. FRA certainly intends to cover the training for these “safety-related railroad employees” when they are doing safety-related tasks, even if these types of employees may also be defined by PHMSA as hazmat employees and require additional training under PHMSA's regulations. *See* § 243.5 (defining “safety-related tasks”). In other words, paragraph (e) is intended to be read so that a hazmat employee will need to be trained in accordance with this part to the extent that the employee is doing safety-related tasks that are not covered by hazmat training required elsewhere in 49 CFR Subtitle B. Subtitle B encompasses other regulations relating to transportation, including hazmat training regulated by PHMSA found at 49 CFR part 172, subpart H. The training required by PHMSA does not overlap with the training required by this final rule.

FRA disagrees with the comment recommending that FRA specify in the regulation that hazmat employees, hazmat employers, and hazmat training organizations and learning institutions be explicitly excluded from the regulation. FRA declines to accept this comment because it is too broad and may have implications beyond what the commenter intended. That is, if the recommendation were adopted as suggested by the commenter, the rejected requirement could be viewed as excluding any railroad (or employer) employing a hazmat employee instead of excluding just the hazmat training for those hazmat employees. For that reason, FRA has rejected that recommendation.

#### C. Preemptive Effect and Construction

FRA received a jointly filed comment from BLET, BMWED, and BRS (“joint labor comment”), that agreed with FRA's statement in the NPRM's section-by-section analysis to § 243.201 that “[o]f course, FRA does not regulate employment issues and will leave those issues to be settled in accordance with any applicable collective bargaining agreement or employment and labor law.” 77 FR 6435. The joint labor comment would like FRA to go further by adding a paragraph (e) to § 243.1 that states that “[n]othing in this part diminishes any rights, privileges, or remedies a safety-related employee may have under any collective bargaining agreement or State or Federal law.” During the Working Group meeting to discuss the comments, BMWED pointed out that there is no appeals process in the NPRM and that FRA should preserve the employees' rights that exist today, whether those rights are found in a collective bargaining agreement or anti-discrimination statutes.

#### FRA's Response

FRA stands by the statement in the NPRM cited by the joint labor comment. However, based on the principles set forth in Executive Order 13132, and affirmed in the Presidential Memorandum regarding preemption issued on May 20, 2009, it is unnecessary to include a statement in the rule regarding whether any requirement in the rule is expected to diminish any rights, privileges, or remedies a safety-related railroad employee may have under any collective bargaining agreement, State law, or Federal law.

#### D. Request for Preemption Provision for Entities That Develop Model Programs

Two commenters, NRC and ASLRRA, were concerned that entities that develop model programs could be subject to State causes of action should an injured individual claim that harm resulted from inadequate employee training derived from a model program created in response to this training rule. The comments raise a concern that the threat of litigation is a real disincentive for organizations to create model programs and that, without a preemption provision, the model program option will not be utilized.

#### FRA's Response

FRA does not have the legal authority to preempt the use of model training programs as a basis for liability or discovery in private litigation. Thus, FRA is not including such a preemption provision. The basis for this request may

be the result of similar discussions in the context of the risk reduction and system safety plan rulemakings. In that context, however, a statute provides FRA with the authority to conduct a study on the issue and, on the basis of the results of that study, FRA will be able to include some preemption language in those specific rules, if applicable. Meanwhile, as a general matter, FRA cannot decide by regulation whether documents, such as a model training plan, would be discoverable in litigation, and the agency's statutory preemption provision at 49 U.S.C. 20106(b)(1)(B) specifically provides that State law causes of action for death, injury, or property damage are not preempted if they are based on the failure of a party "to comply with its own plan, rule or standard that it created pursuant to a regulation or order issued by" the Secretary of Transportation.

*E. Training Required of Manufacturer's Employees and Other Contractors Who Inspect, Repair, and Maintain Equipment off Railroad Property*

FRA received a comment from GE Railcar requesting clarification of the purpose and scope of the rule found in § 243.1. GE Railcar's position is that its leasing and repair activities fall outside the scope of the rule and this contractor would like FRA to confirm its understanding. GE Railcar's business represents most of the diversity of the railcar business because it leases railroad cars, operates railcar repair shops, and has mobile repair capabilities to perform railcar repairs at a customer's site on railcars that it leases. FRA notes that some contractors may also operate a railcar or locomotive repair shop for a railroad on a railroad's property that is not a mobile repair situation. GE Railcar reads the proposed rule and guiding section-by-section analysis as limited to companies and their employees who have contracted with a railroad and are actually working on a railroad's real property.

**FRA's Response**

GE Railcar's comment raises a scope question. A review of the NPRM found that the proposal adequately addressed the scope question as it pertains to track and signal system repair. However, the NPRM could have described how the rule pertains to mechanical repair work in greater detail. Thus, the following paragraphs explain the scope of the final rule in relation to GE Railcar's question.

In describing item (4) of the definition of safety-related railroad employee in the NPRM, FRA explained the scope of training for an individual who is

engaged or compensated by an employer to inspect, repair, or maintain locomotives, passenger cars, or freight cars. The NPRM's section-by-section analysis stated that the inclusion of proposed item (4) "is essential [so] that individuals doing such safety-sensitive work are trained to comply with those laws or rules mandated by the Federal government for keeping those locomotives and cars in safe order." 77 FR 6412, 6423.

In deciding the scope question for mechanical personnel supplied by contractors, the answer mainly rests on the contractual obligations the non-railroad company owes to the railroad. For example, a company that simply manufactures or leases rolling equipment (i.e., locomotives and railroad cars), but does not inspect, repair, or maintain the purchased or leased rolling equipment, does not have any duty under this rule to file a training program because its employees are not performing any of the duties that would cause the employees to be classified as "safety-related railroad employees." In other words, the manufacturer or lessor of the rolling equipment would not be under contract with the railroad to inspect, repair, or maintain locomotives, passenger cars, or freight cars. Under this example, the railroad that purchases or leases the rolling equipment would have the duty to inspect the rolling equipment and make sure it complies with all applicable Federal railroad safety laws, regulations, and orders before placing the rolling equipment in use. *See e.g.*, 49 CFR 229.21 (requiring locomotives to have a daily inspection), and part 231 (requiring certain safety appliances meeting specific standards), and part 232 (requiring the inspection and testing of brake systems). If an inspection revealed that repairs or maintenance were necessary, it would be the responsibility of the railroad to arrange for those repairs or that maintenance to be completed. Under these circumstances, a railroad would need to file a training program under this rule and train its employees to perform the inspections, repairs, and maintenance; or, the railroad could hire a different company to contract the work and accept the training responsibilities.

If a manufacturer or lessor of rolling equipment is under contract to provide a railroad with inspection, repair, or maintenance services necessary to comply with the federal regulations, then the contractor is required to train the employees performing those services in accordance with a training program required under this rule. *See* 66 FR 4104, 4165 (January 17, 2001)

(explaining that FRA intends for the training and qualification requirements of 49 CFR 232.203 to apply not only to railroad personnel but also to contract personnel that are responsible for performing brake system inspections, maintenance, or tests required by part 232). FRA does not believe there is any distinction made for contractor services performed off railroad property versus on railroad property. It also should not matter whether the repairs are made at a fixed location on the railroad's property or from a mobile repair facility.

*F. Application and Responsibility of Compliance for Tourist, Scenic, Historic, and Excursion Railroads*

One commenter characterizes tourist, scenic, historic, and excursion railroads as largely run by people who are untrained and as railroad operations with many safety concerns. This commenter warns that the public will be put further at risk because the NPRM excludes these railroads from the training requirements. Thus, the commenter requests that FRA apply the final rule to tourist, scenic, historic, and excursion railroads.

**FRA's Response**

As noted in the NPRM, the final rule would apply to tourist, scenic, historic, and excursion railroads that operate on the general system, which are the railroads that present the highest risk to members of the public. As discussed in the NPRM, FRA intends to apply its published policy statement regarding how the agency regulates tourist, scenic, historic, and excursion railroads, in determining necessary compliance with the provisions of this final rule. As stated in 49 CFR part 209, appendix A—The Extent and Exercise of FRA's Safety Jurisdiction (the Policy Statement), FRA asserts broad jurisdiction over tourist operations, and explains that it works to ensure that the rules it issues are appropriate to the circumstances of the tourist railroad industry. For example, FRA does not exercise jurisdiction over insular tourist railroads that are off the general system, and it applies a limited number of its regulations to non-insular tourist railroads that are off the general system. Additionally, FRA has excluded all tourist railroads from certain of its regulations, *i.e.*, 49 CFR parts 238 and 239 (passenger equipment safety standards and passenger train emergency preparedness). FRA stated in the Policy Statement that "[i]n drafting safety rules, FRA has a specific obligation to consider financial, operational, or other factors that may be unique to tourist operations . . . [and therefore] we work to ensure that the

rules we issue are appropriate to their somewhat special circumstances.” However, the enforcement policy retains all of the general power and enforcement provisions of the rail safety statutes, including the authority to obtain subpoenas and civil penalties and to issue disqualification orders and emergency orders.

FRA only has limited resources, so it focuses on regulating those areas that would generate the most safety benefit. In the NPRM, FRA stated that the decision to exclude certain types of tourist operations that are not part of the general system of transportation is consistent with FRA’s jurisdictional policy that already excludes these operations from all but a limited number of Federal safety laws, regulations, and orders. FRA disagrees with the contention that tourist, scenic, historic, and excursion railroads that do not operate on the general system of transportation are categorically unsafe and FRA continues to believe that it should not impose these training requirements on these small operations.

#### *G. Application to Private Motorcar Operators*

One commenter raises an objection to private motorcars being operated on the general railroad system when the people operating these cars are untrained. A different commenter disagrees with the first commenter and states that, in his experience, motorcars have been safe and including them in this training rule would be over-reaching the intent of the RSIA.

#### FRA’s Response

The comment regarding the application of this rule to the training of motorcar operators is surprising to FRA because since August 1, 1963, railroads have been prohibited from permitting motorcars to pull or haul trailers, push trucks, hand cars, or similar cars or equipment on their track. 49 CFR 231.22. A railroad motorcar is generally considered an antiquated piece of self-propelled on-track equipment that has been relegated to use by hobbyists.

Considering that this rule only applies to the training of any person employed by a railroad or contractor of a railroad as a safety-related railroad employee, it clearly does not apply to private motorcar owners and hobbyists who obtain permission from a railroad to operate on the railroad’s track for purposes of enjoying the hobby. FRA has no basis to support the commenter’s assertion that the operation of a private motorcar is so inherently unsafe that FRA should begin regulating the

training of private operators who have taken up this hobby.

#### *H. Application to Bridge Inspectors and Small Engineering Firms*

One commenter requests that the rule exempt small engineering firms that perform bridge inspections. The comment states that the cost of compliance is too great for these small entities. Meanwhile, the commenter concedes that training of such individuals on roadway worker protection should still be required to ensure on-track safety.

#### FRA’s Response

FRA is sensitive to the costs imposed by this rule, especially costs imposed on small entities, and the agency has addressed the costs and benefits elsewhere in this rule. The statute mandating this rule specifically requires that FRA address contractor training without regard to the number of employees or total annual operating revenue. FRA is concerned that if it were to provide an exemption to small entity contractors, a great number of safety-related railroad employees would not be covered by this rule and potentially would not receive the same quality training required by this rule.

This preamble includes information regarding the substantial industry feedback on the NPRM and the comments received to the NPRM. FRA has not previously heard from the industry that any particular group of small entities will not be able to comply with the rule due to the costs involved. The option to use a model program or use programs submitted by training organizations or learning institutions should greatly ease the burden on small entities. FRA also expects to clarify the requirements and ease the burden on small engineering firms that conduct bridge inspections by addressing the issue in its compliance guide. Consequently, FRA does not agree that there is sufficient justification to exclude an entire type of small entity contractor from the responsibility to comply with this final rule.

#### *I. Qualified Instructor*

One commenter recommends adding a definition of “qualified instructor” and that the definition state that the instructor must have “exclusive, independently verifiable, educational training experience.” The commenter’s concern is that, without specifically defining the parameters of a qualified instructor, regional and short line railroads will have an incentive to designate individuals as instructors who are truly unqualified.

#### FRA’s Response

In the NPRM, FRA defined the term “designated instructor” but not “qualified instructor.” However, the section-by-section analysis in the proposed rule describing the definition of designated instructor addressed the qualification issue. The analysis stated that “FRA expects only qualified instructors will be designated, which explains why FRA is including in the definition that each designated person must have ‘demonstrated, pursuant to the training program submitted by the employer, training organization, or learning institution, an adequate knowledge of the subject matter under instruction and, where applicable, has the necessary experience to effectively provide formal training.’” 77 FR 6422. As FRA has concluded that the proposed definition of a “designated instructor” includes the requirement that the instructor be qualified, and the term “qualified” is adequately defined, there is no reason to add a definition for “qualified instructor.”

FRA also does not share the commenter’s concern that regional and short line railroads will have an incentive to designate individuals as instructors who are truly unqualified. It is reasonable to expect a railroad to employ instructors who can impart adequate knowledge on employees. A railroad that knowingly or negligently designates an unqualified person as an instructor would create unnecessary risk that the instructor, or an employee improperly trained by the instructor, would cause harm when attempting to perform a safety-related task. In an industry where safety lapses can result in serious injuries and costly accidents, an employer that fails to take the proper precautions to ensure that only qualified persons are designated as instructors would be taking on too much liability.

#### *J. Training for Designated Instructors and Supervisors Performing Oversight*

AAR requests clarification regarding the training required for supervisors performing oversight. In AAR’s view, a supervisor performing oversight should not necessarily be required, in all instances, to successfully complete the same craft training that the employees would be required to complete in accordance with the program. Instead, AAR suggests that a supervisor performing oversight should be trained on how to perform the oversight task.

Similarly, AAR asks FRA to address the training required for a designated instructor in the final rule. AAR states that a railroad might choose, as part of a training program for train crews, to

have a person address the subject of fatigue mitigation who is not a conductor or engineer. AAR interprets the proposed rule so that the designated instructor needs to have demonstrated adequate knowledge of the subject under instruction, but does not need to be qualified in the occupational category or subcategory of the employees being trained.

#### FRA's Response

FRA agrees with AAR's comment that not every designated instructor or supervisor performing oversight will need the identical training that the employer is providing to each occupational category or subcategory of safety-related railroad employee that is being trained by an instructor or subject to oversight by a supervisor. However, in instances where the training is not identical, the employer will need to discern how the instructor or supervisor can be deemed qualified. Typically in these instances, an employer will find an instructor qualified because the person holds a degree or certification from training organization or learning institution, and an employer will find a supervisor qualified because the person has significant relevant work experience and can prove knowledge of the applicable rules. Certainly, FRA agrees with AAR that the important issue is that the instructor is qualified on the subject matter to which the instructor is instructing, not all the subject matters necessary to be qualified in the occupational category or subcategory of the employees being trained.

The more difficult question, which AAR did not address in its comment, is what substitutes for the actual occupational category or subcategory training when the technical aspects of that training are involved. For example, can anyone who is not a carman instruct or supervise another carman on how to conduct certain equipment repairs or maintenance? FRA theorizes that an instructor in a classroom setting could be a college graduate with a degree in mechanical engineering, and thus would be qualified without having been through the employer's training program for a carman. In other instances, a supervisor may only need to know the rules to conduct oversight, yet never have been qualified in the same occupational category or subcategory as the employee subject to oversight. For instance, a Manager of Operating Practices (MOP) observes that the roadway worker in charge of a work group does not conduct a proper job briefing, nor set up roadway worker protection correctly; in this situation, as long as the MOP understands and can

apply the rule correctly, there should be no impediment to the MOP conducting the oversight.

FRA also agrees with AAR that a supervisor performing oversight could not be deemed qualified without being trained on how to perform the oversight task. In conclusion, an instructor or supervisor may be qualified without successfully completing the same training that the employees would be required to complete in accordance with the program, but FRA will be scrutinizing such qualification requirements that substitute for that training to ensure that the railroad has provided an adequate basis for determining the individual is qualified.

#### K. Refresher Training

One commenter questioned whether the regulation should define refresher training and whether initial training courses can substitute for refresher training courses.

#### FRA's Response

FRA included refresher training in the proposed rule in order to address Congress's mandate that the training regulation include requirements for "ongoing training." The NPRM did not define the term "refresher training," but the issues surrounding this particular type of training were described in the section-by-section analysis to paragraph (e) of § 243.201. In the NPRM, FRA made clear that refresher training could be exactly the same as initial training, but that it does not have to be exactly the same training. Refresher training is expected to be comprehensive, but the developer of the training should develop it with the understanding that the employees participating have experience in the subject matter of the training. Experienced employees may not need the step-by-step instruction covering every requirement that would be included in initial training. In other words, the refresher training may not need to cover truly basic tasks or issues that no practicing employee in that field would have a question about.

Refresher training should most likely be focused on placing greater emphasis on advanced areas or subjects that often lead to accidents, injuries, or non-compliance. For example, experienced employees would benefit from refresher training that identifies those behaviors that often lead to accidents/incidents or close calls. Refresher training may also address systemic performance gaps, or possible substantive amendments to existing regulations. FRA expects that by conducting periodic oversight under § 243.205 and the annual review in § 243.207, employers will be gathering

significant information that will help them design refresher training that is data driven to close knowledge or performance gaps. However, FRA certainly would not take exception to refresher training that is identical to an initial training course on the same subject.

Although not raised by the comments, FRA considered whether employees should be allowed to test out of refresher training. The concept is that experienced employees would demonstrate their knowledge and perform a sufficient number of tasks so that the employer could determine that refresher training is unnecessary. FRA did not consider a test out option to be viable for several reasons. One, Congress's mandate that the training regulation include requirements for "ongoing training" did not contemplate a testing out option, and so FRA is concerned that such an option would conflict with the statutory mandate. Two, as explained in the previous paragraph, refresher training is expected to be data driven and applied systemically. If individuals could test out, the effectiveness of the final rule could be diminished. Three, even experienced employees may need refresher training to help them better understand rules or tasks that are not conducted often. Four, there may also be more than one way to do a task, and sharing that information during a mandatory refresher training class could make the employee more efficient or aware of additional options. Five, experienced employees, taking training with other experienced employees, may be more reluctant than employees new to an occupational category to ask questions clarifying how to properly conduct certain tasks considered routine. The data-driven refresher training provides critical information to all participating employees thereby reducing the need for individualized refresher training programs.

FRA also did not receive comments challenging the minimum three-year cycle for refresher training, even though FRA raised the issue during the RSAC Working Group's meetings and in the NPRM. 77 FR at 6436. The reason the three year refresher cycle probably was not challenged is that it has become a railroad industry standard, except where refresher training is required more frequently. FRA has some refresher training requirements in its railroad safety regulations that are more stringent than every three years, and in §§ 243.1(c) and 243.201(e) it is made clear that compliance with those more stringent refresher training cycles is still required. In promulgating this final rule,

FRA has accepted the RSAC's recommendation that a three year refresher cycle is acceptable to the industry and is beneficial to employees.

FRA has added a definition of refresher training to the final rule, based on the definition in 49 CFR 238.5, to further address the commenter's concerns. That definition is explained in the section-by-section analysis to § 243.5.

#### L. Waivers

In the NPRM, FRA included a proposed section explaining how a person may petition the Administrator for a waiver of compliance with any requirement of this part. Meanwhile, FRA stated in the section-by-section analysis that "this section may be unnecessary because 49 CFR part 211 sufficiently addresses the waiver process." 77 FR 6425. FRA requested comments on whether the proposed waiver section should be removed and FRA received several comments, all in support of removing the waiver provision. The commenters frequently cited that the waiver provision should be removed as unnecessary and to reduce confusion. Furthermore, the Working Group reached agreement to delete the waiver section from this rule during its post-comment period meeting.

#### FRA's Response

FRA agrees with the commenters and the Working Group. The procedures for petitioning for a waiver do not depend on the inclusion of a waiver provision in this part. Instead, the procedures are found in 49 CFR part 211. Thus, the proposed waiver section is redundant and can be removed without any impact to any person who may wish to petition the Administrator for a waiver. Thus, FRA is removing the proposed section related to waivers in this final rule.

#### M. Employees Charged With Inspection of Track or Railroad Equipment

In the preamble to the NPRM, FRA requested comments regarding whether the proposed rule adequately covers the specific statutory requirement related to employees charged with the inspection of track or railroad equipment found at 49 U.S.C. 20162(a)(3), or whether the regulatory text needs to be more explicit in the final rule. In that regard, FRA explained that it was considering whether language that mirrors the statutory requirement related to employees charged with the inspection of track or railroad equipment should be added as paragraph (c)(6) to proposed § 243.101 so that it would be one of the specific requirements necessary for each

employer's training program. The joint labor comment supports adding the statutory requirement in 49 U.S.C. 20162(a)(3) to § 243.101, while the NRC opposes it.

Separately, FRA also explained that it was considering whether the proposed regulatory language requiring periodic oversight and annual review should be expanded to directly address those employees inspecting track and railroad equipment. Currently, the oversight and review provisions are only applicable to determine if safety-related railroad employees are complying with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. NRC opposes an expansion of periodic oversight and annual review to address these types of employees explicitly.

#### FRA's Response

Upon further review of the statute and the comments, FRA has concluded that it is unnecessary to add a paragraph (c)(6) to § 243.101 to cover employees charged with the inspection of track or railroad equipment. This rule meets the statutory mandate found in 49 U.S.C. 20162(a)(3) by requiring that each employer of one or more safety-related railroad employee, whether the employer is a railroad, contractor, or subcontractor, be required to train and qualify each such employee on the Federal railroad safety laws, regulations, and orders that the employee is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. See §§ 243.1(a) and 243.201. Employees charged with the inspection of track or railroad equipment are considered safety-related railroad employees that each employer must train and qualify. The rule at § 243.5 defines *safety-related railroad employee* to specifically include an individual who is engaged or compensated by an employer to "(3) In the application of parts 213 and 214 of this chapter, inspect . . . track; (4) Inspect . . . locomotives, passenger cars or freight cars; (5) Inspect . . . other railroad on-track equipment when such equipment is in a service that constitutes a train movement under part 232 of this chapter; [and] (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."

The final rule also requires that the training program developed by each employer be submitted to FRA for approval. See § 243.109. In order to be

approved, each employer must address in its program how it will train those employees charged with the inspection of track or railroad equipment to identify defective conditions and initiate immediate remedial action to correct critical safety defects that are known to contribute to derailments, accidents, incidents, or injuries. FRA would reject a program that fails to adequately address training for those employees charged with the inspection of track or railroad equipment.

The formal training for employees responsible for inspecting track and railroad equipment is expected to cover all aspects of their duties related to complying with the Federal standards. FRA would expect that the training programs and courses for such employees would include techniques for identifying defective conditions and would address what sort of immediate remedial actions need to be initiated to correct critical safety defects that are known to contribute to derailments, accidents, incidents, or injuries. FRA would also expect that the statutorily mandated refresher training address these issues and any other areas that may warrant particular focus.

Finally, after further consideration, FRA has decided not to expand periodic oversight and annual review to directly address those employees inspecting track and railroad equipment. Safety-related railroad employees inspecting track and railroad equipment will be subjected to oversight to the extent that their duties are necessary to comply with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. At this time, FRA does not recognize a need to expand periodic oversight or the annual review to address these types of employees explicitly. Of course, if FRA determines at a later date that such additional periodic oversight or annual review would be worthwhile, FRA could initiate a rulemaking to amend this part.

#### N. Employees Charged With Inspection of Railroad Bridges

The joint labor comment recommends that FRA add a paragraph, *i.e.*, § 243.101(c)(6), that would be applicable to those employees charged with the inspection of railroad bridges including specific training requirements for employees charged with the inspection of track, railroad equipment, and bridges in the final rule to address issues such as the type, frequency, and scope of training and refresher training. In addition, the joint labor comment requests that FRA amend item (3) in the definition of "safety-related railroad

employee" so that it references more CFR parts, specifically parts 234, 236, and 237. Furthermore, the joint labor comment raises a concern that the NPRM does not explicitly include safety-related functions performed in relation to the inspection of roadway maintenance machines and hi-rail vehicles under 49 CFR part 214, subpart D.

#### FRA's Response

It is unnecessary for FRA to require specific training requirements for any category of safety-related railroad employee because each employer will be defining each category or subcategory of employee and thus, each employer will be best situated to determine what training those categories of employees should receive. In order to follow the joint labor organization's recommendation, the rule would need to be extensively rewritten so that it would take away the flexibility provided to each employer to individually define its categories of employees. FRA is unwilling to follow this suggestion as it would substantially increase the costs of implementing the rule for each employer and would force upon the industry a one-size fits all solution that would create many implementation challenges for employers.

It is also unnecessary to address issues such as the type, frequency, and scope of training and refresher training as the joint labor comment advocates because the final rule already addresses those issues. At a minimum, each newly hired safety-related railroad employee will be provided with initial training, and refresher training every three years. *See* 243.201(c). Experienced employees may be exempt from initial training, but will still be required to complete refresher training every three years. *See* 243.201(e).

FRA also rejects the comment that the final rule should reference more CFR parts in the definition of safety-related railroad employee. That definition is not intended to include a recitation of all the Federal laws, regulations, or orders that may apply to any particular safety-related railroad employee covered by this rule. Adding some cross-referencing parts, and not others, has no effect on whether those Federal regulations must be covered in training. The reason FRA added the phrase "in the application of parts 213 and 214 of this chapter" to item (3) of the definition was to refine the statutory definition of safety-related railroad employee which broadly includes the types of employees that the industry recognizes as responsible for "maintain[ing] the right of way of a

railroad." 49 U.S.C. 20102(4)(C). FRA and RSAC agreed that the statutory definition could be confusing if repeated in the regulation. Thus, FRA agreed with the RSAC recommendation to define those employees who maintain the right of way of a railroad in the regulatory definition.

The joint labor comment raises the concern that 49 CFR part 237, which covers "Bridge Safety Standards," might not be covered under this rule. BMWED elaborated during the Working Group meeting to discuss the comments received in response to the NPRM that part 237 is a new regulation that was not contemplated by the RSIA. Hence, BMWED's concern is that this new training regulation might not cover part 237 without specifically citing it. However, as part 237 is an FRA regulation and there is no exemption in this rule that applies, the concern appears unfounded. In other words, as FRA clarified at the Working Group meeting, this final rule applies to training on any FRA regulations as of the effective date of this rule and into the future, not only those FRA regulations that are in effect as of the date of this rule, or as of the implementation date of the RSIA.

Meanwhile, FRA is aware that a person reading this rule might be persuaded to interpret that an employer would be required to adopt and comply with a training program to satisfy certain training requirements of 49 CFR part 237 that could not realistically be supported by an employer's training program because such training could only reasonably be afforded by a training organization or learning institution. For example, the rule does not require railroad bridge engineers to receive "in-house" training when an engineering degree is what is required by § 237.51(b). This rulemaking also does not change the bridge owner's authority under 49 CFR part 237 to determine whether the railroad bridge engineers, inspectors, and supervisors are technically competent. Training on 49 CFR part 237, subpart E—Bridge Inspection is required under this rule. A railroad bridge engineer, inspector, or supervisor would need to be trained on roadway worker protection requirements pursuant to this rule and 49 CFR part 214. So, no amendment to the proposal is necessary as these individuals are covered by the final rule, and employers will need to submit plans explaining how training will be provided and what Federal laws, regulations, and orders will be covered during the training for each category of employee.

FRA disagrees with the statement in the joint labor comment that raises a concern that the NPRM "does not explicitly include safety-related functions performed in relation to the inspection of roadway maintenance machines and hi-rail vehicles under 49 CFR part 214, subpart D." The definition of safety-related railroad employee at item (6) specifically includes an individual that determines 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. Thus, a person who makes this inspection and determination that equipment is safe to use is required by this final rule to be trained to detect non-complying conditions.

#### *O. Joint Ventures*

One commenter notes that the NPRM did not address joint venture companies and raises concerns regarding how FRA would determine compliance for these joint ventures. NRC requests that FRA allow flexibility in how these joint venture companies meet the regulatory requirements: by the original participant companies, under the auspices of one lead participant company, or under the joint venture itself. NRC also suggests that proposed § 243.101(b) could pose difficulties for joint ventures, or any company that forms quickly and wishes to start business soon after forming. NRC recommended that start-ups and joint ventures should be allowed to use employees for up to one year to perform safety-related duties without designating those employees in accordance with a training program filed with FRA.

NRC's comment was discussed at the Working Group meeting held after the comment period closed. During that meeting, the Working Group reached agreement that the final rule should not require employers to designate employees under § 243.201 until 30 days prior to the start of the program.

#### FRA's Response

NRC's comments regarding joint ventures raise some valid concerns. The NPRM did not address any issues related to joint ventures. Furthermore, FRA did not foresee that proposed § 243.101(b) could pose difficulties for joint ventures or start-up companies. The changes FRA made to the proposal that are found in this final rule reflect FRA's considerations of wanting to provide equal treatment to existing companies and new companies, while ensuring that new ventures and new companies begin operations with safety-

related railroad employees that are properly trained.

NRC's comment asks which entity involved in the joint venture is the party responsible for compliance with the rule, because the NPRM was silent on this issue. FRA has decided that the final rule should remain silent on the issue because it is unnecessary for the regulatory text to assign responsibility. Parties to a joint venture should understand that compliance is mandatory and the participants in the joint venture are obligated to ensure that compliance is achieved. No changes were made in this final rule to delineate which entities involved in a joint venture are responsible for training as FRA would determine that all the entities involved would be responsible for compliance, unless the joint venture agreement specifies the responsibilities of each party. This approach permits the maximum flexibility to each entity participating in the joint venture or created by the joint venture.

A different, but related, question may be how does FRA intend to enforce the final rule against multiple companies that form a joint venture. From an enforcement perspective, FRA would likely first consider an employer responsible for training its employees that the employer contributes to the joint venture, unless the joint venture agreement states otherwise. Likewise, the employer responsible for training would be expected to maintain the records for that employee. Although NRC suggests that the parties to the joint venture could agree to assign the responsibility for training and compliance under this rule to the lead participant company or the shell company formed by the joint venture, FRA warns that it will not tolerate the forming of shell companies that accept responsibility for compliance with the final rule but do not actually perform any of the duties necessary for compliance. If FRA discovers training compliance failures under the final rule and that the parties to a joint venture agreement are unresponsive to their regulatory responsibilities, FRA will consider all available means of enforcement to achieve compliance.

With regard to NRC's concerns regarding § 243.101(b), FRA agrees that the proposed rule did not adequately address the difficulties of compliance that start-ups and joint ventures could face. The proposed requirement that the program be submitted at least 90 days prior to commencing operations has been removed. In addition, FRA has removed the proposed requirement that the employer wait for FRA to approve the program prior to adopting and

complying with it. Instead, the final rule requires that the employer adopt and comply with its submitted training program no later than upon the commencement of operations, as long as commencement begins on or after January 1, 2018.

This requirement relieves a start-up or joint venture from filing a program at least 90 days prior to commencing operations, but means that, upon commencing operations, the employer's training must be complete for any safety-related railroad employees, designated by occupational category or subcategory, who are working. See § 243.201(b). Prior to this final rule, railroads are already required to ensure proper training techniques prior to commencing their operations. Therefore, this rule should not create barriers to entry nor delays in starting new operations. More so, new railroads would have access to model training programs and best-in-class training practices. Therefore, they should be able to use their own human resources more efficiently for training purposes and possibly expedite entry into market.

As FRA explains in the section-by-section analysis, FRA does not agree that start-ups and joint ventures should be allowed to use employees for up to one year to perform safety-related duties without designating those employees in accordance with a training program filed with FRA. There is no basis to support the position that start-ups and joint ventures deserve more flexibility than other employers. In addition, such a loophole could create a class of untrained employees that circumvents the purpose of the rule.

Furthermore, FRA has rejected the Working Group's recommendation that the rule should not require employers to designate employees under § 243.201 until 30 days prior to the start of the program. FRA believes the Working Group members may not have realized that they were agreeing to a much more stringent restriction than FRA proposed in the NPRM. For an employer commencing operations after January 1, 2017, under § 243.201(b), FRA has not specified an amount of time prior to beginning operations that the employer has to designate employees, only that the employer declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory prior to beginning operations. That aspect of the final rule is carried over from the NPRM because requiring new employers to designate employees 30 or 90 days prior to commencing operations is unlikely to ensure the employees are qualified to do the safety-related work. Instead, existing

aspects of FRA's operations are better designed to check whether railroad safety would be detrimentally impacted. For instance, FRA routinely conducts inspections, audits, and other oversight of new railroads to identify safety concerns, and frequently makes contact with employers prior to the commencing of operations. If FRA discovered that employees were unqualified to perform safety-related duties, FRA would generally be in a position to take immediate action prior to operations commencing or within a short period after initial start-up. FRA could exercise its enforcement authority to bring about compliance. Thus, FRA's oversight of new operations can address the safety concerns that employees are untrained or not properly designated without placing a restriction on the speed at which joint ventures or businesses of any size can enter the field of railroading.

#### *P. Requests for Confidential Treatment of Programs*

In the NPRM, FRA requested comments on whether the rule should address the submission of proprietary materials or other materials that an entity wishes to keep confidential. FRA raised the issue in the context of the electronic submission process found in § 243.113. FRA suggested that it could develop a secure document submission site so that confidential materials are identified and not shared with the general public. However, FRA sought comments on the issue because the agency questioned whether that extra step would be necessary.

AAR filed the only comment on this issue. In the comment, AAR agrees that it is unlikely that confidential material will be submitted. However, AAR states that it is likely that proprietary (copyrighted) material will be submitted. AAR recommends that FRA ensure that in making such material public, it includes copyright notices and warns the public against copying or other unauthorized use of such material.

#### *FRA's Response*

In the NPRM, FRA explained that the agency did not expect the information in a program to be of a confidential or proprietary nature. For instance, each railroad is expected to share the program submission, resubmission, or informational filing with the president of each labor organization that represents the railroad's employees subject to this part. See § 243.109(d). FRA's expectation is that a railroad would remove any information that it wished to keep private prior to sharing that program material with a labor

organization. In the NPRM, FRA suggested that entities consider this concern when drafting any programmatic material to be submitted to FRA and that each entity takes its own steps not to share such private material with FRA. In that way, FRA may make such programmatic material available to the general public upon request.

In addition to the suggestions made in the NPRM for keeping information confidential, FRA notes that the agency's railroad safety enforcement procedures address requests for confidential treatment at 49 CFR 209.11. The procedures in that section place the burden on the party requesting confidential treatment with respect to a document or portion thereof. For example, according to paragraph (c) of that section, a railroad that wants confidential treatment is required to provide a statement at the time of filing justifying nondisclosure and referring to the specific legal authority claimed. Paragraph (e) of that section explains that FRA retains the right to make its own determination with regard to any claim of confidentiality.

FRA is concerned that a party requesting confidential treatment of a document, or including a copyright notice on a portion of a program submission, may be asking for treatment that could interfere with FRA's safety enforcement program. For this reason, in addition to FRA's procedures in 49 CFR 209.11, a party requesting confidential treatment should provide a detailed explanation for how the party expects FRA to treat the document. In requesting confidential treatment, the party should consider several aspects of FRA's safety enforcement program. For instance, a party should understand that FRA intends to share the program with the State agencies that FRA partners with in accordance with 49 CFR part 212. It is typically understood that a party has consented to all electronic and written dissemination of a submitted program for any investigative and compliance purposes envisioned pursuant to the FRA regulations or FRA's statutory enforcement authority. See 49 CFR 209.11(a). Likewise, program submissions would normally be subject to the mandatory disclosure requirements of the Freedom of Information Act (FOIA, 5 U.S.C. 552) and thus a party that has a copyright notice on the program submission will need to specify which statutory exemption it believes is applicable. Again, FRA retains the right to make its own determination with regard to any claim of confidentiality, including whether an exemption to mandatory

disclosure requirements under FOIA are applicable. If FRA decides to deny a claim of confidentiality, FRA is required to provide notice and an opportunity to respond no less than five days prior to the public disclosure. 49 CFR 209.11(e).

#### *Q. Computer and Simulator-Based Instruction*

The joint labor comment requests that FRA clarify that the use of computer and simulator-based instruction be deployed for training purposes rather than for examination or qualification purposes. The comment implies that new and unproven training technologies could be utilized and could lead to disciplinary action when an employee fails to pass the training. The commenters strongly urge FRA to eliminate such practices in the final rule. This comment was further developed during the Working Group meeting in which the comments were discussed. BRS clarified that it would not want an employee to be qualified solely from computer-based training, as it is essential to be trained on the actual equipment that an employee will be required to maintain. UTU stated that there are field tests for employees who fail simulator tests.

#### FRA's Response

The final rule defines formal training and FRA accepts that formal training can be delivered in many different ways. In the NPRM, FRA recognized that classroom training is preferred by some employees over any other type of training. However, classroom training is not the only type of training that can be effective and FRA has no intention of severely limiting the methods of delivering formal training.

Although FRA is not changing the proposed rule based on this comment, the joint labor comment does raise some important issues that each employer should contemplate when drafting and implementing a training program. One issue is whether the training is effective given the target employee audience. If an employee lacks familiarity with computers or simulators, an employer should consider whether the method of delivery is appropriate. An employee may be able to do the actual task and understand the underlying rules being tested without being able to pass a computer or simulator-based test.

Furthermore, nowhere in the proposed rule or this final rule does FRA require an employer to discipline an employee for failing to pass training. Likewise, the rule does not prohibit an employer from taking disciplinary action. FRA encourages employers to provide employees with sufficient

training and testing opportunities, and to retrain and retest whenever there is a need. If a computer or simulator-based training leads to an employee's failure to qualify on a subject, the employer should take into account whether any technological issues potentially contributed to the failure. The final rule does not prohibit the employer from providing further opportunities for training or testing for any reason or no reason at all. Further opportunities for training or testing may include other types of formal training or other types of acceptable testing in accordance with the training program. An employer should consider building in some flexibility in its program to address exceptions to its normal training program. Of course, if FRA learns that the technology is contributing to training or testing failures, the agency will consider whether any enforcement action is warranted or whether a rulemaking should be initiated to revisit the issue.

#### *R. FRA's Qualifications To Review Training Programs*

One commenter questions whether FRA employs individuals with teaching credentials to evaluate whether training components satisfy the educational standards used for effective teaching.

#### FRA's Response

FRA employs personnel who train other FRA employees. Each in-house FRA trainer must earn a professional certification for trainers at the "Master Trainer" level, if not otherwise credentialed to teach. Thus, FRA's in-house trainers are both qualified in teaching methods and in various aspects of railroading. These in-house trainers have been, and continue to be, instrumental in FRA's development of the interim final compliance guide. For these reasons, the FRA personnel that will be reviewing training programs for educational sufficiency have the requisite background to effectively review each training component, or oversee other FRA personnel who can assist with program review.

#### *S. Compliance Guide*

One commenter suggested that FRA "issue a compliance guide, specifically to railroads that have 15 or less safety-related railroad employees, (as contemplated in 49 CFR part 209, appendix C) and then delay the implementation of the proposed rule to these smallest railroads for one year after the compliance guide is made available to these smallest railroads."

## FRA's Response

As FRA is required to prepare a final regulatory flexibility analysis (see VII, B, of this rule titled “Regulatory Flexibility Act and Executive Order 13272; Final Regulatory Flexibility Assessment”), FRA is also required under sec. 212 of the Small Business Regulatory Enforcement Fairness Act (SBREFA), to publish one or more guides to assist small entities in complying with the final rule. FRA intends to publish an interim final compliance guide early in 2015. By characterizing the guidance as “interim final,” the guidance will be effective immediately, but signal that FRA is willing to consider amending the guidance based on comments received. Consequently, FRA will provide a 60-day comment period and intends to issue a notice for the final guidance by no later than one year from the date of issuance of the interim final guidance. FRA also amended the proposal so that small entities will have at least four years from the date of issuance of the interim final compliance guide to implement a training program under § 243.101(a)(2) and at least four years and eight months from the date of issuance of the interim final compliance guide to designate existing employees under § 243.201(a)(2). That schedule for publication of a compliance guide should also benefit model program developers who will want to reference the guide in their attempt to meet the May 1, 2017 submission deadline in § 243.105(a)(3).

FRA's compliance guide is intended to aid employers by providing the task inventories that provide the foundation of the OJT program. The compliance guide can be used by all employers, but will be written with a primary emphasis on assisting small entities. The task inventories will be presented in a format that is highly respected in the adult training community, and will be modeled after training formats FRA's master trainers use to train FRA personnel. The guide will address each major type of safety-related railroad employee category. It will explain the roles and responsibilities for those administering the program, as well as the trainees and trainers. Duties will be identified by the performance task that the employee is supposed to be able to do. The guide will help identify the preparation that trainers will have to take in order to make sure that the conditions are conducive for learning. For example, trainers will ensure that trainees have all the tools, equipment, and documents needed to practice the task. Furthermore, the guide will help establish standards for establishing

when a trainee has demonstrated proficiency. Such standards are generally based on repetition, the completeness, and the percentage of accuracy. These factors for establishing standards will be driven by the complexity of the related task.

Thus, FRA has addressed this commenter's concern by agreeing to publish a compliance guide and delaying implementation for small entities so that the small entities will have at least four years to consider the agency's guidance prior to the deadline for program submission.

## VI. Section-by-Section Analysis

### Part 214

FRA received three comments regarding the proposed amendments to this part. Two of the commenters, AAR and APTA, support the amendments without recommending any changes from the proposal. The joint labor comment supported the overall direction of the amendments, and included a recommendation to expand this regulation to address the myriad of crane safety issues which fall outside the scope of roadway worker protection and the on-track safety programs specified in part 214, subpart C. For this reason, the joint labor comment requested that the crane operator qualification and certification requirements be moved to a new subpart within part 214.

In the NPRM, FRA explained that on August 9, 2010, the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) published a final rule regarding “Cranes and Derricks in Construction” (Final Crane Rule, 75 FR 47906) and how it may be very difficult or unnecessarily burdensome for the railroad industry to comply with the crane operator certification requirements provided for in OSHA's regulation. In accordance with Executive Order 13563, “Improving Regulation and Regulatory Review,” which requires “[g]reater coordination across agencies” to produce simplification and harmonization of rules, FRA has coordinated with OSHA to maintain an equivalent level of safety in replacing OSHA's training and certification requirements for operators of roadway maintenance machines equipped with a crane who work in the railroad environment.

Although the railroad industry uses many different types of cranes, nearly all of the cranes utilized by railroads are used to support railroad operations and would fall within what FRA refers to as “roadway maintenance machines.”

FRA's “Railroad Workplace Safety” regulation, found at 49 CFR part 214, defines roadway maintenance machine as “a device powered by any means of energy other than hand power which is being used on or near railroad track for maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems. Roadway maintenance machines may have road or rail wheels or may be stationary.” 49 CFR 214.7. FRA already requires some training for crane operators that is related to roadway worker safety, although, prior to this rule, FRA did not require operator certification. See 49 CFR 214.341 and 214.355.

As FRA is promulgating a new regulation (part 243) in this notice to address training standards for all safety-related railroad employees, FRA is solidly situated to require a viable training alternative to OSHA's certification options for certain crane operators in the railroad industry. In particular, FRA is especially well-suited to address the training and qualification requirement for operators of roadway maintenance machines equipped with a crane. This final rule contains various requirements for each employer of a safety-related railroad employee, which would include employers of one or more operators of roadway maintenance machines that are equipped with a crane, to submit a training program that explains in detail how each type of employee will be trained and qualified. However, new part 243 is only intended to cover training of Federal railroad safety laws, regulations, and orders and those railroad rules and procedures promulgated to implement those Federal requirements. Consequently, FRA is adding a new § 214.357 to existing part 214 which includes training and qualification requirements for operators of roadway maintenance machines equipped with a crane. The details of those requirements are addressed below in the analysis for that particular section.

### Section 214.7 Definitions

The final rule would add a definition for *roadway maintenance machines equipped with a crane* in order to address the term's use in § 214.357. The definition of this term would mean any roadway maintenance machine equipped with a crane or boom that can hoist, lower, and horizontally move a suspended load.

### Section 214.341 Roadway Maintenance Machines

FRA is amending paragraph (b)(2) to address two issues. First, FRA is

removing the requirement that the operator of a roadway maintenance machine have “complete” knowledge of the safety instructions applicable to that machine. Based on feedback received from the regulated community, FRA has been informed that requiring that the knowledge be “complete” suggests that a roadway worker operator have instant recall of every instruction contained in the manual. This reading of the rule is not FRA’s intention. FRA intends each operator to have sufficient knowledge of the safety instructions so that the operator would be able to safely operate the machine without reference to the manual under routine conditions, and know where in the manual to look for guidance when operation of the machine is not routine.

The second change to paragraph (b)(2) addresses what is meant by “knowledge of the safety instructions applicable to that machine.” FRA’s intent is that this term means the manufacturer’s instruction manual for that machine. However, it has come to FRA’s attention that some portion(s) of a manufacturer’s instruction manual may not be applicable to a particular machine if the machine has been adapted for a specific railroad use. In that case, FRA requires that the employer have a duty to ensure that such instructions be amended or supplemented so that they shall address all aspects of the safe operation of the crane and be as comprehensive as the manufacturer’s safety instructions they replace. The purpose of this requirement is to ensure that the safety instructions provided address all known safety concerns related to the operation of the machine. If some type of functionality is added to the machine through adaption, the safety instructions would need to address the known safety concerns and proper operation of that additional function. On the other hand, if the adaption removes an operational functionality, the safety instructions would no longer need to address the function that was removed, although it could be possible that the removal of a device could create other safety hazards that may need to be addressed in the safety instructions in order to be considered comprehensive. In order to ensure that the safety instructions for a machine are comprehensive, some employers may choose to provide a completely new safety instruction manual for adapted equipment; however, other employers may choose to simply void certain pages or chapters of the manufacturer’s manual, and provide a supplemental manual to address the safety instructions related to the adapted functions of the equipment.

#### *§ 214.357 Training and Qualification for Operators of Roadway Maintenance Machines Equipped With a Crane*

As mentioned previously, FRA is amending this section in order to ensure that each railroad or contractor (or subcontractor) to a railroad ensures that operators of roadway maintenance machines equipped with a crane are adequately trained to ensure their vehicles are safely operated. The training requirements are intended to address both safe movement of the vehicles and safe operation of the cranes. Once this rule is effective, FRA regulations would apply to operators of roadway maintenance machines equipped with a crane, rather than OSHA’s regulation related to crane operator qualification and certification found at 29 CFR 1926.1427.

Paragraph (a) clarifies that this section requires new training requirements in addition to the existing requirements already contained in this subpart. Paragraph (a) also includes a requirement that each employer adopt and comply with a training and qualification program for operators of roadway maintenance machines equipped with a crane to ensure the safe operation of such machines. The requirement in paragraph (a) to “adopt” and “comply” with a training and qualification program may seem redundant; however, the use of these terms together are intended to remind each employer that it will need to both “adopt” such a program and “comply” with its own program. Failure to adopt or comply with a program required by this section will be considered a failure to comply with this section.

Paragraph (b) requires that each employer’s training and qualification program address initial and periodic qualification for each operator of a roadway maintenance machine equipped with a crane. Both initial training and periodic refresher training must, at a minimum, include certain procedures for addressing critical safety areas. Paragraph (b)(1) requires that each employer develop procedures for determining that the operator has the skills to safely operate each machine the person is authorized to operate. FRA would expect that those procedures would include demonstrated proficiency as observed by a qualified instructor or supervisor. Paragraph (b)(2) requires that each employer develop procedures for determining that the operator has the knowledge to safely operate each machine the person is authorized to operate. As explained in the analysis of the amendments to § 214.341(b)(2), an operator must have

knowledge of the safety instructions applicable to that machine, regardless of whether the machine has been adapted for a particular railroad use. Implicit in this rule is the requirement that the employer must supply the safety instructions for the crane. If the crane has been adapted for a specific use, the employer must ensure that the safety instructions are also adapted. FRA would expect the employer to employ or contract out for a qualified person to adapt the safety instructions, but in any case the employer is responsible for ensuring that the instructions address all aspects of the safe operation of the crane. When equipment has been adapted, the employer has a duty to provide revised safety instructions that comprehensively address each adapted feature as well as any feature supplied by the manufacturer that was not removed during the adaptation.

Paragraph (c) requires that each employer maintain records that form the basis of the training and qualification determinations of each operator of roadway maintenance machines equipped with a crane that it employs. This requirement repeats the requirement contained in § 243.203 to maintain records. However, it is useful to repeat the requirement as a reminder to employers. In repeating this requirement, FRA does not intend the requirement to cause an employer to duplicate records kept in accordance with proposed part 243. Similarly, paragraph (d) requires that each employer is required to make all records available for inspection and copying/photocopying to representatives of FRA, upon request during normal business hours, as is also required in part 243.

In paragraph (e), FRA permits training conducted by an employer in accordance with operator qualification and certification required by the Department of Labor (29 CFR 1926.1427) to be used to satisfy the training and qualification requirements of this section. The purpose of this paragraph is to allow an employer to choose to train and certify an employee in accordance with OSHA’s Final Crane Rule and opt out of the other proposed requirements of this section for that employee. As explained in the introductory analysis to part 214 in the NPRM, if the crane equipment is modified for railroad operations there may not be an accredited crane operator testing organization that could certify the operator in accordance with OSHA’s Final Crane Rule. 29 CFR 1926.1427(b). However, there are some roadway maintenance machines equipped with a crane that are considered standard construction equipment and thus it

would be possible to certify operators of that equipment through such an accredited organization. For this reason, FRA does not want to preclude the option for a person to be trained by the accredited organization and meet OSHA's requirements in lieu of FRA's requirements. Similarly, FRA envisions that some railroads or employers may employ some operators on roadway maintenance machines equipped with a crane who could be used exclusively within State or local jurisdictions in which the operators are licensed. Under those circumstances, the operator would be in compliance with OSHA's fourth option for certifying crane operators as it permits the licensing of such operators by a government entity. 29 CFR 1926.1427(e). FRA has no objection to the use of crane operators who meet OSHA's requirements and does not intend, by the addition of this section, to impose any additional regulatory requirements on such operators.

Although the purpose of this section is to provide an alternative method of training and qualification that is tailored to the unique circumstances faced by most operators of roadway maintenance machines equipped with a crane working for the railroad industry, the purpose of paragraph (e) is to permit an employer to opt out of the alternative FRA requirements as long as the operator has met OSHA's training and certification requirements.

#### Part 232

##### Section 232.203 Training Requirements

FRA modeled some aspects of this final rule related to part 243 after the training requirements found in this section. Meanwhile, when reviewing this section, FRA discovered that several minor corrections to the section are necessary. The minor corrections were described in the NPRM and FRA did not receive any comments regarding them or objecting to their adoption. 77 FR 6420, 6453. As this portion of the final rule is identical to the proposed version, the analysis provided for in the NPRM is not being repeated here.

#### Part 243

##### Subpart A—General

###### Section 243.1 Purpose and Scope

In response to comments received in response to the NPRM, some minor edits have been made to paragraph (a) and paragraph (e) of this section. FRA has not repeated the analysis contained in the NPRM for those paragraphs that remain the same as in the proposal. 77 FR 6420–21. The comments received

regarding this specific section are addressed here.

As previously explained in the supplementary information, FRA is required by RSIA to address minimum training standards for safety-related railroad employees. Paragraph (a) is consistent with the specific statutory language and captures Congress' intent to ensure that any person doing work covered by the Federal railroad safety laws, regulations, and orders, regardless of whether the person is employed by a railroad or a contractor, is properly trained and qualified. This regulation meets the statutory requirement as it intends to cover each employee that does work required by a Federal mandate, regardless of the employer.

Paragraph (a) provides the scope of the training required by this final rule. FRA is only requiring training for an employee to the extent that the employee is required to comply with a Federal mandate. Furthermore, the training that is required by this part is limited to any training necessary to ensure that the employee is qualified to comply with all Federal railroad safety laws, regulations, and orders that would be applicable to the work the employee would be expected to perform. Thus, an employer that chooses to train employees on issues other than those covered by Federal railroad safety laws, regulations, and orders would not need to submit such training to FRA for review and approval in accordance with this part.

Given the limited scope of this rule, not every person that works on a railroad's property should expect that this rule will require that an employer provide that person with training. Some employees of a railroad or a contractor of a railroad may do work that has a safety nexus but is not required by any Federal railroad safety laws, regulations, or orders. For example, a person may be hired to clean passenger rail cars by a railroad's maintenance division for other than safety purposes. However, as there are no Federal requirements related to the cleaning of passenger rail cars, this rule would not require an employer to ensure that this person is trained to clean passenger rail cars. On the other hand, if the person is expected to perform any of the inspections, tests, or maintenance required by 49 CFR part 238, the person must be trained in accordance with all applicable Federal requirements. See e.g., §§ 238.107 and 238.109.

If the employer's rules mirror the Federal requirements, or are even more restrictive than the Federal requirements, the employer may train to the employer's own rules and would not

be required to provide separate training on the Federal requirements. During the RSAC process, some employers raised the concern that it would be confusing for employees if FRA required that training be made directly on the Federal requirements as that would pose potential conflicts whenever an employer's rule was stricter than the Federal requirement. FRA agrees with this concern, and this final rule does not require that employers provide separate training on both the Federal requirements and on employer's rules. As long as the employer's rules satisfy the minimum Federal requirements, an employer's training on its own rules will suffice.

Although FRA does not want to confuse employees, FRA encourages employers to emphasize when compliance with the employer's rules is based on a Federal requirement so that employees can learn which duties are being imposed by the Federal government. When an employee is put on notice that an employer's rule is based on a Federal requirement, the notice that the Federal government deems the issue important enough to regulate may provide further incentive for the employee to comply with the rule at every opportunity. Additionally, in response to concerns raised by RSAC members during the Working Group meetings, FRA wants to be clear that the requirements in this part would not require an employee to be able to cite the volume, chapter, and section of each Federal railroad safety law, regulation, or order that is relevant to the employee's qualification.

Often, a railroad or contractor will train employees on the employer's own safety-related rules, without referencing any particular Federal requirement. There may also be instances where the Federal requirement is generally stated with the expectation that the employer will create procedures or plans that will implement the conceptual requirement of the Federal requirement. Paragraph (a) makes clear that this part covers both types of training; i.e., training that either directly or indirectly is used to qualify safety-related railroad employees on the Federal railroad safety laws, regulations, and orders the person is required to comply with to do his or her job. As an introductory matter, FRA also wishes to make clear that not all training is task-based. Some Federal requirements include prohibitions and the relevant training must impart that information so that employees know how they can comply. For example, employees need to know when they may use cell phones and when they are prohibited from using them.

FRA received one comment suggesting that paragraph (a) could be improved. AAR suggests that paragraph (a) be amended because it could be interpreted to mean the opposite of what the preamble says is not intended; namely, that an employee has to be familiar with the actual wording and citations for relevant regulations. AAR suggests that paragraph (a) be amended to read: “The purpose of this part is to ensure that any person employed by a railroad or a contractor of a railroad as a safety-related railroad employee is trained and qualified to comply with any relevant Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders.” FRA agrees with AAR’s recommendation and has changed paragraph (a) accordingly.

REB’s comment recommends confirming the scope by stating that “This rule does not apply to training programs that do not address FRA rules, regulations, and orders.” FRA believes it would be repetitive to restate the scope of the rule in the way in which REB’s comment suggests and is concerned with the ambiguity of the double negative in the suggested rewrite. Meanwhile, REB’s comment has merit and FRA offers the following clarification. REB’s comment seems to indicate that if another Federal agency, or State or local jurisdiction required training, that the training required by these other authorities would not need to be addressed in the training programs submitted to FRA for approval. FRA agrees. Similarly, an employer may require its employees to complete company-specific training, such as training on an employee’s duties and responsibilities, that are unrelated to FRA’s requirements. Again, FRA agrees with REB that this final rule is not intended to require the employer to file those types of company-specific training programs to FRA.

No comments were received requesting specific changes to proposed paragraphs (b) through (d), and these paragraphs are identical to those in the NPRM.

Paragraph (e) was not proposed, but has been added in order to clarify that this rule does not address hazardous materials training of “hazmat employees” as that term is defined by PHMSA. PHMSA already extensively regulates the training of hazmat employees. This requirement has been added to prevent any confusion on the matter.

### *Section 243.3 Application and Responsibility for Compliance*

No comments were received concerning this proposed section and the rule text is identical to the proposed version. *See 77 FR 6421.*

As discussed in the NPRM, the extent of FRA’s jurisdiction, and the agency’s exercise of that jurisdiction, is well-established. *See 49 CFR part 209, appendix A.* The application and responsibility for compliance section is consistent with FRA’s published policy for how it will enforce the Federal railroad safety laws. This final rule is intended to apply to all railroads (except those types of railroads that are specifically listed as exceptions in paragraph (a)), contractors of railroads, and training organizations or learning institutions that train safety-related railroad employees. Paragraph (b) contains a statement clarifying that each person who performs the duties of this part is responsible for compliance, even if that duty is expressed in terms of the duty of a railroad.

### *Section 243.5 Definitions*

The final rule adds a definition for “refresher training” in response to comments and modifies the definition of “formal training” so it is clear that correspondence training is an acceptable type of formal training. The final rule also modifies the definition of “designated instructor” to be clear that such a person, where applicable, has the necessary experience to effectively provide formal training “of the subject matter.” Otherwise, the definitions in this section are identical to the version in the NPRM. The analysis in the NPRM can be found at 77 FR 6421–25.

This section defines a number of terms that have specific meaning in this part. A few of these terms have definitions that are similar to, but may not exactly mirror, definitions used elsewhere in this chapter. Definitions may differ from other parts of this chapter because a particular word or phrase used in the definition in another chapter does not have context within this part.

FRA raised a question in the NPRM regarding the definitions of *Administrator* and *Associate Administrator*, even though these are standard definitions used in other parts of this chapter. In this part, the term *Associate Administrator* means the Associate Administrator for Railroad Safety/Chief Safety Officer. When the RSAC Committee voted for certain recommendations prior to the NPRM’s publication, the recommendations did not address the role of the Associate

Administrator for Railroad Safety/Chief Safety Officer. The NPRM proposed this additional definition so that it would be clear that some of the proposed program review processes would be delegated to the Associate Administrator. The agency’s expertise in reviewing training programs lies within its Office of Railroad Safety, and the decision-making on these issues will routinely be decided by the Associate Administrator. If a person were to have a material dispute with a decision of the Associate Administrator, it would be expected that the person could bring that dispute to the Administrator’s attention and request final agency action. As FRA did not receive comments on this issue and believes it is an effective approach for agency decision-making, the final rule retains the Associate Administrator definition.

The final rule defines the term *formal training* mainly to distinguish it from informal, less structured training that may be offered by employers. Generally, a briefing during a “safety blitz,” in which an employer quickly tries to raise awareness of a safety issue following an accident or close call incident, would not be considered formal training. Formal training would typically be more structured than a safety blitz briefing and be planned on a periodic basis so that all eligible employees would continuously get opportunities to take the training. Formal training should contain a defined curriculum, as it is not the type of training that can be hastily prepared and improvised.

Formal training may be delivered in several different ways. Many people first think of classroom training as synonymous with formal training, and certainly that is one acceptable way of delivering formal training. However, the definition explains that “[i]n the context of this part, formal training may include, but is not limited to, classroom, computer-based, correspondence, on-the-job, simulator, or laboratory training.” The only change to this definition from the proposed rule is that FRA included correspondence training as a listed type of formal training. Although the list of formal types of training is specifically identified as not being comprehensive, FRA added correspondence to the list to address a commenter’s concern. In a sense, correspondence training is not that much different than computer-based training. Computer-based training could certainly be web-based so that a learner could access training from anywhere with an electronic device capable of accessing the internet. Similarly, software could be given to a person to install on a business-owned or

personally-owned computer, and training could be accomplished anywhere the person used the computer. Consequently, FRA is adding correspondence training to the list of types of formal training.

During the RSAC process prior to the NPRM's publication, some labor organizations explained that their members expressed a preference for classroom training over computer-based training. One valid concern expressed was that computer-based training is often performed without a qualified instructor present to answer questions. It can be frustrating to a training participant if the person finds a subject confusing and cannot get immediate clarification. Meanwhile, the RSAC members recognized an equally valid concern that there could be circumstances when a qualified instructor cannot immediately answer a substantive question during classroom training—so mandating classroom training is not necessarily the remedy for addressing this problem. The final rule addresses this concern by requiring that formal training include an opportunity for training participants “to have questions timely answered during the training or at a later date.” An employer, or other entity providing training, will need to establish procedures for providing participants the opportunity to have questions timely answered. For example, some course providers may give training participants an email address to send questions and promise to respond within five business days. Certainly, there are a wide-variety of reasonable procedures that could be established by course providers that could include registering a question by telephone, written form made available at the time of the training, or even instant-messaging (IM) during the training itself. However, in all such instances, procedures must be clear and provide the training participant an opportunity to have questions answered in a timely fashion.

The term *refresher training* refers to the periodic retraining an employer determines is necessary to keep a safety-related railroad employee qualified. This is the training required for previously qualified employees, not employees who are completely new to the subject matter. Refresher training is required pursuant to paragraph (e) of § 243.201. The term was used in the proposed rule, but was not defined in the NPRM. In consideration of a comment received, FRA has added this definition. Additional information about the comment and what is meant by refresher training is addressed in the

Discussion of Specific Comments and Conclusions section.

#### *Section 243.7 Penalties and Consequences for Non-Compliance*

This section was formerly proposed as § 243.9, but was renumbered because proposed § 243.7 (addressing the issue of waivers) was not retained in this final rule.

No comments were directly received with regard to proposed § 243.9 and it is identical substantively to the proposed version; thus, the analysis provided for in the NPRM is merely summarized here. *See* 77 FR 6425. Some commenters did raise questions regarding what civil penalty amounts would be reasonable if FRA were to take enforcement action, and those comments are addressed with regard to the analysis for appendix A, the schedule of civil penalties.

This final rule section provides minimum and maximum civil penalty amounts determined in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101-410 Stat. 890, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996 Public Law 104-134, April 26, 1996, and the RSIA.

#### *Subpart B—Program Components and Approval Process*

##### *Section 243.101 Employer Program Required*

Compared to the NPRM, this section only contains a few changes. In paragraphs (a) and (b), FRA extends the actual implementation dates significantly from the NPRM's proposed dates. The broad issue of implementation dates is addressed in the Discussion of Specific Comments and Conclusions section of this document. Also in paragraph (b), FRA is making some substantive changes which are addressed below. Finally, this analysis includes a discussion of comments received with regard to paragraph (d)(3) of this section, to explain why FRA decided to reject an alternative to the proposed rule that FRA suggested in the NPRM's section-by-section analysis.

Paragraph (a) differs from the NPRM as it was split into two paragraphs so that small entity employers could be provided with one year longer to comply with the training program submission requirement as compared to those employers subject to this part with 400,000 total employee work hours or more annually. Paragraphs (a)(1) and (a)(2) contain the general requirement for each “employer” to submit, adopt, and comply with a training program for

its safety-related railroad employees. Both paragraphs (a)(1) and (a)(2) provide a significantly more generous deadline for compliance than what was proposed.

An employer's program must be submitted and approved by FRA in accordance with the process set forth in §§ 243.107, 243.109, and 243.113. However, an employer's duty is not complete upon submission of a program to FRA. The employer will also be required to adopt and comply with its program. By using the term “adopt,” FRA is requiring each employer to accept its training program as its own. Furthermore, an employer is obligated to comply with its program by implementing it. Thus, when adopted and complied with, FRA would expect the employer's safety-related railroad employees to receive training in accordance with the employer's program. Potentially, FRA could take enforcement action if an employer failed to comply with its approved training program. As with any potential enforcement action, FRA will use its discretion regarding whether to issue a warning, a civil monetary penalty, or other enforcement action. *See* 49 CFR part 209, appendix A.

NRC and ASLRRA recommend amending paragraph (b) of this proposed section so that an employer commencing operations subject to this part after the rule is implemented shall submit a training program within one year after commencing operations, instead of the proposed 90 days in advance of commencing operations. The commenters take the position that to do otherwise would stifle the entrepreneurial spirit of small business job creators. The commenters also state that many small business owners would not even know for certain that they would be starting a new business 90 days prior to commencing operations, much less be prepared to file an extensive training program with FRA. FRA agrees that the commenters have identified an issue, but disagrees on the approach to resolving the perceived conflict.

Paragraph (b) differs from the proposal in order to provide equal treatment of program review and implementation regardless of whether an employer commences operations after the appropriate deadline under paragraph (b) or submits a training program as an existing employer under paragraphs (a)(1) or (a)(2). FRA decided not to retain paragraph (b) as proposed in order to address the concerns FRA received regarding the difficulties of compliance that start-ups and joint ventures could face. The change will still require an employer under

paragraph (b) to submit its training program prior to commencing operations, but will no longer contain the proposed requirement that the program be submitted at least 90 days prior to commencing operations. In addition, FRA has removed the proposed requirement that the employer wait for FRA to approve the program prior to adopting and complying with it. Instead, the final rule requires that the employer adopt and comply with its submitted training program no later than upon the commencement of operations. FRA does not agree with the comments suggesting that start-ups and joint ventures should be allowed to use employees for up to one year to perform safety-related duties without designating those employees in accordance with a training program filed with FRA. If FRA were to do so, FRA believes it would be creating a large loophole for many new businesses to use untrained or unqualified individuals in positions that endanger the lives of railroad employees and the general public. FRA notes that there is nothing in the regulation preventing an employer from implementing a training program prior to commencing operations so that its safety-related railroad employees are ready to work independently on its first day of operations. The employer is required to adopt and comply with the training program for the same reasons as explained in the analysis for paragraph (a).

As no comments were received regarding paragraphs (c) through (f), and those paragraphs are identical to the proposed versions, we are merely summarizing the rest of the requirements in this section.

Paragraph (c) requires a list of overarching organizational requirements for each employer's training program.

Paragraph (d) contains OJT training requirements that are essential to ensuring that OJT successfully concludes in a transfer of knowledge from the instructor to the employee (learning transfer), but only applies if a training program has OJT. As FRA alluded to in the analysis for the definition of OJT, too much OJT is currently unstructured and does not lead to learning transfer. OJT should not vary so much that one person can have a good mentor who is able to give the employee all the hands-on instruction the employee will need while another mentor makes the person simply watch the mentor do the job without any feedback, instruction, or quality hands-on experience. OJT should be a positive experience for the learner, as well as the

mentor, with sufficient opportunity for practice and feedback.

In the NPRM, FRA explained that a manual and a checklist may serve similar, but not identical purposes. RSAC recommended that FRA only require one or the other, or another similar document. By requiring only one document, the requirement is less burdensome. However, FRA requested comments in the section-by-section analysis of the NPRM with regard to paragraph (d)(3). FRA wanted commenters to consider the distinctions between these types of documents, and whether FRA should promulgate this final rule with a requirement for both a manual and a checklist. 77 FR 6426–27. In response, a number of railroads and railroad association commenters unanimously voiced strong opposition to the suggestion that a manual and a checklist should be required. The commenters argued primarily that a requirement for both a checklist and a manual would be micromanaging that would reduce an employer's flexibility to comply. AAR stated that "railroads might use different methods for different types of employees and different types of training [and thus] . . . [u]niform . . . requirements for the documentation of tasks are neither necessary nor desirable." Although FRA strongly urges each employer to consider making both detailed manuals and the generally less detailed checklists available to all employees involved in OJT exercises, FRA has decided to provide each employer with the flexibility to choose which type of reference document must be made to employees involved in OJT exercises.

In concluding the analysis of this section, FRA responds to a comment by APTA requesting that FRA simplify the OJT requirements further. APTA suggests that the OJT does not have to be "a formalized program, replete with specific steps, tasks and methods that must be followed and documented in exacting detail." FRA does not agree with APTA that the OJT requirements are too complicated and unnecessary. Without formalizing OJT, FRA will be unable to break the cycle of unstructured OJT practices by some employers that permit shadowing an experienced person without any confirmation of learning transfer on any particular safety-related tasks. If the rule failed to contain this requirement, the rule would likely fail to substantially improve safety. Certainly, each employer will need to review whether a previously imposed OJT program is too informal, and may not be able to maintain the status quo without adding

structure or a defined curriculum as this rule requires for formal training.

#### *Section 243.103 Training Components Identified in Program*

No comments were received that suggested specific changes with regard to this section and the final rule is identical to the proposed rule; thus, the analysis provided in the NPRM is merely summarized here. *See* 77 FR 6427–29.

Unlike § 243.101, which focuses on the general requirements for an employer's training program, this section details the component requirements for each program. The main purpose for this section is to ensure that an employer provides sufficient detail so that FRA would be able to understand how the program works when the agency reviews the program for approval. It is expected that a failure to include one or more component requirements would result in disapproval of the program. In § 243.111, FRA also requires that training organizations and learning institutions include all information required for an employer's program in accordance with this part, and this mainly means the information required in this section. Thus, each program submitter should ensure that each component requirement in this section is addressed.

Although the analysis for paragraph (b) of this section remains the same as that in the NPRM, FRA wants to emphasize that it provides an option for an employer to avoid submitting one or more similar training programs or plans when the employer has a separate requirement, found elsewhere in this chapter, to submit that similar program or plan to FRA. In order to take advantage of this option, an employer must choose to cross-reference any program or plan that it wishes not to submit in the program required by this part. In the NPRM, FRA listed the examples of FRA training programs that an employer may choose not to resubmit as located in §§ 214.307, 217.9, 217.11, 218.95, 236.905, and 240.101. After publication of the NPRM, FRA published a final rule regarding conductor certification at 49 CFR part 242. Certainly, the training program required by §§ 242.101 and 242.103 is another example of a program that may be referenced in the program required by this part without being submitted again.

During the Working Group meeting to discuss comments, AAR asked whether FRA will contact a railroad when a previously submitted program does not meet the training program criteria of this

rule. FRA explained that paragraph (b) requires the employer to state in the training program filed under this rule that it has previously filed a training program in accordance with another FRA regulation. Once an employer has put FRA on notice of the previously filed program under a different regulation, it will be FRA's burden to contact the railroad to address any perceived inadequacies.

#### *Section 243.105 Optional Model Program Development*

This section of the final rule is identical to the proposed rule except for the addition of paragraph (a)(3). See 77 FR 6429–30. The addition of this paragraph was made to address FRA's concerns raised in the NPRM that incentives should be offered to submitters of model programs so that they are encouraged to seek FRA's approval of such programs at an early stage. Early approval of model programs would make it more likely that an employer could choose to adopt and comply with the model program. If a model program is not approved prior to the deadlines set forth in § 243.101(a)(1) and (a)(2) for each employer to submit a program, the model program is not likely to be of much use to employers.

To encourage early submission of model programs, FRA is guaranteeing that, as long as the submission is made prior to May 1, 2017, the program may be considered implicitly approved and implemented 180 days after the program is submitted unless FRA explicitly disapproves of the program. Although FRA encourages model program submitters to submit much earlier than this optional deadline, the deadline will permit programs submitted on April 30, 2017 to be implicitly approved on October 27, 2017—which is 65 days prior to the employer's deadline, for those employers with 400,000 total employee work hours annually or more, under § 243.101(a)(1), and at least one year and 65 days prior to the small entity employer's deadline under § 243.101(a)(2), as the small entity deadline may be extended depending on the date of issuance of FRA's Interim Final Compliance Guide. Of course, FRA may explicitly approve the program in less than 180 days, which would also benefit the early model program submitter and the employers that intend to use the model program.

FRA also received one comment regarding this section that pertained to the use of unique identifiers for each model program, but has decided not to amend this section based on the comment. The commenter recommends that FRA assign a unique identification

number to all training developers—whether they are employers or third-party developers. In the NPRM, FRA proposed that each entity submitting an optional model program should submit a unique identifier associated with the program, or FRA will assign a unique identifier. The proposal and final rule provide a training developer with the maximum flexibility to create its own unique identifier. If one submitter duplicates another entity's identifier, FRA intends to notify the training developer so that entity has an opportunity to create another identifier. There does not appear to be any basis for supporting FRA's creation of unique identification numbers for training developers versus the developers creating their own unique identifier.

During the RSAC process, FRA expressed that it wanted to encourage the development of model training programs that could be used by multiple employers. There are several reasons why model programs are desirable as an option. Smaller entities may struggle with the costs and burdens of developing a program independently; thus, a model program could reduce the costs, especially for smaller businesses. For instance, in the context of locomotive engineer training and certification programs required pursuant to 49 CFR part 240, FRA has worked with ASLRRA in developing model programs for use by short line and regional railroads. Furthermore, there are economies of scale that benefit FRA in helping organizations, associations, and other businesses to develop model programs that may be adopted by other entities. That is, the more businesses that adopt model programs, the fewer the number of programs FRA would need to closely scrutinize in the review process. FRA is willing to provide early and frequent feedback to any entity producing a model program. In that way, FRA can ensure that each model program will contain all of the necessary components of a successful program and can be implemented by multiple businesses with little fear of rejection during the program submission and approval process.

Paragraph (a) contains an option that would permit any organization, business, or association to submit one or more model programs to FRA for later use by multiple employers. As FRA explained in the preamble under the heading "Compliance Guide," FRA will be publishing an interim final compliance guide in early 2015. Additionally, FRA has amended the proposal so that small entities will have at least four years to review FRA's guidance prior to the requirement in

§ 243.101(a)(2) that a small employer file a training program. That schedule for publication of a compliance guide should also benefit model program developers who will want to reference the guide in their attempt to meet the May 1, 2017 submission deadline in § 243.105(a)(3). In addition to short line and regional railroads, FRA encourages similar types of contractors to submit model programs possibly developed by a common association. In some instances, it is foreseeable that several employers may hire an organization, such as a training organization or learning institution, to develop a model program for those multiple employers to submit to FRA. FRA notes that the model program would be the program for any employer that chooses to submit it, and it is not a program submitted on behalf of the training organization, business, or learning institution that developed the program. Another possibility is that one railroad or contractor develops a program for its own use that it later allows other entities to copy. FRA expects that some organizations, businesses, and associations may take a proprietary interest in any model program it develops; however, FRA would hope that the costs imposed on small entities would be reasonable. Although FRA does not intend to draft and develop programs for employers to use, FRA intends to provide guidance to any person or entity in the development of model or individual employer programs.

To aid users, model program developers may use a modular approach in the design phase. For example, a model program designed for Track Safety Standards (49 CFR part 213), will likely incorporate all subparts (A–G) of the regulation. A modular approach will enable small railroad that may have all "excepted track" to essentially only use the training materials associated with subparts A and F, since the regulation for excepted track only requires a weekly inspection and a record of the inspection. Similarly, any railroad that only operates trains for distances of 20 miles or less are not required to train to the full requirements of the Brake System Safety Standards for Freight (49 CFR part 232). Once again, a modular approach in the design phase will enable users to easily customize a model program to fit their operational needs.

#### *Section 243.107 Training Program Submission, Introductory Information Required*

No comments were received recommending specific changes with regard to this section and the final rule is identical to the proposed rule; thus,

the analysis provided in the NPRM is merely summarized here. See 77 FR 6430.

In this section, FRA requires specific information from each employer submitting a program. The required information will provide FRA with some introductory information that the agency will need to understand the employer's approach to training. The information required in these paragraphs is intended to help put the training components in the program in some context before a reviewer reads the finer details of each component. For example, FRA may closely scrutinize a small railroad's training program if the program states that the employer primarily conducts the training of its own safety-related railroad employees using its own resources. The reason that information may raise a concern is that smaller railroads would not always have qualified instructors to implement all the different types of training required by the Federal laws, regulations, and orders.

#### *Section 243.109 Training Program Submission, Review, and Approval Process*

Several comments were received with regard to this section, but most of those comments did not persuade FRA to deviate from the provisions proposed in the NPRM. As the comments raised fairly narrow issues, the comments have been addressed in this analysis. As most of the final rule is identical to the proposed rule, the analysis provided in the NPRM is merely summarized here. Interested parties are directed to the NPRM for a more detailed discussion. The analysis in the NPRM can be found at 77 FR 6430–32. However, the following analysis explains the differences between the proposed rule and this final rule.

Paragraph (a)(1) addresses the issue of how employers must address apprenticeship, or similar intern programs, that have begun prior to submission of the employer's initial program filed in accordance with this part. RSAC recommended that FRA address this situation so that those persons who had already started an apprenticeship-type training program would know that their training would not be mooted by this final rule. During the RSAC deliberations, there were general concerns raised that some long-term training might be initiated prior to a training program submission and that, when reviewed in the context of the rest of the employer's initial program, the long-term training would not meet the employer's program requirements. In some instances, it may be possible to

revise an apprenticeship or similar long-term intern program that has already begun; in other instances, changing the apprenticeship program would be prohibitively expensive or logically difficult. RSAC recommended and FRA accepted the premise that as long as the apprenticeship-type training program is described in the employer's initial program, that apprenticeship or similar intern program may continue unless FRA advises the employer of specific deficiencies.

As FRA explained previously in the section-by-section analysis to § 243.101, the agency chose to provide equal treatment to an employer whether it is submitting a training program as an existing employer (as of January 1, 2018 under § 243.101(a)(1) or as of January 1, 2019 under § 243.101(a)(2)) or as an employer commencing operations after January 1, 2018 under § 243.101(b). FRA decided to provide this equal treatment in order to address concerns FRA received regarding the difficulties of compliance that start-ups and joint ventures could face. In order to carry that equal treatment throughout the rule, FRA is requiring the same initial program submission requirements for both § 243.101(a) and (b) employers in paragraph (a)(2) of this section, and has removed proposed paragraph (a)(3) of this section. This will allow all employers to consider their initial program submissions to be approved and ready for immediate implementation. Railroads are already required to ensure proper training techniques prior to commencing their operations. Therefore, this rule should not create barriers to entry nor delays in starting new operations. More so, new railroads would have access to model training programs and best-in-class training practices. Therefore, they should be able to use their own human resources more efficiently for training purposes and possibly expedite entry into market.

FRA did not receive comments suggesting that allowing an employer to immediately implement a training program without explicit FRA-approval might prove problematic; however, FRA considered whether the final rule could be problematic in that regard. FRA starts with the premise that even before this final rule is effective, all safety-related railroad employees are required to comply with the applicable Federal railroad safety laws, regulations and orders. An employer is responsible for its employees, and thus FRA could hold an employer accountable for any violations committed by an employee. In FRA's experience with program approval requirements, employers

express the greatest anxiety over whether they can immediately implement a program versus having to wait for FRA's explicit approval. By allowing employers to immediately implement a program, FRA believes it has relieved most anxiety that employers are likely to have. In FRA's experience, it often takes several years before a latent problem in a training program is discovered. The open ended approval process permits FRA to go back years after initial approval and raise newly identified alleged instances of non-compliance. Although FRA will use enforcement when necessary, the agency's primary goal is to improve training for safety-related railroad employees and FRA expects that its focus will be on employers taking effective remedial measures.

If an employer's training program failed to meet the requirements of this final rule, there are two potential concerns. One concern is that the employer will incur additional training costs beyond what it would have incurred if FRA had rendered explicit approval prior to implementation and the second is that the employees will not be adequately trained. With regard to the first concern, FRA expects that most shortline railroads and contractors will use model programs previously FRA-approved in accordance with § 243.105. Because the model program would have received prior approval, FRA expects that any problems encountered will likely be with the implementation of the programs and not the programs themselves. Problems with implementation are likely to be discovered during investigations and audits, not during program reviews. If an employer is implementing its own individualized program, FRA expects that the worst case scenario is that the program would reflect the current state of the employer's training program without formalizing OJT or other aspects of its training. Under these scenarios, FRA intends to instruct the employer on the requirements of the rule and request a plan to get the training program in compliance with the final rule. Enforcement action will be considered on a case-by-case basis, but certainly would not be warranted in every instance if swift remedial action can be accomplished. An employer filing an individualized training program might be able to avoid these issues by submitting its program much earlier than the applicable implementation deadline and thereby getting FRA-approval prior to implementation. With regard to the second concern that employees will not

be properly trained, again, FRA does not see the problem as an employer failing to discuss a subject as an employer is responsible for an employee's non-compliance even prior to the effective date of this rule. FRA believes the problems will be that the training is not sufficiently formalized to capture that an employee can complete each assigned task; as this is an essential element of this final rule, it seems that it would be a blatant disregard of the requirements of the rule for an employer to leave it out of its program. In those cases, enforcement action is likely appropriate and, depending on the circumstances, an employer will have to plan a fix for the next training cycle or immediate remedial measures.

In paragraph (b), FRA implements a requirement for an annual informational filing. This filing is intended to ease an employer's regulatory burden by reducing the number of times an entire training program would need to be revised, resubmitted, and reviewed for approval on routine matters. An employer is required to submit a single informational filing no later than January 30 each calendar year that addresses any new safety-related Federal railroad laws, regulations, or orders issued, or new safety-related technologies, procedures, or equipment that were introduced into the workplace during the previous calendar year. The rule explains how FRA may advise individual employers, one or more group of employers, or the general public that an informational filing is not required for a particular issue.

APTA's comment requests that each railroad be provided the discretion to file an information filing anytime it wants rather than within 30 days of the end of the calendar year. However, FRA notes that APTA has misinterpreted the requirement. Under paragraph (b) of this section, an employer must file an informational filing "not later than 30 days after the end of the calendar year in which the modification occurred, unless FRA advises otherwise." There is no prohibition against an employer filing earlier than 30 days after the end of the calendar year in which the modification occurred. FRA has simply set a deadline for filing the informational filings, not a requirement that the filings can only be made within 30 days of the end of the calendar year.

Paragraph (c) sets forth the requirements for an employer that wants to revise a training program that has been previously approved. The requirement would allow substantial additions or revisions to a previously approved program to be considered approved and implemented

immediately upon submission. For example, a program is considered revised if the employer adds any occupational categories or subcategories of safety-related railroad employees to the training program. Most other changes to an existing program would not be considered a substantial addition or revision but instead would likely require only an "informational filing" under paragraph (b).

AAR's comment reiterated a concern raised during RSAC Working Group meetings that the final rule should contain the flexibility to implement modifications in a manner consistent with each railroad's normal training schedule. After discussing the issue at the Working Group meeting to discuss the comments, it is FRA's belief that the final rule contains the flexibility that AAR seeks. For example, under paragraph (b), "the employer must review its previously approved training program and modify it accordingly when new safety-related Federal railroad laws, regulations, or orders are issued, or new safety-related technologies, procedures, or equipment are introduced into the workplace and result in new knowledge requirements, safety-related tasks, or modification of existing safety-related duties." Pursuant to paragraph (b), FRA expects that new legal requirements will contain their own implementation deadlines and that any employer implementing a new legal requirement will comply with that new legal requirement's deadline. Paragraph (b) also requires that an employer that needs to modify its training program to implement a new legal requirement shall submit an informational filing to the Associate Administrator not later than 30 days after the end of the calendar year in which the modification occurred, unless FRA advises otherwise. In other words, the rule requires that the employer be permitted the flexibility to modify the program at any time but the employer is not required to notify FRA of the modification until January 30 in the year after the modification occurred. The informational filing is the employer's notice to the FRA that the modification to the training program was made the previous year. As AAR's members will have completed new training curriculums by January 1 of each year, summarizing the modifications and filing the changes in an informational filing to FRA by January 30 should not pose an obstacle for any railroad that wishes to continue its normal training schedule.

Similarly, there is no requirement in paragraph (c) that could possibly deter a railroad or contractor from having the maximum flexibility to implement

modifications in a manner consistent with the employer's training schedules. Paragraph (c) permits substantial additions or revisions to a previously approved program, that are not described as informational filings in accordance with paragraph (b) of this section, to be considered approved and ready for immediate implementation upon submission. Of course, if an employer chooses to submit the addition or revision during the early part of a newly started training cycle (e.g., January through March for a major railroad) and FRA finds the addition or revision does not conform to this part, the employer will potentially have trained and be continuing to train employees based on a non-conforming program. Thus, an employer that begins new training in January should make every effort to get FRA's approval of an addition or revision prior to January.

FRA disagrees with APTA's concerns regarding the training program submission, review, and approval process. APTA states that the approval process "stifles the development of innovative and progressive techniques in training methodologies which could provide better employee understanding and adherence." APTA suggests that FRA add a provision to the final rule for a provisional status, such as "Conditional Acceptance" to allow for piloting or testing of new training approaches outside of misusing the waiver application for such a purpose. APTA is concerned that FRA will reject new training concepts or that an employer cannot utilize new training concepts until FRA approves a program. In response, FRA notes that under the rule, an employer could, at any time, submit substantial additions or revisions to a previously approved program and that the submission would be considered approved and may be implemented immediately upon submission. See § 243.109(c). Thus, as an employer could change the method of course delivery (see § 243.103 Training components identified in program) at any time after a program has been approved; a provision for conditional acceptance is unnecessary. The change will be considered accepted unless FRA determines that the new portion or revision to an approved program does not conform to this part; however, even then an employer will have 90 days to resubmit the program in accordance with the instructions provided by FRA.

APTA further comments that the disqualification procedure for the program was not well-defined in the NPRM and that due process should be provided. APTA is concerned about

employers having to pay civil penalties for failing to resubmit conforming programs. FRA does not believe that additional procedures are warranted. The procedures are sufficiently defined and give FRA the discretion to address each type of non-conformance through enforcement. FRA believes it needs the discretion to decide the appropriate method of addressing non-conforming training programs. FRA does not expect civil penalties to be assessed for program deficiencies that are correctable and corrected within the time allotted to the employer. FRA envisions taking enforcement action when an employer has a deficient program that is not corrected within the 90 days provided, and the deficiency is likely to have an impact on the quality of the training or the non-conforming aspect of the program makes it difficult for FRA to properly assess the quality of the program. Whenever possible, FRA would consider the potential disruption in requiring an immediate fix to a deficient program and extend this 90-day period upon written request in accordance with paragraph (a)(2). Instead of requiring the deficiencies to be fixed within 90 days, FRA could allow changes in the program to be made during the employer's normal program review and implemented during the employer's normal training cycle. Furthermore, FRA is not obligated to assess civil penalties or take other enforcement action, and does not anticipate doing so unless the agency deems that such action is warranted.

FRA also expects that, in some instances, FRA representatives will be meeting with the entity that submits the non-conforming program and discussing the issues FRA identifies as problematic. These types of meetings are expected to lead to a better understanding of FRA's concerns, which FRA hopes would alleviate any anxiety that the agency is acting without understanding the submitter's concerns. Finally, once a submitter has exhausted its requests for FRA to accept its program, the submitter may have a legal cause of action based on the agency's final decision. Thus, the submitter will receive due process by appealing to Federal court after receiving an adverse final agency action. *See* Administrative Procedure Act, 5 U.S.C. 701–706.

The requirement in paragraph (d), to serve and involve labor organizations in the review of training programs, is for railroads only. One comment requested further clarification on what entities were obligated to comply with paragraph (d). For this reason, FRA clarifies that this requirement does not

apply to any non-railroad entities that may have other obligations within this part. Thus, paragraph (d) does not apply to contractors, training organizations, and learning institutions that submit training programs. Paragraph (d) also does not apply to any model program submitters, unless the submitter is a railroad that intends to implement the model program on its own property following FRA approval.

FRA has also rejected AAR's comments suggesting that the requirement for a railroad to maintain proof that it has served a labor organization president with a training submission, resubmission, or informational filing is unnecessary under paragraph (d)(1)(ii) of this section. AAR states that if a railroad failed to provide a labor organization president with service of the training program, the railroad would be subject to FRA enforcement. AAR also questions the need for the names and addresses of the people served, as it is anachronistic with the use of electronic service and electronic docketing systems. FRA notes that it has recently promulgated a similar provision in 49 CFR part 242, Conductor Certification, and that the agency's concern is ensuring that the relevant labor organizations have sufficient time to review and provide FRA with feedback on the training submissions. When FRA reviews the program, if the agency notices that a certificate of service contains out-of-date or incorrect information then the agency can notify the railroad and relevant labor representatives of the error quickly. Certainly, if the labor organizations are amenable to being served by email or some other electronic means, the railroad would be required to capture that electronic address in addition to the name of the labor organization president served. FRA is less concerned with catching a railroad out of compliance than with ensuring that labor organizations have a full 90 days to comment on any program submission and not otherwise delaying the approval process because of improper service. Without a certificate of service, there is a greater likelihood that a railroad could intentionally or negligently fail to properly serve a labor organization. The certificate of service provides FRA with a relatively simple way to verify that the correct persons have been served.

Paragraph (d)(2) requires that each railroad labor organization has up to 90 days to file a comment. The reason for the 90-day deadline is that FRA would like to send approval notification to railroads in a timely fashion. Without a deadline for comments, the approval

process would seem open ended. However, FRA realizes that, from time-to-time, a labor organization may find something objectionable in a previously approved program, and FRA encourages those types of comments to be filed as they are discovered. When a labor organization discovers an objectionable issue outside of the required 90-day window, FRA would still accept the comment and review the issue to see whether a revision to the training program is warranted.

*Section 243.111 Approval of Programs Filed by Training Organizations or Learning Institutions*

Only one comment was received with regard to this section and it is addressed in this analysis without a need to change the proposal. FRA made a slight change to paragraph (b) in order to align the implementation deadline for training organizations and learning institutions with that of the other implementation deadlines in the final rule. Otherwise, the final rule is identical substantively to the proposed version and the analysis provided for in the NPRM is merely summarized here. Interested parties are directed to the NPRM for a more detailed discussion. The analysis in the NPRM can be found at 77 FR 6432–34.

The purpose of this section is to facilitate the option of using training organizations or learning institutions. An employer that intends to implement any training programs conducted by some other entity (such as a training organization or learning institution), or intends to qualify safety-related railroad employees previously trained by training organizations or learning institutions, has an obligation to inform FRA of that fact in the employer's submission. If FRA has already approved the training organization or learning institution's program, an employer could reference the approved program in its submission, avoid lengthy duplication, and likely expect a quick review and approval by FRA. Furthermore, individuals or employers that use training provided by training organizations or learning institutions need assurances that the training will meet or exceed FRA's requirements prior to incurring any training expense. Without such assurances, an individual or employer may determine that paying for such training is not worth the risk.

Paragraph (b) requires that a training organization or learning institution that has provided training services to employers covered by this part prior to January 1, 2017 may continue to offer such training services without FRA approval until January 1, 2018. The final

rule is more generous than the NPRM as it provides additional time for any training organization or learning institution to submit a program for FRA approval. FRA decided that since the final rule does not require any employer to submit a program prior to January 1, 2018, FRA should permit any training organization or learning institution to continue offering such training services without FRA approval until that date. Each training organization and learning institution should understand that its best interests are served by seeking early FRA approval of its training program so the program can be referenced by the employers who are its clients. In accordance with paragraph (d) of this section, explicit approval of such a program is required and the program will not be considered approved on submission. FRA will need time to review each program and it can be anticipated that the agency will be busy reviewing a large volume of programs late in 2017 and throughout 2018. Thus, each training organization and learning institution should plan to file its program as early as possible to avoid implementation delays.

Paragraph (c) requires that a program submitted by a training organization or learning institution must include all information required for an employer's program in accordance with this part, unless the requirement could only apply to an employer's program. In the section-by-section analysis in the NPRM, FRA explained that this sentence mainly refers to the requirements found in §§ 243.101 and 243.103. FRA received one comment requesting clarification as to whether § 243.103(a)(3) applies to employers only. In response to the comment, FRA notes that the citation refers to the requirement for an employer's program to have a document for each OJT program component that includes certain information about the OJT program. FRA concludes that OJT would not be a required part of a program filed by a training organization or learning institution, but individual employers that utilize a training organization or learning institution may choose to supplement a program with OJT. It can be left to each employer to clarify that supplemental OJT issue in the employer's program. Please note that OJT is not considered a mandatory program requirement and, other types of hands-on formal training provided by a training organization or learning institution may be considered an adequate substitute for OJT.

#### *§ 243.113 Electronic and Written Program Submission Requirements*

In the NPRM, FRA raised the issue of whether the option to file a program electronically should be modified to mandate electronic filing. An electronic submission process would allow the agency to more efficiently track and review training programs than a written paper submission process would permit. FRA was also concerned with incurring costs in developing and maintaining an electronic submission process if many submitters opted out. FRA always has the option to add paper submissions to an electronic database, but FRA would have to allocate resources to digitize and upload those paper submissions to the database.

FRA received one comment that objected to mandatory electronic submission. ASLRRA disagreed with FRA's assumption that even the smallest Class III railroads should have access to the Internet (or reliable access), and should therefore be able to file a training program electronically. FRA explored this issue with ASLRRA and the Working Group at the meeting held to discuss the comments filed in response to the NPRM.

FRA's electronic submission mandate addresses the ASLRRA's comment by creating an exception for an employer with less than 400,000 total employee work hours annually in paragraph (a) of this section. Typically, when FRA has created an exception for small entities (especially railroads), it has defined small entities as those having less than 400,000 total employee work hours annually. FRA's exception is an accommodation that will spare small companies from requesting a waiver from the otherwise mandatory electronic submission process. Of course, nothing in this final rule precludes an employer with less than 400,000 total employee work hours annually from submitting its program electronically. If an employer does not meet the requirements for the exception and does not have the capability to file electronically, the employer may submit a waiver request to FRA, consistent with FRA's general waiver provision found at 49 CFR part 211. Paragraph (a) also requires that all model programs be filed electronically in accordance with the requirements of this section.

In addition to the previously mentioned considerations, FRA considered that it is becoming routine for private and public transactions to occur electronically. It would currently be unusual for an employer to forego having a Web site that customers can visit. FRA also expects that many

companies would prefer not to have to print out written materials to mail in when a paper free electronic submission process is available. For these reasons, FRA is best served by requiring electronic submission.

This section and section title were modified from the NPRM to reflect the mandatory nature of the electronic program submission and to acknowledge that the section also contains the requirements for a written submission. Other than the comment and changes previously discussed, only minor edits were made compared to the proposed section. Interested parties are directed to the NPRM for a more detailed discussion. The analysis in the NPRM can be found at 77 FR at 6434.

Paragraph (b)(1) was changed from the proposal so that it is clear that organizations, businesses, and associations may file a program, not just employers, training organizations, and learning institutions. Throughout the section, the term "person" was substituted for the term "entity," which was not defined in the NPRM or this final rule.

FRA intends to create a secure document submission site and will need basic information from each company before setting up the user's account. The points of contact information in paragraph (b) are necessary in order to provide secure access. FRA has already developed a prototype of the document submission site and has offered a variety of likely users that represent the gamut of the regulated community an opportunity to test the site. Based on feedback received from test users, FRA received valuable insight into the pros and cons of the prototype. If necessary, the secure site should be able to start accepting electronic submissions by the effective date of the rule, although FRA expects to make additional functionality improvements up to the date of publication of FRA's compliance guide. FRA encourages every regulated organization and employer to obtain access to FRA's secure document submission site early in the program drafting process in order to become familiar with what can be accomplished on the site and potentially to enter basic user or program information so that the contact for the organization or employer will only need to upload the relevant written program submissions as they are completed. By developing the electronic submission process years in advance before the first programs are required for submission, FRA intends to create an electronic submission process that is easy to use and provides benefits to both the user and the agency.

The requirements in paragraphs (c), (e), and (f) will allow FRA to make efficient use of this electronic database. It is anticipated that FRA will be able to approve or disapprove all or part of a program and generate automated notifications by email to an entity's points of contact. Thus, FRA wants each point of contact to understand that by providing any email addresses, the entity is consenting to receive approval and disapproval notices from FRA by email. Entities that allow notice from FRA by email would gain the benefit of receiving such notices quickly and efficiently.

Paragraph (d) is necessary to provide FRA's mailing address for those entities that need to submit a program submission in writing to FRA. Those entities that choose to submit printed materials to FRA must deliver them directly to the specified address. Some entities 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 this will be an acceptable method of submission if the exception in paragraph (a) applies or the entity is granted a waiver, FRA would encourage each entity to utilize the electronic submission capabilities of the system. Please be advised that FRA will reject any submission if FRA does not have the capability to read it in the type of electronic storage format sent.

In the NPRM, FRA requested comments on whether this section should address the submission of proprietary materials or other materials that an entity wishes to keep confidential. This issue has been addressed previously under the Discussion of Specific Comments and Conclusions section of this document.

#### *Subpart C—Program Implementation and Oversight Requirements*

Once a program has been approved by FRA, each employer will have to comply with the requirements of this subpart. The subpart includes both implementation and oversight requirements. Some requirements apply only to railroads, and others to both railroads and contractors. Additionally, each training organization and learning institution will be required to maintain records as evidence of completed training.

#### *Section 243.201 Employee Qualification Requirements*

Except for comments received regarding implementation dates, no comments were received requesting specific changes to this proposed

section. FRA made some minor changes and clarifications to this section which are explained in the following analysis. This analysis summarizes all the requirements, but interested parties should reference the NPRM (77 FR 6434–36) for additional analysis on those requirements that are the same as the proposal.

The implementation dates in paragraphs (a), (b), and (e) have been extended from the proposal to address concerns raised in the comments. Paragraph (a), which requires each employer to designate existing employees, was split into two paragraphs so that smaller employers will have an extra year to comply with that requirement; this change from the proposal mirrors the change made to § 243.101(a) that provides smaller employers with an extra year to submit a training program. The implementation date issues are discussed in greater detail in the Discussion of Specific Comments and Conclusions section of this document, but FRA complied with the spirit of the agreement reached by the Working Group to delay the start of refresher training so that it does not interrupt the normal three year training cycle instituted by many employers. Paragraph (b) contains a conforming change to reflect the new implementation dates in paragraph (a) of this section. Paragraph (e) was also split into two paragraphs so that smaller employers will have an extra year to comply with the refresher training requirements. In addition, in order to explain FRA's intent regarding when refresher training is due when the last training event occurs prior to FRA's approval of the employer's training program, some clarifying language has been added to paragraphs (e)(1) and (e)(2). This clarification is explained in more detail later in this analysis.

In the NPRM, FRA raised the issue of whether proposed paragraph (f) should stand alone or be combined with proposed paragraph (c)(2) of this section. That is, the proposed paragraph (f) requirement related directly to situations in which “as part of the OJT process and prior to completing such training and passing the field evaluation, a person may perform such tasks under the direct onsite observation of any qualified person, provided the qualified person has been advised of the circumstances and is capable of intervening if an unsafe act or non-compliance with Federal railroad safety laws, regulations, or orders is observed.” Because proposed paragraph (f) provided the context of what is a “qualified person” under paragraph (c)(2) of this section, FRA has decided

that the proposed paragraph (f) requirement should be incorporated into the final paragraph (c)(2). This information explains why FRA deleted proposed paragraph (f) of this section.

This section includes an exemption for existing employees to be designated for a particular occupational category or subcategory without further training, provides procedures for qualifying those employees that are not exempted by the employer for a particular occupational category or subcategory, and requires each employer to deliver refresher training. FRA's intention is to ensure that all safety-related railroad employees receive proper initial training if previously unqualified, and that all previously qualified employees receive refresher training at regular intervals to ensure continued compliance. FRA encourages each employer to find ways to provide remedial training and retesting of any employee that fails to successfully pass any training or testing. Under this part, a failure of any test or training does not bar the person from successfully completing the training or testing at a later date. Of course, FRA does not regulate employment issues and will leave those issues to be settled in accordance with any applicable collective bargaining agreement or employment and labor law.

Paragraph (e) of this section requires that each employer shall deliver refresher training at an interval not to exceed three calendar years from the date of an employee's last training event, except where refresher training is specifically required more frequently in accordance with this chapter. Comments were raised at the Working Group meeting regarding how to treat employees who are already receiving refresher training in a three year cycle. The commenters wanted to clarify that FRA would not be requiring every existing employee to receive refresher training in the same year, which would disrupt the current refresher training cycle as well as be expensive and logistically difficult. The commenters correctly stated FRA's position, although FRA determined that the proposal could be improved to articulate that position more clearly. The regulatory language indicates that the employer is required to conduct refresher training at an interval based on “an employee's last training event.” Based on the comments, FRA has added clarification in the rule to further bolster the agency's intent that if the last training event occurs prior to FRA's approval of the employer's training program, the employer shall provide refresher training either within 3

calendar years from that prior training event or no later than December 31, 2022 or December 31, 2023, depending on the size of the employer. The changes from the proposal do not prevent an employer from initiating and completing its first round of refresher training all within the year of the applicable deadline established by paragraphs (e)(1) or (e)(2). However, the final rule allows for any employer to begin or continue implementing refresher training on a three calendar year cycle for one-third of its workforce each year without creating any logistical issues.

#### Section 243.203 Records

Several comments were received with regard to this section and they are addressed in this analysis. Compared to the NPRM, this section is substantially the same except that proposed paragraph (b)(5) was deleted, resulting in the renumbering of the remaining numbered paragraphs in paragraph (b); paragraph (c) was amended to address comments suggesting that certain types of records should only be required to be kept at one of the employer's headquarters location within the United States; and, the electronic recordkeeping requirements were revised to more closely resemble FRA's latest approach in this chapter. As most of the final rule is identical to the proposed rule, the analysis provided in the NPRM is merely summarized here. Interested parties are directed to the NPRM for a more detailed discussion. *See* 77 FR 6436–38.

An essential requirement of any training program is the maintenance of adequate records to support that the training was completed. In paragraph (a) of this section, FRA sets forth the general requirements for each safety-related railroad employee's qualification status records and the accessibility of those records. One commenter asks whether a railroad will be required to maintain records for its contractors. The answer to the question is found in paragraph (a) which requires that each employer is responsible for keeping records of each of its own safety-related railroad employees. Thus, a railroad is not required to maintain records for any contractor's safety-related railroad employees. It is the contractor that is responsible for keeping records of its own employees.

In paragraph (b), FRA requires that certain core information be kept in the records for each current or former safety-related railroad employee. As mentioned previously in this analysis, proposed paragraph (b)(5) was deleted. In the NPRM, FRA questioned whether

proposed paragraph (b)(5) was necessary as it would have required that the records for each current or former safety-related railroad employee indicate whether the person passed or failed any tests associated with training even though paragraph (b)(4) requires that the employer indicate in the records that the person successfully completed a specified formal training course. FRA received four comments supporting removal of proposed paragraph (b)(5) as unnecessary and none in support of retaining the provision.

Paragraph (c) contains a three-year record retention requirement for any records that are not individual employee records. The records referred to here would mainly be those kept in accordance with periodic oversight (§ 243.205) and the annual review (§ 243.207). The proposed three-year window for retention would actually be a bit longer than 3 years because it would be measured as three calendar years after the end of the calendar year to which the event relates. Thus, if a test occurred on March 1, 2018, the record would need to be maintained through December 31, 2021.

Paragraph (c) also requires that any records that are not individual employee records must be accessible at one headquarters location within the United States. This paragraph lists different types of acceptable headquarters locations, but this is not an all-inclusive list and certainly other locations may be suitable. However, FRA has specifically rejected the idea that a multi-national corporation could maintain these records exclusively in a foreign location as doing so could hamper FRA's enforcement activities. FRA eliminated the proposed requirement that these records also be kept at each division headquarters where the test, inspection, annual review, or other event is conducted after considering the overwhelming negative comments received. Thus, the revisions to this paragraph provide the flexibility sought by employers to choose where to maintain records, as well as eliminating the proposed requirement that the records also be maintained at certain division headquarters.

Paragraph (d) contains the requirements for each employer, training organization, or learning institution to make available any record that it is required to maintain under this part.

Paragraph (e) contains the requirements that apply for each employer, training organization, or learning institution that chooses to retain the information prescribed in this

section by maintaining an electronic recordkeeping system. FRA decided not to retain the same provisions that were in the NPRM because the agency recently promulgated electronic recordkeeping provisions in the conductor certification final rule that provide a more up-to-date version of such requirements. *See* 49 CFR 242.203(g). NRC recommends deleting paragraphs (e)(1) through (e)(3) from this proposed section arguing that small contractors would find the requirements too prescriptive to comply with. In response, FRA disagrees with the comment that a small business would have difficulty complying with proposed paragraph (e)(3) or paragraph (e)(2) of the final rule, which requires limiting access and identifying individuals with access. Off-the-shelf software should be available to small businesses that would provide the appropriate security necessary to comply with these requirements. FRA is concerned that if these electronic recordkeeping system requirements are relaxed for small businesses that the integrity of the records would be susceptible to inadvertent changes or outright falsification. Individual employers may file a waiver request, using FRA's standard procedures in 49 CFR part 211, and provide alternative assurances to the integrity of an electronic system to bolster such a request.

Paragraph (f) contains a transfer of records requirement with the goal of preserving training records that might otherwise be lost when an employer ceases to do business.

#### Section 243.205 Periodic Oversight

FRA had requested comments on whether to expand periodic oversight beyond what was proposed in the NPRM, but the only comment FRA received with regard to this section requested that FRA not consider any additional oversight necessary. Considering the comment and the RSAC's recommendation, FRA has decided to keep this section of the final rule identical to the proposed version except for one non-substantive change discussed in this analysis. Thus, the analysis provided for in the NPRM is still applicable and merely summarized here. Interested parties are directed to the NPRM for a more detailed discussion. The analysis in the NPRM can be found at 77 FR 6438–41.

There are two central purposes to conducting periodic oversight under a training rulemaking. One central purpose is to take notice of individual employees who are in non-compliance and to take corrective action to ensure

that those specific employees know how to do the work properly. In some instances, the employee might need coaching or retraining, especially if the person has not had much experience doing the work. In other instances, training may not be an issue and other remedial action may be appropriate. A second central purpose in conducting periodic oversight is to look at all of the oversight data as a whole to detect patterns of non-compliance. The annual review in § 243.207 is intended to spur such a global review of training and trigger adjustments that improve the effectiveness of training courses. Taken together, these oversight and review actions should lead to significant improvements in compliance and the overall quality of training programs. The recording of oversight, and the identification of problem areas, is intended to compel each employer to focus on how a training course can be improved to place greater emphasis on the causes of such non-compliance.

Paragraph (a) contains the general periodic oversight provision and limits the required testing and inspection oversight to the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. The Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety that FRA is referring to are currently limited to 49 CFR part 214 (Railroad Workplace Safety), part 218 (Railroad Operating Practices), and part 220 (Railroad Communications). These particular compliance issues are not currently required to be as closely monitored as train movements and other railroad operations. For that reason, FRA would like to close that gap and have employers more closely monitor the activities of largely maintenance-of-way, signal, and operations personnel (who are not conductors or locomotive engineers, see § 243.205(b)) that are required to abide by the listed regulations related to FRA-regulated personal and work group safety. Thus, this section does not impose periodic oversight requirements for each and every Federal railroad safety law, regulation, and order that the training program required by § 243.101 covers.

Periodic oversight means regularly conducting both tests and inspections. In this context, a test is conducted by a qualified supervisor who changes the work environment so that one or more employees would need to act to prevent non-compliance. An inspection involves a qualified supervisor observing one or more employees at a job site and determining whether the employees are in compliance.

Paragraph (b) exempts railroads from conducting periodic oversight under this part on certified locomotive engineers and conductors as those safety-related railroad employees are already covered by similar requirements found elsewhere in this chapter.

Although only paragraph (c) contains the heading “[r]ailroad oversight,” paragraphs (c) through (f) need to be read together in order to fully understand the responsibilities for each railroad as it performs oversight. Generally, a railroad is required to provide periodic oversight tests and inspections for the safety-related railroad employees that it authorizes to perform safety-related duties on its property. Paragraph (c) lists several exceptions to this general rule.

Paragraph (d) limits a railroad’s requirement to conduct periodic oversight of a contractor’s employees. In situations where a railroad is obligated to conduct oversight of a contractor’s employees, a railroad would not be required to perform operational tests of safety-related railroad employees employed by a contractor. Please note that although paragraph (d) does not require a railroad to conduct operational tests of safety-related railroad employees employed by a contractor, this provision does not prohibit it either.

Paragraph (e) provides each railroad with significant discretion to conduct oversight of a contractor’s safety-related railroad employees when it is convenient for the railroad. Each railroad has the discretion to choose when it is convenient to conduct oversight of contractors. Paragraphs (e)(1) and (e)(2) suggest that a railroad may choose to require supervisory employees to perform oversight under certain conditions.

Paragraph (f) requires that when a railroad finds evidence of contractor employee non-compliance during the periodic oversight it shall provide that employee and that employee’s employer with details of the non-compliance. The final rule substitutes “a railroad” for “any railroad,” but the meaning is the same as the requirement applies to each and every railroad that finds such evidence of a contractor employee’s non-compliance.

Paragraph (g) requires each contractor to conduct periodic oversight tests and inspections of its safety-related railroad employees provided that certain conditions are met. If any condition is not met, the contractor is exempt from being required to perform the oversight. For instance, in paragraph (g)(1) there is a small business exemption for any

contractor that employs 15 or fewer safety-related railroad employees.

Paragraph (h) would allow a railroad and a contractor to agree that the contractor will provide the periodic oversight, notwithstanding the requirements of this section that impose the requirements on either the railroad or the contractor. With that understanding, the RSAC proposed that in order to accept this oversight responsibility, the contractor would need to address in its program that the railroad has trained the contractor employees responsible for training and oversight. In other words, the contractor may accept responsibility for the oversight, but not until the railroad trains the contractor’s supervisory employee and qualifies that person to do the oversight; thus, the railroad has some obligation to ensure that the contractor’s supervisory employees are capable of conducting the oversight before abdicating what would otherwise be the railroad’s responsibility.

Paragraph (i) contains the requirements for retaining oversight records and paragraph (j) contains the statement that the records required under this section are subject to the requirements of § 243.203, which is the section containing the recordkeeping requirements of this part. In the NPRM, FRA requested comments on whether paragraph (j) is necessary given that the requirements of § 243.203 would apply to any records of period oversight required under this part even if paragraph (j) was deleted. Although FRA has not received any comments on this issue, FRA is retaining paragraph (j) as a reminder that records of periodic oversight must be retained and that without the paragraph some employers might not grasp that the recordkeeping requirements apply under these circumstances.

FRA also sought comments on a potential scope issue that would allow some situations where safety-related railroad employees would not be subject to any oversight. Those situations would likely occur when a short line railroad hires a contractor with 15 or fewer safety-related railroad employees. It is possible that the short line railroad would not have the supervisors with the expertise necessary to conduct the oversight and the contractor would be too small to be required to do it themselves per the requirements of this section. As FRA did not receive any comments raising concerns with this scope issue, FRA has decided to finalize its proposal for the reasons acknowledged in the NPRM. Of course, if FRA receives information that supports addressing this issue, FRA can

initiate a rulemaking to amend the rule accordingly.

#### *Section 243.207 Annual Review*

FRA has decided to keep this section of the final rule identical to the proposed version, except for a non-substantive change to paragraph (b) to clarify that this section does not apply to a railroad with less than 400,000 total employee work hours annually. Thus, the analysis provided for in the NPRM is still applicable and merely summarized here. Interested parties are directed to the NPRM for a more detailed discussion. The analysis in the NPRM can be found at 77 FR 6441–43. The comments received with regard to this section have been addressed in this analysis.

Paragraph (a) of this section requires that each railroad with at least 400,000 total employee work hours per year must conduct an annual review in accordance with the requirements of this section. This section only applies to railroads except that, in accordance with paragraphs (a) and (f), contractors must use any information provided by railroads to adjust training specific to the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. In order to address a comment suggesting proposed paragraph (b) seemed to include railroads with less than 400,000 total employee work hours per year despite the exclusion in paragraph (a), FRA has added a reference to this exception in an introductory phrase to paragraph (b). FRA anticipates that this non-substantive change will prevent further misunderstandings of the agency's intent.

It is likely that most annual reviews will reveal that the current method of formal training covers the subject matter, but some aspect of the training could be improved. For example, it might be determined that the training could place more emphasis on compliance with one or more specific tasks. Greater emphasis could be placed on the task by increasing the amount of time covering how to perform the task and the problems that could be encountered when conducting the task. The course materials should be reviewed to see if they could be improved for clarity. In other instances, especially when the pattern of non-compliance is detected in a safety-related task, adding an OJT or hands-on component, or adding more repetitions within the OJT or hands-on component, may increase an employee's proficiency and lead to more lasting compliance. In still other instances, adding

opportunities for individualized instruction and feedback could cut down on non-compliance. It could also be determined that a particular instructor is ineffective, or some other aspect of the way the course is delivered is not conducive to learning.

There are certainly a number of ways to improve training and that is why it is important that each person a railroad designates to conduct the annual review should be familiar with the training program filed with FRA. The rule does not mandate that the designated person in paragraph (c) have any specific knowledge requirements; although the NPRM requested comments on whether there should be any such requirements, FRA did not receive any comments on this issue. Consequently, FRA is maintaining the position it took in the proposal that the person designated to conduct the review will need to have extensive information about the training program and individual course material, as well as direct access to shape the methods of delivery. Again, the annual review is intended to effect change in how training is delivered to improve performance and should not be viewed as the end itself.

In the NPRM, FRA explained that paragraph (f) requires that contractors have a duty to use any information provided by railroads to adjust training specific to the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. FRA solicited comments regarding this paragraph because FRA was concerned that it failed to address a situation in which a contractor disagrees with the railroad's information that a modification to a training program is necessary. FRA received three comments on this issue and all three comments took the position that FRA should not address such potential conflicts between a railroad and a contractor. The NRC, ASLRRA, and AAR were unified in their position that such conflicts should be handled without Federal intervention and during the normal course of business. As FRA does not have a strong rationale for addressing these potential conflicts between a railroad and a contractor, FRA has decided not to change the rule from the proposal.

#### *Section 243.209 Railroad Maintained List of Contractors Utilized*

FRA has decided to keep this section of the final rule identical to the proposed version. Thus, the analysis provided for in the NPRM is still applicable and merely summarized here. See 77 FR 6443–44.

One issue that was repeatedly raised during the RSAC meetings was that employees of contractors routinely work alongside employees of railroads. From an enforcement viewpoint, it is essential that FRA be able to identify which employees work for railroads and which for contractors. When an employee works for a contractor, FRA can sometimes find it an additional burden to figure out basic contact information for the contractor employer. This section is intended to require each railroad to maintain a list of the contractors it uses and some basic contact information about each of those contractors.

With this basic information, FRA should be able to track down a contractor to follow-up during any audit or investigation.

#### *Appendix A*

FRA did not publish a proposed penalty schedule because such penalty schedules are statements of policy, and thus notice and comment are not required prior to their issuance. See 5 U.S.C. 553(b)(3)(A). FRA has published similar penalty schedules in each of its existing rules and this practice is described in 49 CFR part 209, appendix A, under the heading "Penalty Schedules: Assessment of Maximum Penalties." The schedule is intended to set penalty levels commensurate with the severity of the violation for typical violations, whether willful or non-willful. Of course, the penalty schedule does not constrict the agency's authority to issue a penalty anywhere in the range from the statutory minimum amount to the statutory maximum amount.

In the NPRM, FRA reminded interested parties that they were welcome to submit their views on what penalties may be appropriate. FRA received three comments requesting that FRA adopt a penalty schedule at the lowest or lower range of possible penalties. Each commenter expressed a different reason why low penalties in the schedule are warranted.

ASLRRA asked that FRA adopt a penalty schedule at the lowest range of possible penalties which reflects the low threat to safety which training rule infractions represent. ASLRRA is concerned that onerous penalties against small railroads for recordkeeping and procedural errors will waste resources when few of those types of non-complying conditions are likely to have a direct, adverse, or serious consequence on the immediate safety to employees or the public. In response, it should be noted that regardless of recommended standard penalties in a schedule, FRA is always

free to adjust penalties for small entities based on ability to pay and a variety of mitigating factors. See 49 CFR part 209, appendix C.

AAR urged FRA to adopt a penalty schedule with the potential penalties at the lower end of the penalty ranges normally found in FRA's penalty schedules. AAR argues that it is extremely unlikely that violations of the training requirements would lead directly to accidents. Furthermore, AAR stated that the railroads already have a record of providing sufficient training to their employees. In response, FRA acknowledges AAR's position and believes it has been taken into account in the penalty schedule. Of course, there are many other factors to consider in creating this penalty schedule. For example, some penalties may be geared towards one-time violations when others are for systemic issues; in that case, it may be appropriate to propose higher penalties on average for systemic non-compliance than a violation involving a single occurrence. FRA has also considered that gaps in training or ineffective training are often found to be contributing causes to accidents/ incidents.

NRC urges FRA to adopt a penalty schedule with the potential penalties on the lowest end of the penalty ranges normally found in FRA's penalty schedules in order to consider the "unprecedented level of direct interaction between the FRA and hundreds of rail contractors that have little previous experience being directly regulated by a federal agency." Again, FRA appreciates the comment and can make adjustments to assessed penalties on a case-by-case basis depending on the totality of the legal and factual circumstances. Contractors unfamiliar with FRA's civil penalty process should consult 49 CFR part 209, appendix A for a description of that process and the factors FRA considers when deciding the amount or the appropriateness of any penalty. FRA also understands that NRC's comment refers to the fact that FRA is an active enforcement agency that conducts inspections and audits of regulated entities on a continual basis, not just when an accident/incident occurs. Some rail contractors may be more familiar with other Federal agencies that rarely are quite as active as FRA in that regard. Despite the truth to NRC's comment that some contractors may not have experience with an active Federal enforcement agency, FRA does not agree that the penalty schedule amounts should be adjusted lower to account for employers that lack that experience.

## VII. Regulatory Impact and Notices

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

This final rule is a significant regulatory action within the meaning of Executive Order 12866, Executive Order 13563, and the U.S. Department of Transportation's regulatory policies and procedures (DOT Order 2100.5 dated May 22, 1980; 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 final rule.

The RIA details estimates of the costs likely to occur over the first twenty years after its effective date and a breakeven analysis that details the reductions in relevant railroad accidents and incidents that will be necessary for the final rule to breakeven in the same timeframe. Informed by its analysis of the economic effects of this final rule, FRA believes that this final rule will result in positive net benefits. FRA believes the final rule will achieve positive net benefits primarily through requiring that training programs include "hands-on" training components, such as OJT, simulation, and lab training,<sup>6</sup> which scientific literature has shown to be much more effective at reducing railroad accidents and incidents than traditional training.<sup>7</sup> The costs that will be induced by this final rule over the twenty-year period considered include: the costs of revising training programs to include "hands-on" training where appropriate, as well as the costs of creating entirely new training programs for any employer that does not have one already; the costs of customizing model training programs for those employers that choose to adopt a model program rather than create a new program; the costs of annual data review and analysis required in order to constantly improve training programs; the costs of revising programs in later years; the costs of additional time new employees may have to spend in initial training; the costs of additional periodic oversight tests and inspections; the costs of additional qualification tests; and the costs of additional time all safety-related railroad employees may have to spend

<sup>6</sup> Hands-on training is generally used by instructors/trainers to re-enforce new skills to the learner. Hands-on can be a simulated exercise in a laboratory, classroom, or it can be used in the actual work environment similar to OJT. Hands-on activity enables the trainer/instructor to objectively assess learning transfer based on successful completion of the task to be performed.

<sup>7</sup> For a review and citation information of this scientific literature, please see the Regulatory Impact Analysis that accompanies this final rule and that has been placed in the docket.

in refresher training. (FRA has accounted for additional costs that were not addressed in the NPRM including: hiring new trainers and indoctrinating them into the railroad training programs; filing documentation on programs to FRA; and hosting visits of FRA officials to review training programs.)

In analyzing the final rule, FRA has applied updated "Guidance on the Economic Value of a Statistical Life in US Department of Transportation Analyses," March 2013. This policy updates the Value of a Statistical Life (VSL) from \$6.2 million to \$9.1 million and revises 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% annual growth rate in median real wages over the next 30 years (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 RIA are labor costs and avoided injuries and fatalities, both of which in turn depend on wage rates.

Based on the 2013 VSL DOT guidance and CBO wage forecast, the total non-discounted cost of the final rule over the 20-year period analyzed is approximately \$389.9 million. Present discounted costs evaluated over the first 20 years of the final rule total about \$290.9 million at a 3% discount rate and about \$207.1 million at a 7% discount rate.

The annualized costs are \$26,201,913 at a 3% discount rate and \$36,796,090 at a 7% discount rate.

FRA has performed a break-even analysis for this final rule. FRA expects that improving training primarily by requiring the inclusion and implementation of "hands-on" elements where appropriate will reduce the number of relevant railroad accidents and incidents. Rather than assume any specific reduction will be achieved, FRA has calculated the percentage of relevant railroad accidents that will need to be prevented by this final rule to at least offset the total costs of the final rule. Reductions in railroad accidents will result in fatalities avoided, injuries avoided, and property damage avoided, all of which can be monetized and quantified using FRA safety data.

The table below presents the average yearly number of accidents, fatalities, injuries, and property damage from relevant railroad accidents between 2001 and 2010.

Average yearly number of accidents/incidents	Average yearly number of fatalities	Average yearly number of injuries	Average yearly property damage	Average monetized economic damages from all relevant accidents (using VSL of \$9.1 million)
9,723 .....	43	7,545	\$273,896,902	\$1,566,480,194

The accident/incident pool that FRA used for its analysis includes a wide range of events. These range from very minor and less expensive incidents to major accidents with multiple fatalities. An incident that was a result of an employee not wearing proper fall protection is an example of an incident that might be impacted by this rule. The more rigorous training (emphasized by this rule) not only focuses on specific safety hazards and safety behavior, it also enhances the overall safety culture which will affect both work safety performance and the quality of the safety training provided. On the higher end of the range, for example, are derailments and collisions between on track equipment.

FRA believes that additional hands-on and refresher training will reduce the frequency and severity of some future accidents and incidents. Expected safety benefits were calculated using full accident costs, which are based on past accident history, the values of preventing future fatalities and injuries sustained, and the cost of property damage. (Full accident costs are determined by the number of fatalities and injuries multiplied by their respective prevention valuations, and the cost of property damage.)

In addition to fatalities, injuries, and property damage, railroad accidents can result in train delay, environmental damages, evacuations and emergency response costs, but FRA does not have

sufficient data with which to estimate those potential costs savings related to implementation of the enhanced training requirements due to this final rule. Human factors can also play a role in limiting the consequences of accidents—in other words reducing the severity of their outcomes. Some FRA regulations are focused on the subject of reducing human factor caused accidents and this final rule has the potential to result in improvements in this area as well.

Using the 2013 VSL guidance, FRA estimates that this final rule will break even if it results in a 20-year total reduction in relevant railroad accidents and incidents of 4.59% using a 3% discount rate, and 4.59% using a 7% discount rate. These are the official break-even percentages. Safety regulations have already achieved significant results, while the industry has increased freight and passenger traffic, total number of trains, and employee hours worked. However, all of these statistics are on an upward trend with very little increase in track miles (*i.e.*, density ever increasing, creating an environment where the probability of an accident is higher). FRA believes that this comprehensive rule that improves the safety behavior of safety-related employees in the industry should achieve the results as stated above. The table below shows the total present discounted annual costs of relevant railroad accidents and incidents that

would likely be incurred over the next 20 years without this final rule, as well as the percent reduction in relevant railroad accidents and incidents that will be necessary for the accident reduction benefits to justify implementation of the final rule. This corresponds to approximately 118 accidents and incidents per year on average over the 20-year period that would have to be avoided for this rule to break even. This potential reduction of 118 accidents and incidents would likely involve relatively more employee fatality or injury incidents resulting while carrying out work duties (as compared to train accidents). Another way this final rule would break even is by preventing 1 fatality and 86 injuries per year. These injuries would likely be comprised of a few severe injuries and many minor injuries. These calculations take into account various other recent and concurrent initiatives to address railroad accidents and incidents including implementation of positive train control systems, revisions to hours of service regulations, development of conductor certification standards and a roadway worker protection rule, and implementation of programs to address fatigue and electronic device distraction, among others.

The following table summarizes estimates using the revised DOT guidance and CBO real wage rate forecasts.

Present value of potential annual benefits (3% discount rate)	Total present discounted costs (3% discount rate)	Percent reduction for breakeven (3% discount rate)	Present value of potential annual benefits (7% discount rate)	Total present discounted costs (7% discount rate)	Percent reduction for breakeven (7% discount rate)
\$6,333,998,623	\$290,932,418	4.59%	\$4,507,378,459	\$207,068,184	4.59%

With the 2013 VSL policy, DOT also recommended a sensitivity analysis be considered using VSL of \$5.2 million and \$12.9 million. Using a VSL of \$5.2 million, FRA estimates that this final rule will break even if it results in a 20-year total reduction in relevant railroad accidents and incidents of 7.18% using a 3% discount rate, and 7.18% using a 7% discount rate. Using a VSL of \$12.9 million, FRA estimates that this final

rule will break even if it results in a 20-year total reduction in relevant railroad accidents and incidents of 3.41% using a 3% discount rate, and 3.41% using a 7% discount rate.

For comparability purposes, FRA has also provided below the costs and benefits, as calculated and using the same real wage and VSL assumptions used in the NPRM—assuming no changes in real wage rates for the period of the analysis, using a VSL of \$6.2

million, which reflected DOT guidance at the time, and in 2010 dollars.

Using this methodology, the total cost of the final rule is estimated to be about \$261 million, discounted at a 3% rate, and about \$186.9 million, discounted at a 7% rate. The Table below lists specific cost elements and each element's estimated cost over the first 20 years following promulgation of the final rule, as well as the total cost estimates.

Cost element	Twenty-year total (3% discount rate)	Twenty-year total (7% discount rate)
Creating and revising training programs .....	\$31,796,815	\$26,599,026
Revising programs for model program users:		
400,000 or more total labor hours annually .....	166,976	117,558
Less than 400,000 total labor hours annually .....	7,654,491	5,870,184
Customizing model programs .....	839,572	727,798
Designating current and future employees .....	995,974	804,215
Additional initial training .....	91,195,393	62,663,586
Additional refresher training .....	74,701,853	48,936,721
Additional periodic tests and inspections .....	24,689,109	16,964,762
Qualification testing .....	14,136,417	12,185,273
Hiring and indoctrinating additional trainers .....	12,209,461	9,991,110
Other Costs (Filing, hosting FRA) .....	2,656,263	2,012,102
<b>Total .....</b>	<b>261,042,324</b>	<b>186,872,334</b>

Using the former methodology with a VSL of \$6.2 million and no annual growth rate in real wages, FRA estimates that this final rule will break even if it

results in a twenty-year total reduction in relevant railroad accidents and incidents of 6.07% using a 3% discount rate, and a 6.06% reduction using a 7%

discount rate. The table below details the total present discounted annual costs of the final rule.

Present value of potential annual benefits (3% discount rate)	Total present discounted costs (3% discount rate)	Percent reduction for breakeven (3% discount rate)	Present value of potential annual benefits (7% discount rate)	Total present discounted costs (7% discount rate)	Percent reduction for breakeven (7% discount rate)
\$4,301,939,374	\$261,042,324	6.07%	\$3,081,262,864	\$186,872,334	6.06%

In the RIA, FRA presented a sensitivity analysis using the \$6.2 million VSL. By presenting a low and high end of four main cost components,<sup>8</sup> and varying the accident benefit reduction potential from other FRA regulations,<sup>9</sup> a break-even range was presented. Using all possible combinations of the cost component options and accident benefit options, the lowest break-even point (at 3 percent discount rate) was 1.87% and the highest was 15.91%. Using a 7 percent discount rate, the lowest break-even point was 1.96% and the highest was 17.03%.

Given the prevalence of accidents and incidents in the railroad industry and the relationship between quality training and safety, FRA believes it is reasonable to expect that improvements in training as required in this final rule will yield safety benefits that will exceed the costs.<sup>10</sup> As stated above, accident/incident reductions due to

safety regulations have occurred even while the industry has been growing at a fast rate for the most part of the last decade (infrastructure assets, business, and people). This training standards final rule will improve the safety behavior of all safety-related employees in the industry and should achieve the results as concluded. The improvements to training programs is expected to produce employees who are more highly qualified, and therefore better able to avoid or prevent accidents and incidents, even in an environment that has more employees, passengers, work activities, and assets operated.

#### *B. Regulatory Flexibility Act and Executive Order 13272; Final Regulatory Flexibility Assessment*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and Executive Order 13272 require a 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 impact on a substantial number of small entities. During the Notice of Proposed Rulemaking (NPRM) stage, FRA had not determined whether the proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA published an IRFA to aid the public in commenting on the potential small business impacts of the proposals in the NPRM. All

interested parties were invited to submit data and information regarding the potential economic impact that would result from adoption of the proposals in the NPRM.

The Regulatory Flexibility Act also requires an agency to conduct a final regulatory flexibility assessment (FRFA) unless it determines and certifies that a rule is not expected to have a significant impact on a substantial number of small entities. FRA is not able to certify that the final rule will not have a significant economic impact on a substantial number of small entities. FRA received comments and data from several commenters on the IRFA, and that information was used to make this determination. Therefore, FRA will publish this FRFA and issue a guidance document that includes small entities.

FRA estimates that approximately 10% of the total cost of this rulemaking (see the regulatory impact analysis (RIA)) will be borne by small entities. This burden is because more small railroads will have to enhance, upgrade, or modify their current training programs. It is important to note that, in general, the typical small railroad is a less complex operation and has an average of only 21 employees. Small railroads do not have as many layers of supervision; therefore, revising or implementing programs can be done more quickly and efficiently than in larger railroads.

This final rule also mandates that each railroad have an approved training

<sup>8</sup>Cost components that were varied for the sensitivity analysis were: number of employers creating/revising their own programs, number of employers customizing programs, costs for 1.5 days of initial training, and the amount of additional refresher training required per employee.

<sup>9</sup>For the sensitivity analysis, four alternate projections of future economic damages from relevant railroad accidents were presented, given alternate future reductions from other initiatives.

<sup>10</sup>To further indicate the reasonableness of this analysis, FRA has removed other regulatory impact results so no double-counting of accident/incident reductions from other regulations are represented here. These benefits solely reflect training standards results.

program, but the training program is only applicable to federally mandated training requirements. Therefore, the training program, its requirements, and implications do not cover other training that a railroad provides or initiates for other purposes.

FRA provides the rationale the agency used for assessing what impacts will be borne by small entities. FRA considered comments received in the public comment process when making a determination in the FRFA.

This FRFA was developed in accordance with the Regulatory Flexibility Act.

(1) A succinct statement of the need for and objectives of the rule.

FRA is addressing the RSIA's statutory mandate to establish minimum training standards for safety-related railroad employees and the submission of training plans in this rulemaking. FRA is requiring that each employer of one or more safety-related railroad employees (whether the employer is a railroad, contractor, or subcontractor) be required to train and qualify each such employee on the Federal railroad safety laws, regulations, and orders that the employee is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. The final rule also requires that the training program developed by each employer be submitted to FRA for approval.

The scientific literature on training in general and FRA's experience with training in the railroad industry show a clear link between the quality of training programs—including whether training is engaging or hands-on—and safety. Please see the RIA for a more detailed discussion and references for the scientific literature.

Even though rail transportation in the United States is generally an extremely safe mode of transportation and rail safety has improved over the years, well-designed training programs have the potential to further reduce risk in the railroad environment. All of the positive impacts noted above would apply to expected results from enhanced training in the railroad industry, and the work force performing job tasks more efficiently, skillfully, and more safely. The main goal of this rulemaking is to improve railroad safety by ensuring that safety-related employees receive appropriate training that takes into consideration the type of activities they perform and analysis of relevant data.

(2) A summary of the significant issues raised by the public comments in response to the IRFA, a summary of the assessment of the agency of such issues,

and a statement of any changes made to the proposed rule as a result of such comments.

Several comments were received that directly addressed the IRFA or the impacts on small entities. One commenter (ASLRRA) disagreed with FRA's RIA for the NPRM. ASLRRA also believed that this rulemaking would have a significant economic impact on the small railroad industry.

#### (a) Training Program Approval

ASLRRA noted that "further aggravating the potential cost disadvantage for small railroads is the threat by FRA in the proposed rule to scrutinize more intensely the training programs of small railroads that primarily conduct their own training. (77 FR 6430). Railroads that otherwise might have perfectly adequate in-house safety programs may turn to more costly alternatives out of fear of being subject to extensive and distracting audits from FRA just because they are small. There are many reasons that small railroads may evaluate in deciding whether or not to conduct their own training programs or use outside resources . . . FRA should allow the railroads to make the most rational economic and operating decision according to their individual circumstances and not intimidate them into choosing a more costly option if they would not otherwise do so." FRA believes that the level of scrutiny that any railroad's training program will receive will be based on a number of risk factors. The comment did not include FRA's explanation in the proposed rule that the reason to more closely scrutinize a small railroad that chooses to conduct all of its own training is because a small railroad "would not always have qualified instructors to implement all the different types of training required by the Federal laws, regulations, and orders." Thus, FRA's example in the proposed rule focused on the situation where a shortline's training program appears legally sufficient at first glance, but unless the shortline has taken affirmative steps to train or hire qualified instructors, the shortline is unlikely to be able to fully implement its program. FRA recognizes that this issue could still potentially be a concern that it considers in its review of programs, as we want to put all railroads on notice that they must both adopt and comply with the training program submitted to FRA. However, when it comes to the amount of scrutiny FRA gives each program, FRA will certainly be looking at other factors that are more directly related to safety concerns and a greater level of scrutiny

will be placed on the particular risks inherent in a particular employer's operation. For example, a small railroad operation that is relatively segregated from major railroad operations and only operates in rural areas may pose less risk than those that routinely interchange with major railroads or operate through more populated suburbs and urban neighborhoods. If a simple railroad operation with low risk has a good history complying with FRA's regulations, FRA may view in-house training more favorably, as long as the railroad's program meets the minimum requirements of the final rule. Meanwhile, if a small railroad has a relatively complicated operation that poses significant risks to employees and the general public, FRA would certainly be justified to more closely scrutinize the in-house training for that operation; especially if the railroad does not have a good history of railroad safety law compliance. Other risk factors FRA may consider including, but are certainly not limited to, are the employer's accident history, the condition of the railroad's track and equipment, the types of commodities hauled, and the number of train miles operated annually.

Although each employer may be better suited than FRA to identify the weaknesses in its existing training program and to seek ways to strengthen those components, FRA has the expertise to also make such judgments. FRA understands that changing a training program will have costs associated with it, and the agency intends to only request training adjustments that will positively impact safety. FRA will not require training program changes that would force an entity to exceed the minimum requirements for compliance. Finally, small entities should expect that FRA will consult with the entity in order to receive constructive input prior to ordering any programmatic changes. Therefore, the process FRA envisions is expected to engage any size entity in a discussion of any FRA-perceived weaknesses in a training program before FRA issues a decision that the entity's program is inadequate and must be upgraded.

FRA also notes that each employer's training program will not be reviewed by an FRA field inspector. FRA will have a specific group of safety specialists designated, trained, and responsible for reviewing and approving the training programs. Local or regional FRA personnel will not be authorized to conduct random audits without the involvement of FRA's specialized training staff, which should lead to a uniform approach to enforcement of this

rule. Small railroads will generally not be subject to intrusive or distracting audits as some might be concerned, unless one of three events occur: (1) A major accident or fatality occurs on that railroad's property; (2) a complaint is filed with FRA from an employee or other entity alleging noncompliance with respect to the mandates of this part; or (3) a pattern of incidents industry wide raises a training concern attributable to multiple small railroads with certain similar characteristics. In summary, FRA is unlikely to initiate enforcement activities to find weaknesses in a small entity's training program unless there is some basis that raises a specific concern.

FRA does not agree with ASLRRA's comment suggesting that small railroads will be intimidated into providing unneeded costly training. FRA fully intends to offer to enter into a constructive dialog with any employer whose training program is found to be deficient. In each instance, FRA fully expects that there will be more than one option to correct a training deficiency and that it will be up to the employer to choose those options. Because FRA will review all the training programs, FRA may have some recommended options for addressing any training program deficiency. Meanwhile, just like any other business decision, there will be pros and cons to every option. For example, some options may be proven effective, but cost more than a lesser-used option. Although FRA will have the authority to reject unsuitable options that fail to meet the minimum requirements of this part, FRA will not otherwise reject less expensive options and impose additional costs on any employer.

#### (b) Annual Review Exemption

ASLRRA also noted "Section 243.207(a) expressly grants an exemption from the annual review requirement for a railroad with fewer than 400,000 total employee work hours annually. Paragraph (b) then states that any railroad required to conduct periodic oversight under section 243.205 is also required to conduct an annual review." ASLRRA requested clarification of who is exempt from the annual review requirement.

FRA addressed this issue by adding the exemption language as an introductory phrase to 49 CFR 243.207(b). Paragraph (b) now reads: "[e]xcept as provided for in paragraph (a) of this section, each railroad that is required to conduct periodic oversight in accordance with § 243.205 is also required to conduct an annual review, as provided in this section, and shall

retain, at its system headquarters, one copy of the written annual review" (italicized emphasis added). As noted in the preamble above, FRA did not change the intent of paragraph (b) of this section but, by adding the exception language, it did clarify that this section does not apply to railroads with less than 400,000 total employee work hours annually. FRA anticipates that this non-substantive change will prevent further misunderstandings of the agency's intent.

FRA also notes that the final rule requires all railroads and most contractors to conduct periodic oversight, per § 243.205. A contractor would be exempt from the periodic oversight requirements if it (1) employs 15 or fewer employees; (2) does not rely on training it directly provides to its own employees as the basis for qualifying those employees to perform safety-related duties on a railroad; or (3) does not employ supervisory safety-related railroad employees capable of performing oversight. Periodic oversight is limited to Federal regulations associated with FRA-regulated personal and work group safety currently in parts 214, 218, and 220. Periodic oversight does not apply to employees covered by parts 240 and 242, but information gained (performance gaps) from those assessments must be used when appropriate in training programs to close performance gaps.

#### (c) Impact on Railroads That Have Less Than 16 Employees

One commenter was concerned "that this proposed rule will adversely affect the smallest railroads, in particular railroads that have less than 16 employees, these railroads do not have the resources for training like a Class I or even larger Class III railroads that typically send a new hire to a central location for 6 weeks of initial training. The smallest railroads initial training is almost always a one-on-one, on-the-job training with the person who does the hiring. Ongoing training is most often addressed at an annual rules class or frequently provided to an employee with an impromptu training session when incorrect behavior/technique is observed. How these smallest railroads document the training they do to the satisfaction of the FRA will be problematic." The commenter indicated that it believed small railroads should be allowed to continue the status quo with a training program centered on an annual rules class and informal on-the-job training (OJT) that is completed without any recordkeeping of what safety-related tasks and information were learned.

This final rule is being promulgated to satisfy statutory requirements in the RSIA to establish minimum training standards for safety-related railroad employees. The statute does not explicitly exempt small entities from the requirements, nor does it suggest that FRA could permit a small entity exemption. Therefore, FRA believes it was Congress's intent to include small entities as that statute focuses on the training of each employee, not each employee that works only for a major railroad or large contractor.

FRA agrees with the commenter that the rule will require more than what most small railroads were doing prior to the promulgation of this rule. The final rule will require that a small railroad submit a formal training program where none likely existed before; however, FRA expects that most small railroads will adopt and comply with a model training program that is largely written by an association that understands the Federal requirements and can devise a broad program suitable for the flexibility needed by most small railroads. Many small railroads may continue to train employees largely in the same manner by periodically providing a rules class and training through OJT. However, the OJT will need to meet the standards of "formal training," as that term is defined in the rule, and it is that formality that will raise the standards from one in which a supervisor believes the employee should know how to do the safety-related task to one in which the supervisor knows and has a record to support that the employee has demonstrated the knowledge and ability to perform the task. The extra time necessary for a qualified supervisor or instructor to record what training the employee has accomplished and to retain that record should not add significantly to the cost of the previously unrecorded OJT. Some instructors may spend more time instructing and observing employees conduct federally mandated tasks than what was being performed prior to the promulgation of this rule, but FRA views that alleged additional burden as a flaw in the execution of current training programs that should not be tolerated by the employer. An employer should not be permitted to claim that this final rule adds costs for training if the employer is currently not meeting the minimum requirements for the pertinent federally mandated employee training. It is for this very reason that formalized training programs and records are necessary—that is, to compel all employers of safety-related railroad employees to provide

appropriate training that can be measured as having been successfully administered.

(d) Compliance Guide

One commenter suggested that FRA “issue a compliance guide, specifically to railroads that have 15 or less safety-related railroad employees, (as contemplated in 49 CFR part 209, appendix C).” As noted previously, FRA intends to publish an interim final compliance guide early in 2015. By characterizing the guidance as “interim final,” the guidance will be effective immediately, but signal that FRA is willing to consider amending the guidance based on comments received. Consequently, FRA will provide a 60-day comment period and intends to issue a notice for the final guidance by no later than one year from the date of issuance of the interim final guidance. FRA also amended the proposal so that small entities will have at least four years from the date of issuance of the interim final compliance guide to implement a training program under § 243.101(a)(2) and at least four years and eight months from the date of issuance of the interim final compliance guide to designate existing employees under § 243.201(a)(2).

FRA’s compliance guide is intended to aid employers by providing the task inventories that provide the foundation of the OJT program. The compliance guide can be used by all employers, but will be written with a primary emphasis on assisting small entities. The task inventories will be presented in a format that is highly respected in the adult training community, and will be modeled after training formats FRA’s master trainers use to train FRA personnel. The guide will address each major type of safety-related railroad employee category. It will explain the roles and responsibilities for those administering the program, as well as the trainees and trainers. Duties will be identified by the performance task that the employee is supposed to be able to do. The guide will help identify the preparation that trainers will have to take in order to make sure that the conditions are conducive for learning. For example, trainers will ensure that trainees have all the tools, equipment, and documents needed to practice the task. Furthermore, the guide will help establish standards for establishing when a trainee has demonstrated proficiency. Such standards are generally based on repetition, the completeness, and the percentage of accuracy. These factors for establishing standards will be driven by the complexity of the related task.

(e) Implementation and Program Submission Date for Small Railroads

One commenter thought that FRA should push back the “deadline for an employer submission by at least one year after the submission deadline for an organization that allows other entities to copy its program to at a reasonable cost.” FRA agrees that the comment has validity and would make the implementation of the rule much smoother. Therefore, FRA addressed this comment by extending the implementation deadline schedule in multiple ways. A summary of the changes made in response to this comment and similar comments can be found in the preamble under the heading “Implementation Dates and Incentives for Early Filing of Programs.”

(f) Number of Contractors Considered To Be Small Entities

One commenter responded to FRA’s request for comment on the number of small contractors impacted by this rule. The National Railroad Construction and Maintenance Association (NRC) responded that FRA’s estimates appear reasonable. This commenter further noted that it was their understanding that “the 600+ other contractors generally consist of extremely small companies, some of which may be more accurately thought of as ‘two guys and a pickup truck,’ however the NRC is not aware of any comprehensive listing of these small companies.”

(g) Impact on Commuter Operations

APTA noted in its comment that most “of the public agencies providing commuter rail services are small entities and contract all or a significant amount of the operations to one or more specialized rail service contractors. The contracts typically specify that any training or qualifications, for example to meet FRA regulations, is the responsibility of the contractor. These types of public agencies would not be knowledgeable on training costs or in a position to estimate their cost to develop and implement a training program of this type. Contracting out the entire training program or adopting a model program with input from their contractors would likely be a solution for the small operators. For most, contracting out the entire training program would be prohibitively expensive for a small entity.”

By FRA’s definition of a small entity, only two commuter railroads would be considered to be small entities, which represent approximately 8% of the total number of commuter railroads. (See FRA policy on small entities at 68 FR

24891 (May 9, 2003)). These two entities are very different from all of the other commuter railroads. They are primarily event- or seasonal destination-based passenger rail transportation (e.g., scheduled service to sporting events). One of the two entities is primarily contracted by a university to operate trains to football games. Therefore, all of the train and engine crew training would be conducted by a Class III railroad, which should currently be compliant with all federally mandated training. The function of the conductors is carried out by volunteers who should also be compliant with part 242. The additional burden from this final rule should only be from the adoption of a model training program and not significant. The second small entity that is classified as a commuter operation is owned by a larger holding company. This entity began operation in 2011, running trains Friday through Monday primarily for racetrack attendees. The entity does operate year round with activities that include seasonal ski trains. From site visits, FRA believes this second small entity is also compliant with all federally mandated training requirements. This railroad is an expanding operation that had made all necessary efforts to be compliant with FRA regulations. The additional burden for this entity should also only be from the adoption of a model training program and any necessary modifications.

(3) A Description and an Estimate of the Number of Small Entities to Which the Rule Will Apply or an Explanation of Why No Such Estimate is Available

“Small entity” is defined in 5 U.S.C. 601 (Section 601). Section 601(3) defines a small entity as having the same meaning as “small business concern” under Section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) includes within the definition of small entities not-for-profit enterprises that are independently owned and operated, and are not dominant in their fields of operation. Additionally, Section 601(5) defines small entities as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000. The U.S. Small Business Administration (SBA) stipulates in its size standards that the largest a railroad business firm that is for-profit may be, and still be classified as a small entity, is 1,500 employees for “line haul operating railroads” and 500

employees for “switching and terminal establishments.”

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 policy that formally establishes small entities as railroads that meet the line haulage revenue requirements of a Class III railroad.<sup>11</sup> The revenue requirements are currently \$20 million or less in annual operating revenue. The \$20 million limit (which is adjusted by applying the railroad revenue deflator adjustment)<sup>12</sup> is based on the Surface Transportation Board’s (STB) threshold for a Class III railroad carrier. FRA is using the STB’s threshold in its definition of small entities for railroads affected by this rule. FRA has also adopted the STB threshold for Class III railroad carriers as the size standard for railroad contractors.<sup>13</sup> FRA estimates that 720 railroads will be affected by this final rule. This number equals the number of railroads that reported to FRA in 2011, minus those railroads that are tourist, scenic, excursion, or historic railroads and are not part of the general system (these railroads are exempt from the rule). Of those railroads, 44 are Class I, Class II, commuter, and intercity passenger railroads. The remaining 676 railroads are therefore assumed to be small railroads for the purpose of this assessment. It is important to note that in the RIA for the final rule, FRA has not revised the number of railroads used in these analyses to provide better transparency in the comparison of the analyses for the NPRM and the final rule. The final rule will affect all employers of safety-related railroad employees, which, in addition to railroads of all sizes, includes contractors and subcontractors who are engaged to perform safety-related duties on railroads. FRA assumes in its RIA that approximately 795 railroad contractors and subcontractors exist, based on conversations with industry experts. That figure of 795 includes 155 well-established track and signal maintenance contractors, 500 very small (1–4 employee companies) or relatively new track and signal maintenance contractors, and another 140 contractors who do not perform track or signal maintenance. FRA has previously clarified its definition of small entity

with respect to contractors, stating that FRA defines railroad contractors that meet the income level established for Class III railroads as small entities. For the purpose of this analysis, FRA conservatively assumes that about 10 of these contractors have annual revenues in excess of \$20 million, leaving 785 contractors that are considered small entities that may be affected by this proposed rule. FRA requested comments on this assumption and any information regarding the number of small contractors affected by this proposal. As noted above, FRA did receive one comment on this estimate and is using it for the purpose of this analysis.

Therefore, the total estimate of the number of small entities that the rule may affect equals 676 Class III railroads plus approximately 785 contractors, totaling approximately 1,459 entities. All but 6 of the 676 Class III railroads have less than 400,000 annual employee hours. Most contractors are businesses with less than 400,000 hours as well.

**(4) A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the 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**

The final rule will include several recordkeeping requirements that may pertain to small entities. Each employer will be required to maintain records that form the basis of the training and qualification determinations of each operator of roadway maintenance machines equipped with a crane that it employs. Each employer will be required to maintain records to demonstrate the qualification status of each safety-related railroad employee. Each employer that conducts periodic oversight in accordance with the final rule will be required to keep a record of the date, time, place, and result of each test or inspection. Each railroad using contractors to supply the railroad with safety-related railroad employees will be required to maintain a list at its system headquarters with information regarding each contractor used unless:

(1) The railroad qualifies each of the contractor’s safety-related railroad employees used.

(2) The railroad maintains the training records for each of the contractor’s safety-related railroad employees used.

The burden of maintaining a list of contractors is certainly significantly less than the burden of training each contractor employee and maintaining records for each contractor employee.

Given the propensity for shortline railroads to hire smaller contractors to handle segments of the railroad’s safety-related work (for example, signal or track maintenance), keeping up-to-date information regarding the contractors recently used is a reasonable, and not overly taxing, burden on small entities. FRA believes that a professional or administrative employee will be capable of maintaining these records.

The final rule will require employers of safety-related railroad employees to submit a training program to FRA for approval. Each employer’s training program will be required to include on-the-job training where appropriate and practicable. However, FRA has given employers the option to adopt a model program, and FRA assumes in this assessment that nearly all small entities will adopt model programs rather than hire training experts to develop a complete, unique program. However, for the sake of the RIA and this assessment, FRA assumes that any entity that adopts a model program will customize the model program, if necessary. FRA also assumes that such customization should require about 8 hours on average.

Following the initial submission of the training program, employers of safety-related railroad employees will be required to revise the training programs, if necessary. The decision on whether to revise a training program would be required annually and will depend on changes in the workplace environment. When new laws, regulations, technologies, procedures, or equipment are introduced into the workplace, for example, it may be appropriate for training programs to be modified accordingly. FRA assumes in the RIA accompanying the final rule that some annual revision of training programs will be required every year for all employers of safety-related railroad employees. Furthermore, these annual revisions will be required to reflect the results of annual reviews of safety data for all entities with 400,000 or more total employee work hours annually. For purposes of this analysis, FRA assumes that four Class III railroads and three small contractors will surpass this threshold. One comment was received relative to it from the NRC, which only noted that they estimated 10 contractors had 80 or more employees.<sup>14</sup>

Specifically, as in the RIA, FRA assumes that two Class III railroads will choose to develop their own programs, while the remaining 657 Class III railroads adopt model programs. FRA

<sup>11</sup> See 68 FR 24891 (May 9, 2003); 49 CFR part 209, appendix C.

<sup>12</sup> For further information on the calculation of the specific dollar limit, please see 49 CFR part 1201.

<sup>13</sup> See 68 FR 24891 (May 9, 2003).

<sup>14</sup> Note: a company that has 400,000 or more total employee work hours annually would have more than 190 employees.

also believes that all 785 small contractors will adopt model programs. All of the hours spent creating or revising training programs are assumed to be incurred by training experts or craft-specific technical experts at a cost \$56.84 per hour, which is the average wage rate in 2010 dollars of professional and administrative employees for Class I railroads as reported to the STB, multiplied by 1.75 to cover overhead.<sup>15</sup>

The IRFA provided a table of the cost of compliance for small entities. The RIA for the final rule has been revised and some of these cost estimates have also been revised. The revised estimates include small entities. In the NPRM, FRA estimated that the average railroad would take 160 hours to create and submit an initial program. Based on comments received, the RIA for the final rule now estimates that it would take 2,160 hours. However, that cost is an average cost estimate. It is estimated that Class III railroads will create their own training programs and FRA believes that these two small entities will spend much less than the average railroad. The NPRM's RIA also estimated that the annual revisions would take 40 hours per railroad to complete. The final rule's RIA now estimates that cost at 432 hours.<sup>16</sup> Again, these two small entities will likely spend significantly less than the average railroad. FRA is retaining the NPRM's estimate of 8 hours for the average small entity to customize the model program.

This final rule also did not change the NPRM's estimate of 30 hours for the average entity with 400,000 or more total employee work hours annually to perform annual review and annual revisions in subsequent years. FRA estimates that only four Class III railroads and three contractors will be affected by this requirement. For entities that have less than 400,000 total employee work hours annually, the RIA for the final rule estimates that it will take 4 hours per year to perform annual revisions in subsequent years past the implementation.

While the final rule does not explicitly require any increase in the amount of time that must be spent in initial or refresher training, such increases may arise for some small

entities if those entities add substantial amounts of OJT to training programs. Since small railroads usually have less formal training programs for their employees, this may be the case. In the RIA for the NPRM, FRA assumed that new hires would require 1 extra day of initial training as a result of the final rule, and that 1 additional hour of refresher training would be required on average for each employee. In the IRFA, FRA noted that it was not clear to what extent the cost of additional initial training—to whatever extent that is induced by the proposed rule—would be borne by small entities. For the final rule, FRA has revised this estimate to 1.5 days (12 hours) of additional training for initial training for new hires. For the refresher training, FRA has also revised the estimate to half a day (4 hours). Small entities will likely have to incur the cost of additional refresher training to whatever extent that will be required.

**(5) A Description of the Steps the Agency Has Taken To Minimize the Significant Adverse Economic Impact on Small Entities Consistent With the Objectives of Applicable Statutes, Including a Statement of Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule, and Why Each of the Other Significant Alternatives to the Rule Considered by the Agency Was Rejected**

FRA is unaware of any significant alternatives that would meet the intent of the RSIA and that would further reduce the economic impact on small entities. FRA is exercising its discretion to provide the greatest flexibility for small entities available under the RSIA.

The process by which this final rule was developed provided outreach to small entities. As noted earlier in the preamble, this notice was developed in consultation with industry representatives via the RSAC, which includes small railroad representatives. Throughout the development of RSAC's recommendation for this rule, FRA received input that focused discussions on issues specific to shortline and regional railroads and contractors. The discussions yielded insight into their concerns and this rule takes into account those concerns expressed by small railroads during the deliberations. Several alternatives were considered in the creation of this final rule in order to attempt to minimize the impact on small entities. FRA and the RSAC Working Group recognized very early on in the rulemaking recommendation process that small entities probably do not have training experts on staff. Requiring every small entity to create or

revise a unique training program could create a disproportionate, and possibly unnecessary, burden on small entities because it might require the small entities to hire a training expert to perform the task, whereas larger railroads and contractors may already have training experts on staff. As an alternative to requiring every entity to create unique programs, FRA has a provision in the final rule to formalize a process for entities (including and especially small entities) to adopt a "model program." FRA envisions a model program designed with modular characteristics reflecting best practices in training program development. Model programs designed in modular format will allow small entities to easily customize the training for their operational needs. Any organization, business, or association may create a model program and submit that model program to FRA for approval. Subsequently, any employer may then choose to use a model program approved by FRA, rather than create its own program. An employer adopting a model program need only inform FRA that the employer plans to use a model program, submit the unique identifier for the program, and include any information reflecting customization or deviation from the model program that the employer has undertaken. This alternative can significantly simplify and consolidate the reporting requirements of this final rule for small entities.

The final rule's requirements with respect to periodic oversight also contain alternatives that were designed by FRA and the Working Group to limit the final rule's impact on small entities. Periodic oversight operational tests and inspections will be required by the final rule to determine if safety-related railroad employees comply with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. FRA and the Working Group considered requiring that periodic oversight tests and inspections be performed by all employers of safety-related railroad employees. However, FRA and the Working Group also recognized that small entities may not employ supervisory employees who are qualified as safety-related railroad employees in some or all categories of employees. Requiring these entities to perform periodic oversight would necessitate that those entities expand their workforce expressly for that purpose. Additionally, one purpose of periodic oversight with respect to this rule is to determine if changes in

<sup>15</sup> For 2011, the wage rate is \$59.34 per hour.

<sup>16</sup> FRA initially estimated 40 hours per railroad for modifying training programs. In its comments to the NPRM, AAR suggested 800 hours per railroad for this purpose. FRA revised its estimate substantially to 432 hours per railroad. This estimate was developed by using a like proportion that it had increased the time allotted to create training programs (now 6,480 hours per railroad over 3 years). The details and explanation for this revised estimate can be found in the RIA.

training programs are necessary to close any proficiency gaps found during oversight assessments. As such, it would make sense if the entity that performs the training of safety-related employees is also the entity that performs the periodic oversight tests and inspections.

As an alternate approach designed to ensure that periodic oversight is useful, and to minimize the burden that would arise if small entities had to expand their workforce just to comply, several provisions are included in the final rule that limit the extent to which small contractors will have to conduct periodic oversight. In general, railroads will be responsible for performing oversight for all railroad employees and some oversight for contractors performing safety-related duties on railroad property. Railroads will not be required to perform operational tests of contractor employees, but railroads will be required to perform periodic oversight inspections of contractor employees performing safety-related duties on railroad property. However, if a contractor employs more than 15 safety-related railroad employees, trains its own employees, and employs supervisory safety-related railroad employees capable of performing oversight, the contractor (rather than the railroad) will be required to perform periodic oversight on its own employees. Contractors who meet those criteria may not be small entities, and contractors will only perform periodic oversight if the contractor relied on its own training in accordance with its training program and could therefore improve the program with the results of the oversight program. In any case, a railroad and contractor may voluntarily agree that the contractor will perform the periodic oversight.

The requirements for periodic oversight also contain provisions

designed to limit the impact on small railroads. First, if a contractor conducts its own periodic oversight, then the railroad will not be required to also do so. Second, railroads will not be required to perform operational tests of contractor employees in any case, as mentioned above. Third, a railroad will not be required to perform oversight tests or inspections for categories of a contractor's safety-related railroad employees if the railroad does not employ supervisory employees who are qualified as safety-related railroad employees in those categories. This final exception is designed mostly with small entities in mind. Small railroads may maintain a very small workforce and hire contractors to perform most safety-related duties. Those small railroads that do not have supervisory employees on staff who are capable of performing oversight of contractor employees will therefore not be required to expand their workforces by hiring a supervisory employee trained in the safety-related duties that the contractor employees perform in order to perform oversight of contractor employees.

FRA and the Working Group also considered alternatives for small entities in the section of the final rule requiring annual reviews of safety data. Railroads will be required, under the final rule, to conduct an annual review of periodic oversight data, reportable accident/incident data, FRA inspection report data, employee training feedback, and feedback received from labor representatives if available. However, all railroads with less than 400,000 total employee work hours annually will be exempt from this annual review requirement. FRA stated in the NPRM that it is likely that all but six Class III freight railroads would fall below this threshold and no comments were received challenging this assumption. In § 243.113(a) of this final rule, FRA

provided another alternative to decrease the impact on small entities. The final rule exempts any employer (approximately 653 Class III railroads and most contractors) with less than 400,000 total employee work hours annually from the requirement to file written program submission requirements electronically.

In § 243.101(a)(2), FRA has provided each employer with less than 400,000 total employee work hours annually an additional year to implement its training program. Therefore, instead of having to implement the programs by January 1, 2018, most small entities will not have to implement the programs until January 1, 2019, or four years from the date of issuance of FRA's Interim Final Compliance Guide, whichever is later. There should be cost savings from this delayed implementation. In addition, the small railroads will benefit from being able to observe the implementation of the larger railroads in the industry. The additional time will permit these small entities to spread out the cost of revising or modifying a model program too.

FRA has identified no additional significant alternative to this final rule that satisfies the mandate of the RSIA or meets the agency's objective in promulgating this rule, and that would further reduce the economic impact of the rulemaking on small entities.

#### C. Paperwork Reduction Act

The information collection requirements in this final rule are being submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the current and new information collection requirements, and the estimated time to fulfill each requirement are as follows:

49 CFR section or statutory provision	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
214.357—Training and Qualification Program for Operators of Roadway Maintenance Machines (RMM) Equipped with a Crane.	535 railroads/contractors.	535 revised programs.	4 hours .....	2,140
—Initial Training/Qualification of RMM Operators (Cranes).	17,396 roadway workers.	1,750 tr. worker +15,646 tr. wrkr.	24 hours + 4 hours	104,584
—Periodic Training/Qualification of RMM Operators (Cranes).	17,396 roadway workers.	17,396 trained workers.	1 hour .....	17,396
—Records of Training/Qualification .....	17,396 roadway workers.	17,396 records .....	15 minutes .....	4,349
243.101— <i>Training Programs</i> Submissions by Employers subject to this Part with 400,000 total annual employee work hours or more by Jan. 1, 2018.	56 railroads/contractors/etc.	16 programs .....	6,480 hours .....	103,680
—Submissions by Employers subject to this Part with less than 400,000 total annual work hours by Jan. 1, 2019.	1,459 railroads/contractors/etc.	486 programs .....	20 hours .....	9,720
—Submission by New Employers Commencing Operations after Jan. 1, 2018.	5 New Railroads ....	5 programs .....	40 hours .....	200

49 CFR section or statutory provision	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Validation documents sent from contractors that train their own safety-related employees to railroads that are using their training programs.	795 railroad contractors/sub-contractors.	50 documents .....	15 minutes .....	13
—Copies of contractor validation documents kept by railroads.	720 railroads .....	50 copies .....	10 minutes .....	8
243.103—Training Programs required to be modified by FRA due to essential missing/inadequate components.	1,459 railroads/contractors/etc.	73 programs .....	10 hours .....	730
243.105—Optional Model Program Development—Customized Training Program Submissions.	1,459 railroads/contractors/etc.	4 model training programs.	8 hours .....	32
243.109—Initial Training Programs Found Non-Conforming to this Part by FRA—Revisions to Programs.	56 railroads/contractors/etc.	7 programs .....	10 hours .....	70
—Written Request to Extend Revision/Resubmission Deadline.	56 railroads/contractors/etc.	1 request .....	15 minutes .....	.25
—Previously Approved Programs Requiring an Informational Filing When Modified.	56 railroads/contractors/etc.	8 informational filings	432 hours .....	3,456
—New Portions or Substantial Revisions to an approved Training Program.	56 railroads .....	25 revised programs	16 hours .....	400
—Training Programs found Deficient .....	56 railroads .....	12 rev. program .....	16 hours .....	192
—Copy of Additional Submissions, Resubmissions, and Informational Filings to Labor (Union) Presidents.	56 railroads .....	225 copies .....	15 minutes .....	56
—Railroad Statement Affirming that a copy of Submissions, Resubmissions, or Informational Filings has been served to Labor (Union) Presidents.	56 railroads .....	25 affirming statements.	60 minutes .....	25
—Labor comments on Railroad Training Program Submissions, Resubmissions, or Informational Filings.	5 RR labor Organizations.	3 comments .....	4 hours .....	12
243.111—Written Request by Training Organization/Learning Institution Previously Providing Training Services to Railroads Prior to Jan. 1, 2017, to Provide Such Services after Jan. 1, 2018.	11 tr. organizations/ Learning Institutions.	3 requests .....	60 minutes .....	3
—Revised/Resubmitted Training Program by Training Organization/Learning Institution after found Deficient by FRA.	11 tr. organizations/ Learning Inst.	2 programs .....	20 hours .....	40
—Informational Filing by Training Organization/Learning Institution due to New Federal Laws/Regulations/ Order or New Technologies/Procedures/Equipment.	11 tr. organizations/ Learning Inst.	1 filing .....	432 hours .....	432
—New Portions or Revisions to Training Organization/ Learning Institution Training Program Found Deficient.	11 tr. organizations/ Learning Inst.	2 programs .....	20 hours .....	40
—Safety Related Employees Instructed by Training Organizations/Records.	11 tr. organizations/ Learning Inst.	1,600 employees + 1,600 records.	8 hours + 5 minutes	12,933
—Request to Training Organization/Learning Institution by Student to Provide Transcript or Record.	11 tr. organizations/ Learning Inst .....	200 requests + 200 records.	5 minutes + 5 minutes.	34
243.113—Required Employer Information Sent to FRA Prior to First Electronic Submission (Employers with 400,000 Annual Work Hours or More).	56 RR/contractors/ learning institution/ associations .....	16 letters .....	15 minutes .....	4
243.201—Designation of Existing Safety-related Employees by Job Category—Lists (Employer with 400,000 Annual Work Hours or More).	56 railroads/contractors.	13 lists .....	15 minutes .....	5
—Written Request to Extend Deadline for Designation List by These Employers.	56 railroads/contractors.	3 requests .....	60 minutes .....	3
—Designation of Existing Safety-related Employees by Job Category—Lists (Employer with Less than 400,000 Annual Work Hours).	1,459 railroads/contractors/etc.	486 lists .....	15 minutes .....	122
—Training of Newly Hired Employees or Those Assigned New Safety-related Duties and Records.	56 railroads/contractors.	114 trained employees + 114 records.	8 hours + 15 minutes.	941
—Requests for Relevant Qualification or Training Record from an Entity Other Than Current Employer.	56 railroads/contractors.	11 requests + 11 records.	5 minutes + 5 minutes.	2
—Testing of Employees When Current Record of Training is Unavailable.	56 railroads/contractors.	68 tests + 68 records.	8 hours + 30 minutes.	578
—Testing of Employees Who Have Not Received Initial/Periodic Training or Who Have Not Performed the Necessary Safety-Related Duties for An Occupational Category or Subcategory in the Previous 180 Days.	56 railroads/contractors.	68 tests + 68 records.	8 hours + ..... 30 minutes .....	578
243.203—Electronic Recordkeeping—Systems Set Up to Meet FRA Requirements.	56 RR/contractors	20 systems .....	120 hours .....	2,400
—Transfer of Records to Successor Employer .....	56 RR/contractors	20 records .....	15 minutes .....	5
243.205—Modified Training Resulting from Periodic Oversight Tests and Inspections.	56 railroads/contractors.	1 modified programs	40 hours .....	40
—Periodic Tests and Inspections .....	56 railroads/contractors.	8,600 tests/ Inspections.	10 minutes .....	1,433

49 CFR section or statutory provision	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—RR Identification of Supervisory Employees Who Conduct Periodic Oversight Tests by Category/Sub-category.	56 railroads/contractors.	10 identification .....	5 minutes .....	1
—Contractor Periodic Tests/Inspections Conducted by RR Supervisory Employees.	56 railroads/contractors.	4,695 tests/inspections.	20 minutes .....	1,565
—Notification by RR of Contractor Employee Non-Compliance with Federal Laws/Regulations/Orders to Employee and Employee's Employer.	56 railroads/contractors.	175 notices + 175 notices.	5 minutes .....	30
—Contractor conduct of Periodic Oversight Tests/Inspections of Its Safety-related Employees.	11 contractors .....	795 tests/inspections	10 minutes .....	133
—Contractor Direct Training of Its Employees for Qualifying Those Employees to Perform Safety-related Duties.	11 contractors .....	45 trained employees.	8 hours .....	360
—Employer Records of Periodic Oversight .....	56 railroads/contractors.	5,490 records .....	5 minutes .....	458
243.207—Written Annual Review of Safety Data (RRs with 400,000 Annual Employee Work Hours or More).	18 railroads .....	4 reviews .....	20 hours .....	80
—RR Copy of Written Annual Review at System Headquarters.	18 railroads .....	4 review copies .....	20 minutes .....	1
—RR Designation of Person(s) to Conduct Written Annual Review.	18 railroads .....	48 designations .....	15 minutes .....	12
—Adjustments to Initial/Refresher Training Based Upon Results of Written Annual Review.	18 railroads .....	1 adjusted program	1 hour .....	1
—RR Notification to Contractor of Relevant Training Program Adjustments.	18 railroads .....	2 notifications .....	15 minutes .....	1
—Contractor Adjustment of Its Training Program Based on RR Information.	38 contractors .....	1 adjusted program	20 hours .....	20
243.209—Railroad Maintained List of Contractors Utilized ..	56 railroads .....	11 lists .....	30 minutes .....	6
—Updated Lists of Contractors .....	56 railroads .....	1 list .....	15 minutes .....	.25

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan at 202-493-6292 or Ms. Kimberly Toone at 202-493-6132 or via email at the following addresses: *Robert.Brogan@dot.gov*; *Kimberly.Toone@dot.gov*.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503, Attention: FRA Desk Officer. Comments may also be sent via email to the Office of Management and Budget at the following address: *oira\_submissions@omb.eop.gov*.

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

FRA cannot 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 this final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

#### D. Federalism Implications

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

governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

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

However, this final rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. 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.

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

#### *E. 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 final rule 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.

#### *F. Environmental Impact*

FRA has evaluated this rule in accordance with its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this final rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA’s Procedures. See 64 FR 28547 (May 26, 1999).

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

significantly affecting the quality of the human environment.

#### *G. Unfunded Mandates Reform Act of 1995*

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the Act (2 U.S.C. 1532) further requires that “before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and tribal governments and the private sector. For the year 2010, this monetary amount of \$100,000,000 has been adjusted to \$143,100,000 to account for inflation. This final 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 notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of

energy. Consequently, FRA has determined that this final rule is not a “significant energy action” within the meaning of Executive Order 13211.

#### *I. Privacy Act*

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, *etc.*). See <http://www.regulations.gov/#/privacyNotice> for the privacy notice of regulations.gov or interested parties may review DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477).

#### **List of Subjects**

##### **49 CFR Part 214**

Bridges, Occupational safety and health, Penalties, Railroad safety, Reporting and recordkeeping requirements.

##### **49 CFR Part 232**

Railroad power brakes, Railroad safety, Two-way end-of-train devices.

##### **49 CFR Part 243**

Administrative practice and procedure, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

#### **The Final Rule**

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

#### **PART 214—[AMENDED]**

##### ■ 1. The authority citation for part 214 is revised to read as follows:

**Authority:** 49 U.S.C. 20103, 20107, 21301, 31304, 28 U.S.C. 2461, note; and 49 CFR 1.89.

#### **Subpart A—General**

##### ■ 2. Section 214.7 is amended by adding a definition in alphabetical order for *roadway maintenance machines equipped with a crane* to read as follows:

#### **§ 214.7 Definitions.**

\* \* \* \* \*

*Roadway maintenance machines equipped with a crane* means any roadway maintenance machine equipped with a crane or boom that can hoist, lower, and horizontally move a suspended load.

\* \* \* \* \*

**Subpart C—Roadway Worker Protections**

■ 3. Section 214.341 is amended by revising paragraph (b)(2) to read as follows:

**§ 214.341 Roadway maintenance machines.**

\* \* \* \* \*

(b) \*

(2) No roadway worker shall operate a roadway maintenance machine without having knowledge of the safety instructions applicable to that machine. For purposes of this paragraph, the safety instructions applicable to that machine means:

- (i) The manufacturer's instruction manual for that machine; or
- (ii) The safety instructions developed to replace the manufacturer's safety instructions when the machine has been adapted for a specific railroad use. Such instructions shall address all aspects of the safe operation of the crane and shall be as comprehensive as the manufacturer's safety instructions they replace.

\* \* \* \* \*

■ 4. Section 214.357 is added to read as follows:

**§ 214.357 Training and qualification for operators of roadway maintenance machines equipped with a crane.**

(a) In addition to the general training and qualification requirements for operators of roadway maintenance machines set forth in §§ 214.341 and 214.355 of this subpart, each employer shall adopt and comply with a training and qualification program for operators of roadway maintenance machines equipped with a crane to ensure the safe operation of such machines.

(b) Each employer's training and qualification program for operators of roadway maintenance machines equipped with a crane shall require initial and periodic qualification of each operator of a roadway maintenance machine equipped with a crane and shall include:

(1) Procedures for determining that the operator has the skills to safely operate each machine the person is authorized to operate; and

(2) Procedures for determining that the operator has the knowledge to safely operate each machine the person is authorized to operate. Such procedures shall determine that either:

(i) The operator has knowledge of the safety instructions (*i.e.*, the manufacturer's instruction manual) applicable to that machine; or

(ii) The operator has knowledge of the safety instructions developed to replace

the manufacturer's safety instructions when the machine has been adapted for a specific railroad use. Such instructions shall address all aspects of the safe operation of the crane and shall be as comprehensive as the manufacturer's safety instructions they replace.

(c) Each employer shall maintain records that form the basis of the training and qualification determinations of each operator of roadway maintenance machines equipped with a crane that it employs.

(d) Availability of records: Each employer required to maintain records under this part shall make all records available for inspection and copying/photocopying to representatives of FRA, upon request during normal business hours.

(e) Training conducted by an employer in accordance with operator qualification and certification required by the Department of Labor (29 CFR 1926.1427) may be used to satisfy the training and qualification requirements of this section.

**PART 232—[AMENDED]**

■ 5. The authority citation for part 232 is revised to read as follows:

**Authority:** 49 U.S.C. 20102–20103, 20107, 20133, 20141, 20301–20303, 20306, 21301–21302, 31304, 28 U.S.C. 2461, note; and 49 CFR 1.89.

**Subpart C—Inspection and Testing Requirements**

■ 6. Section 232.203 is amended by revising paragraphs (b)(6)(iv) and (e)(6) through (8) to read as follows:

**§ 232.203 Training requirements.**

\* \* \* \* \*

(b) \*

(6) \*

(iv) Any combination of the training or testing contained in paragraphs (b)(6)(i) through (b)(6)(iii) of this section and paragraphs (b)(3) through (b)(5) of this section may be used to satisfy the training and testing requirements for an employee in accordance with this paragraph.

\* \* \* \* \*

(e) \*

(6) The tasks required to be performed under this part which the employee is deemed qualified to perform;

(7) Identification of the person(s) determining that the employee has successfully completed the training necessary to be considered qualified to perform the tasks identified in paragraph (e)(6) of this section; and

(8) The date that the employee's status as qualified to perform the tasks

identified in paragraph (e)(6) of this section expires due to the need for refresher training.

\* \* \* \* \*

■ 7. Add part 243 to read as follows:

**PART 243—TRAINING, QUALIFICATION, AND OVERSIGHT FOR SAFETY-RELATED RAILROAD EMPLOYEES****Subpart A—General**

Sec.

243.1 Purpose and scope.

243.3 Application and responsibility for compliance.

243.5 Definitions.

243.7 Penalties and consequences for noncompliance.

**Subpart B—Program Components and Approval Process**

243.101 Employer program required.

243.103 Training components identified in program.

243.105 Optional model program development.

243.107 Training program submission, introductory information required.

243.109 Training program submission, review, and approval process.

243.111 Approval of programs filed by training organizations or learning institutions.

243.113 Electronic and written program submission requirements.

**Subpart C—Program Implementation and Oversight Requirements**

243.201 Employee qualification requirements.

243.203 Records.

243.205 Periodic oversight.

243.207 Annual review.

243.209 Railroad maintained list of contractors utilized.

Appendix to Part 243—Schedule of Civil Penalties

**Authority:** 49 U.S.C. 20103, 20107, 20131–20155, 20162, 20301–20306, 20701–20702, 21301–21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

**Subpart A—General****§ 243.1 Purpose and scope.**

(a) The purpose of this part is to ensure that any person employed by a railroad or a contractor of a railroad as a safety-related railroad employee is trained and qualified to comply with any relevant Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders.

(b) This part contains the general minimum training and qualification requirements for each category and subcategory of safety-related railroad employee, regardless of whether the employee is employed by a railroad or

a contractor of a railroad. Contractors shall coordinate with railroads and comply with the contents of this part, including those aspects of training that are specific to the contracting railroad's rules and procedures.

(c) The requirements in this part do not exempt any other requirement in this chapter.

(d) Unless otherwise noted, this part augments other training and qualification requirements contained in this chapter.

(e) The requirements in this part do not address hazardous materials training of "hazmat employees" as defined in 49 CFR 171.8 as such training is required pursuant to 49 CFR part 172, subpart H.

#### **§ 243.3 Application and responsibility for compliance.**

(a) This part applies to all railroads, contractors of railroads, and training organizations or learning institutions that train safety-related railroad employees except:

(1) Railroads or contractors of 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 § 243.5);

(2) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation as defined in § 243.5; or

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

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

#### **§ 243.5 Definitions.**

As used in this part—

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

*Associate Administrator* means the Associate Administrator for Railroad Safety and Chief Safety Officer of the Federal Railroad Administration or that person's delegate as designated in writing.

*Calendar year* means the period of time beginning on January 1 and ending on December 31 of each year.

*Contractor* means a person under contract with a railroad, including, but not limited to, a prime contractor or a subcontractor.

*Designated instructor* means a person designated as such by an employer,

training organization, or learning institution, who has demonstrated, pursuant to the training program submitted by the employer, training organization, or learning institution, an adequate knowledge of the subject matter under instruction and, where applicable, has the necessary experience to effectively provide formal training of the subject matter.

*Employer* means a railroad or a contractor of a railroad that employs at least one safety-related railroad employee.

*Formal training* means training that has a structured and defined curriculum, and which provides an opportunity for training participants to have questions timely answered during the training or at a later date. In the context of this part, formal training may include, but is not limited to, classroom, computer-based, correspondence, on-the-job, simulator, or laboratory training.

*Knowledge-based training* is a type of formal training that is not task-based and is intended to convey information required for a safety-related railroad employee to comply with Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders.

*On-the-job training (OJT)* means job training that occurs in the workplace, i.e., the employee learns the job while doing the job.

*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 providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

*Plant railroad* means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for

other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

*Qualified* means that a person has successfully completed all instruction, training, and examination programs required by both the employer and this part, and that the person, therefore, may reasonably be expected to proficiently perform his or her duties in compliance with all Federal railroad safety laws, regulations, and orders.

*Refresher training* means periodic retraining required by an employer for each safety-related railroad employee to remain qualified.

*Safety-related duty* means either a safety-related task or a knowledge-based prohibition that a person meeting the definition of a safety-related railroad employee is required to comply with, when such duty is covered by any Federal railroad safety law, regulation, or order.

*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.

*Safety-related task* means a task that a person meeting the definition of a safety-related railroad employee performs, when such task is covered by any Federal railroad safety law, regulation, or order.

*Task-based training* means a type of formal training with a primary focus on teaching the skills necessary to perform specific tasks that require some degree of neuromuscular coordination.

*Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation* means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (i.e., there is no freight, intercity passenger, or commuter passenger railroad operation on the track).

#### **§ 243.7 Penalties and consequences for noncompliance.**

(a) A person who violates any requirement of this part, or causes the violation of any such requirement, is subject to a civil penalty of at least \$650 and not more than \$25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$100,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See Appendix A to this part for a statement of agency civil penalty policy.

(b) A person who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from all safety-sensitive service in accordance with part 209 of this chapter.

(c) A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

#### **Subpart B—Program Components and Approval Process**

##### **§ 243.101 Employer program required.**

(a)(1) Effective January 1, 2018, each employer conducting operations subject to this part with 400,000 total employee work hours annually or more shall submit, adopt, and comply with a training program for its safety-related railroad employees.

(2) Effective January 1, 2019 or four years from the date of issuance of FRA's Interim Final Compliance Guide, whichever is later, each employer

conducting operations subject to this part with less than 400,000 total employee work hours annually shall submit, adopt, and comply with a training program for its safety-related railroad employees.

(b) Except for an employer subject to the requirement in paragraph (a)(2) of this section, an employer commencing operations subject to this part after January 1, 2018 shall submit a training program for its safety-related railroad employees prior to commencing operations. Upon commencing operations, the employer shall adopt and comply with the training program.

(c) In the program required by this part, the employer shall:

(1) Classify its safety-related railroad employees in occupational categories or subcategories by craft, class, task, or other suitable terminology;

(2) Define the occupational categories or subcategories of safety-related railroad employees. The definition of each category or subcategory shall include a list of the Federal railroad safety laws, regulations, and orders that the employee is required to comply with, based on the employee's assignments and duties, broken down at a minimum to the applicable part of the Code of Federal Regulations, section of the United States Code, or citation to an order. The listing of the Federal requirements shall contain the descriptive title of each law, regulation, or order;

(3) Create tables or utilize other suitable formats which summarize the information required in paragraphs (c)(1) and (2) of this section, segregated by major railroad departments (e.g., Operations, Maintenance of Way, Maintenance of Equipment, Signal and Communications). After listing the major departments, the tables or other formats should list the categories and subcategories of safety-related railroad employees within those departments;

(4) Develop procedures to design and develop key learning points for any task-based or knowledge-based training; and

(5) Determine how training shall be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, OJT, or other formal training. The curriculum shall be designed to impart knowledge of, and ability to comply with applicable Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those applicable Federal railroad safety laws, regulations, and orders.

(d) On-the-job (OJT) training requirements:

(1) If a training program has OJT, the OJT portion of the training program shall consist of the following three key components:

(i) A brief statement describing the tasks and related steps the employee learning the job shall be able to perform;

(ii) A statement of the conditions (prerequisites, tools, equipment, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and

(iii) A statement of the standards by which proficiency is measured through a combination of task/step accuracy, completeness, and repetition.

(2) Prior to beginning the initial safety-related tasks associated with OJT exercises, employers shall make any relevant information or materials, such as operating rules, safety rules, or other rules available to employees involved for referencing.

(3) The tasks and related steps associated with OJT exercises for a particular category or subcategory of employee shall be maintained together in one manual, checklist, or similar document. This reference shall be made available to all employees involved in those OJT exercises.

(e) Contractor's responsibility to validate approved program to a railroad: A contractor that chooses to train its own safety-related railroad employees shall provide each railroad that utilizes it with a document indicating that the contractor's program of training was approved by FRA. A contractor is being utilized by a railroad when any of the contractor's employees conduct safety-related duties on behalf of the railroad and the railroad does not otherwise qualify those employees of the contractor that are allowed to perform those duties.

(f) Railroad's responsibility to retain contractor's validation of program: A railroad that chooses to utilize contractor employees to perform safety-related duties and relies on contractor-provided training as the basis for those employees' qualification to perform those duties shall retain a document from the contractor indicating that the contractor's program was approved by FRA. A copy of the document required in paragraph (e) of this section satisfies this requirement.

##### **§ 243.103 Training components identified in program.**

(a) Each employer's program shall include the following components:

(1) A unique name and identifier for each formal course of study;

(2) A course outline for each course that includes the following:

(i) Any prerequisites to course attendance;

(ii) A brief description of the course, including the terminal learning objectives;

(iii) A brief description of the target audience, e.g., a list of the occupational categories and subcategories of employees the course will be delivered to;

(iv) The method(s) of course delivery, which may include, but are not limited to, classroom, computer-based, on-the-job, simulator, laboratory, correspondence courses, or any combination thereof;

(v) The anticipated course duration;

(vi) A syllabus of the course to include any applicable U.S.C. chapters, 49 CFR parts, or FRA orders covered in the training; and

(vii) The kind of assessment (written test, performance test, verbal test, OJT standard, etc.) performed to demonstrate employee competency.

(3) A document for each OJT program component that includes the following:

(i) The roles and responsibilities of each category of person involved in the administration and implementation, guidelines for program coordination, and the progression and application of the OJT;

(ii) A listing of the occupational categories and subcategories of employees for which the OJT program applies; and

(iii) Details of the safety-related tasks and subtasks, conditions, and standards covered by the program components.

(4) The job title and telephone number of the employer's primary training point(s) of contact, listed separately by major department or employee occupational category, if applicable.

(5) If any training organization or learning institution developed and will deliver all or any part of the training, the employer must include the following:

(i) A narrative, text table, or other suitable format which describes those portions of the training that fit into this category;

(ii) The business name of the organization that developed and will deliver the training; and

(iii) The job title and telephone number of the training organization or learning institution's primary training point of contact.

(b) An employer that is required to submit similar training programs or plans pursuant to other regulatory requirements contained elsewhere in this chapter may elect to cross-reference

these other programs or plans in the program required by this part rather than resubmitting that similar program or plan. When any such similar program or plan did not include the OJT components specified in paragraph (a)(3) of this section, the employer shall supplement its program in accordance with this part by providing that additional information.

(c) If an employer arranges job-related practice and practice related feedback sessions to supplement classroom, laboratory, simulator training, or OJT, the program shall include a description of the supplemental training.

(d) FRA may require modifications to any programs, including those programs referenced in paragraph (b) of this section, if it determines essential program components, such as OJT, or arranged practice and feedback, are missing or inadequate.

#### **§ 243.105 Optional model program development.**

(a) Any organization, business, or association may develop and submit one or more model training programs to FRA for review and approval so that the model program(s) may be used by multiple employers.

(1) Any such model program should be submitted with a unique identifier associated with the program, or FRA will assign a unique identifier.

(2) The program associated with the organization's unique identifier shall include all information required by § 243.103.

(3) Each model training program submitted to FRA prior to May 1, 2017 is considered approved and may be implemented 180 days after the date of submission unless the Associate Administrator advises the organization, business, or association that developed and submitted the program that all or part of the program does not conform.

(b) An employer that chooses to use a model program approved by FRA is not required to submit the entire program to FRA. Instead, the employer must submit only the unique identifier, and all other information that is specific to that employer or deviates from the model program.

#### **§ 243.107 Training program submission, introductory information required.**

(a) An employer who provides or is responsible for the training of safety-related railroad employees shall submit its training program to FRA for review and approval. Each employer shall state in its submission whether, at the time of filing, it:

(1) Primarily conducts the training program of its own safety-related

railroad employees, utilizing its own resources;

(2) Conducts any training for other than its own safety-related railroad employees;

(3) Implements any training programs conducted by some other entity on its behalf but adopted by that employer;

(4) Qualifies safety-related railroad employees previously qualified by other employers;

(5) Qualifies safety-related railroad employees previously trained by training organizations or learning institutions; or

(6) Any combination of paragraph (a)(1) through (5) of this section.

(b) An employer who utilizes any of the options specified in paragraphs (a)(2) through (5) of this section shall provide the following information in its submission:

(1) The categories of safety-related railroad employees who, at the time of filing, will receive training utilizing one or more of these options; and

(2) Whether the training delivered, utilizing one or more of these options, composes all or part of the overall training program regimen for that category of employee at the time of filing.

(c) An employer that elects to use training organizations or learning institutions to train some or all of its safety-related railroad employees, or to hire new safety-related railroad employees that have previously received training from any training organizations or learning institutions, shall include the full name of the training organization or learning institution in its submission.

#### **§ 243.109 Training program submission, review, and approval process.**

(a) *Initial programs.* (1) Apprenticeship or similar intern programs, that began prior to submission of the employer's initial program filed in accordance with this part, shall be described in the employer's initial program. Any such apprenticeship or similar intern programs may continue, but if the Associate Administrator advises the employer of specific deficiencies, the employer shall resubmit that portion of its program, as revised to address specific deficiencies, within 90 days after the date of any notice of deficiencies from the Associate Administrator. A failure to resubmit the program with the necessary revisions shall be considered a failure to implement a program under this part. The Associate Administrator may extend this 90-day period upon written request.

(2) An employer's initial program, as required by § 243.101(a) or (b), must be submitted to the Associate Administrator and is considered approved, and may be implemented immediately upon submission. Following submission, the Associate Administrator will review the program and inform the employer as to whether the initial program conforms to this part. If the Associate Administrator determines that all or part of the program does not conform, the Associate Administrator will inform the employer of the specific deficiencies. The deficient portions of the non-conforming program may remain in effect until approval of the revised program, unless FRA provides notification otherwise. An employer shall resubmit the portion of its program, as revised to address specific deficiencies, within 90 days after the date of any notice of deficiencies from the Associate Administrator. A failure to resubmit the program with the necessary revisions shall be considered a failure to implement a program under this part. The Associate Administrator may extend this 90-day period upon written request.

(b) *Previously approved programs require an informational filing when modified.* The employer must review its previously approved training program and modify it accordingly when new safety-related Federal railroad laws, regulations, or orders are issued, or new safety-related technologies, procedures, or equipment are introduced into the workplace and result in new knowledge requirements, safety-related tasks, or modification of existing safety-related duties. An employer that modifies its training program for these described reasons shall submit an informational filing to the Associate Administrator not later than 30 days after the end of the calendar year in which the modification occurred, unless FRA advises otherwise to individual employers, one or more group of employers, or the general public. Programs modified in accordance with this paragraph, after the initial FRA approval, are considered approved upon being modified and may be implemented immediately. Any program deficiencies noted by the Associate Administrator shall be addressed in the same manner as paragraph (a)(2) of this section. The filing shall contain a summary description of sufficient detail that FRA can associate the changes with the employer's previously approved program, and shall include:

(1) Descriptions of all new or refresher training courses developed since the

previous FRA approval, using the same criteria required for an initial filing;

(2) Explanations whenever OJT or arranged practice is added to, or discontinued from, a program;

(3) Explanations as to how the methods of delivering training, or qualifying employees has changed; and

(4) A statement from an organization, business, or association that has submitted a model program pursuant to this part, that the organization, business, or association has informed each employer who requested the right to use the affected training program of the changes and the need for the employer to comply with those changes that apply to the employer's operation.

(c) *New portions or revisions to an approved program.* Substantial additions or revisions to a previously approved program, that are not described as informational filings in accordance with paragraph (b) of this section, shall be considered approved and may be implemented immediately upon submission. Following submission, the Associate Administrator will review the new portions or revisions to the previously approved program and inform the employer as to whether the modifications conform to this part. Any program deficiencies noted by the Associate Administrator shall be addressed in the same manner as paragraph (a)(2) of this section. The Associate Administrator will inform the employer as to whether a new portion or revision to an approved program conforms to this part. If the Associate Administrator has determined that the changes do not conform to this part, the employer shall resubmit the portion of its program, as revised to address specific deficiencies, within 90 days after the date of any notice of deficiencies from the Associate Administrator. Failure to resubmit the program with the necessary revisions shall be considered a failure to implement a program under this part. The Associate Administrator may extend this 90-day period upon written request.

(d) *Additional submission, resubmission, or informational filing requirement for railroads.* (1) Each railroad shall:

(i) Simultaneous with its filing with the FRA, serve a copy of any submission, resubmission, or informational filing required pursuant to this section, to the president of each labor organization that represents the railroad's employees subject to this part; and

(ii) Include in its submission, resubmission, or informational filing required pursuant to this section a

statement affirming that the railroad has served a copy to the president of each labor organization that represents the railroad's employees subject to this part, together with a list of the names and addresses of persons served.

(2) Not later than 90 days from the date a railroad files its submission, resubmission, or informational filing required pursuant to this section, a representative designated by the president of each labor organization that represents railroad employees subject to this part, may file a comment on the submission, resubmission, or informational filing:

(i) Each comment shall be submitted to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590; and

(ii) The commenter shall certify that a copy of the comment was served on the railroad.

#### **§ 243.111 Approval of programs filed by training organizations or learning institutions.**

(a) A training organization or learning institution that provides training services for safety-related railroad employees, including providing such training services to independent students who enroll with such training organization or learning institution and who will rely on the training services provided to qualify to become safety-related railroad employees, must submit its program to FRA for review and approval.

(b) A training organization or learning institution that has provided training services to employers covered by this part prior to January 1, 2017 may continue to offer such training services without FRA approval until January 1, 2018. The Associate Administrator may extend this period at any time based on a written request. Such written requests for an extension of time to submit a program should contain any factors the training organization or learning institution wants the Associate Administrator to consider prior to approving or disapproving the extension.

(c) A program submitted by a training organization or learning institution must include all information required for an employer's program in accordance with this part, unless the requirement could only apply to an employer's program. The submitted program for a training organization or learning institution must also include the following information:

(1) The full corporate or business name of the training organization or learning institution;

(2) The training organization or learning institution's primary business and email address;

(3) The training organization or learning institution's primary telephone number and point of contact;

(4) A listing of the training organization or learning institution's designated instructors;

(5) A resume for each designated instructor, showing how the instructor achieved the subject-matter and training expertise necessary to develop and deliver training to safety-related railroad employees, unless the designated instructors are currently employed by a railroad;

(6) A list of references of employer customers the learning organization or training institution has provided services to in the past; and

(7) A brief summary statement indicating how the training organization or learning institution determined the knowledge, skills, and abilities necessary to develop the training courses it provides to employers and independent students who enroll with such training organization or learning institution in order to become safety-related railroad employees. This brief summary should be of sufficient detail so that FRA can ascertain the methodologies the training organization or learning institution used during training development.

(d) Except as specified in paragraph (b) of this section, prior approval by the Associate Administrator is required before FRA will accept such training as sufficient to meet the requirements of this part. The Associate Administrator will advise the training organization or learning institution in writing whether FRA has approved the program. If all or part of the program is not approved by FRA, the Associate Administrator will inform the training organization or learning institution of specific deficiencies. At the time that the Associate Administrator informs of any deficiencies, the Associate Administrator will clarify whether any particular training courses shall be considered approved.

(e) Previously approved programs require an informational filing when modified. The training organization or learning institution shall review its previously approved training program and modify it accordingly when new safety-related Federal railroad laws, regulations, or orders are issued, or new safety-related technologies, procedures, or equipment are introduced into the workplace and result in new knowledge requirements, safety-related tasks, or in modifications of existing safety-related duties. A training organization or

learning institution that modifies its training program for these described reasons shall submit an informational filing to the Associate Administrator not later than 30 days after the end of the calendar year in which the modification occurred, unless FRA advises otherwise. Programs modified in accordance with this paragraph are considered approved upon modification and may be implemented immediately. Any program deficiencies noted by the Associate Administrator shall be addressed as specified in this section. The filing shall contain a summary description of sufficient detail so that FRA can associate the changes with the training organization's or learning institution's previously approved program, and shall include:

(1) Descriptions of all new or refresher training courses developed after the previous FRA approval, using the same criteria required for an initial filing;

(2) Explanations whenever OJT or arranged practice is added to, or discontinued from, a program; and

(3) Explanations as to how the methods of delivering training, or qualifying employees has changed.

(f) New portions or revisions to an approved program: Substantial additions or revisions to a previously approved program, that are not described as informational filings in accordance with paragraph (e) of this section, shall require prior approval by the Associate Administrator before FRA will accept such training as sufficient to meet the requirements of this part. The Associate Administrator will advise the training organization or learning institution in writing whether FRA has approved the new or revised program. If all or part of the program is not approved by FRA, the Associate Administrator will inform the training organization or learning institution of specific deficiencies. At the time that the Associate Administrator informs the training organization or learning institution of any deficiencies, the Associate Administrator will clarify whether any particular new or revised training courses shall be considered approved.

(g) Training organizations and learning institutions subject to this part are required to maintain records for each safety-related railroad employee that attends the training, in accordance with the recordkeeping requirements of this part.

(h) Training organizations and learning institutions subject to this part shall provide a student's training transcript or training record to any employer upon request by the student.

#### **§ 243.113 Electronic and written program submission requirements.**

(a) Except for an employer with less than 400,000 total employee work hours annually, each employer, training organization, or learning institution to which this part applies is required to file by electronic means any program submissions required under this part in accordance with the requirements of this section. Each organization, business, or association that develops an optional model program in accordance with § 243.105 of this part is required to electronically file the program in accordance with the requirements of this section.

(b) Prior to any person's first program submission electronically, the person shall provide the Associate Administrator with the following information in writing:

(1) The name of the employer, organization, learning institution, business, or association;

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

(3) The mailing addresses for the person's points of contact;

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

(5) The email addresses for the person's points of contact; and

(6) The daytime telephone numbers for the person's points of contact.

(c) A person that electronically submits an initial program, informational filing, 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.

(d) A request for 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.

(e) FRA may electronically store any materials required by this part regardless of whether the person that submits the materials does so by delivering the written materials to the Associate Administrator and opts not to submit the materials electronically.

(f) A person 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 consent to receive approval or disapproval notices from FRA by email or mail.

## Subpart C—Program Implementation and Oversight Requirements

### § 243.201 Employee qualification requirements.

(a) Designating existing employees:

(1) By no later than September 1, 2018, each employer with 400,000 total employee work hours annually or more in operation as of January 1, 2018, shall declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory, and only permit designated employees to perform safety-related service in that occupational category or subcategory. The Associate Administrator may extend this period based on a written request.

(2) By no later than September 1, 2019 or four years and eight months from the date of issuance of FRA's Interim Final Compliance Guide, whichever is later, each employer with less than 400,000 total employee work hours annually in operation as of January 1, 2019, shall declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory, and only permit designated employees to perform safety-related service in that occupational category or subcategory. The Associate Administrator may extend this period based on a written request.

(b) Except for an employer subject to the requirement in paragraph (a)(2) of this section, an employer commencing operations after January 1, 2018 shall declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory prior to beginning operations, and only permit designated employees to perform safety-related service in that category or subcategory. Any person designated shall have met the requirements for newly hired employees or those assigned new safety-related duties in accordance with paragraph (c) of this section.

(c) Newly hired employees or those assigned new safety-related duty: The following requirements apply to qualifying a safety-related railroad employee who, subsequent to the employer's designation in accordance with paragraphs (a) and (b) of this section, is newly hired or is to engage in a safety-related task not associated with the employee's previous training.

(1) Prior to an employee becoming a qualified member of an occupational category or subcategory, the employer shall require a safety-related railroad employee who is newly hired or is to engage in safety-related duties not associated with the employee's previous training to successfully complete the

formal training curriculum for that category or subcategory of safety-related railroad employee. Successful completion of the formal training curriculum includes passing any required examinations covering the skills and knowledge the employee will need to possess in order to perform the safety-related duties necessary to be a member of the occupational category or subcategory.

(2) If the training curriculum includes OJT, the employee shall demonstrate, to the satisfaction of a designated instructor, OJT proficiency by successfully completing the safety-related tasks necessary to become a qualified member of the occupational category or subcategory. However, as part of the OJT process and prior to completing such training and passing the field evaluation, a person may perform such tasks under the direct onsite observation of any qualified person, provided the qualified person has been advised of the circumstances and is capable of intervening if an unsafe act or non-compliance with Federal railroad safety laws, regulations, or orders is observed. An employee designated to provide formal training to other employees, and who is not a designated instructor, shall be qualified on the safety-related topics or tasks in accordance with the employer's training program and the requirements of this part.

(d) Employees previously qualified or trained, but not by the current employer: If an employee has received relevant qualification or training for a particular occupational category or subcategory through participation in a FRA-approved training program submitted by an entity other than the employee's current employer, that training shall satisfy the requirements of this part:

(1) Provided that:

(i) A current record of training is obtained from that other entity; or

(ii) When a current record of training is unavailable from that other entity, an employer performs testing to ensure the employee has the knowledge necessary to be a member of that category or subcategory of safety-related railroad employee; and

(2) When the employee, in the previous 180 days, has either not performed the safety-related duties or not received initial or periodic training for an occupational category or subcategory, the employer shall perform testing to ensure the employee has retained the knowledge necessary to remain a member of that occupational category or subcategory. In the situation where an employee's records are

unavailable and the employee is subject to testing under paragraph (d)(1)(ii) of this section, no additional testing is required.

(e) Refresher training requirements and options:

(1) Beginning January 1, 2020, each employer with 400,000 total employee work hours annually or more shall deliver refresher training at an interval not to exceed 3 calendar years from the date of an employee's last training event, except where refresher training is specifically required more frequently in accordance with this chapter. If the last training event occurs prior to FRA's approval of the employer's training program, the employer shall provide refresher training either within 3 calendar years from that prior training event or no later than December 31, 2022. Each employer shall ensure that, as part of each employee's refresher training, the employee is trained and qualified on the application of any Federal railroad safety laws, regulations, and orders the person is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders.

(2) Beginning January 1, 2021 or six years from the date of issuance of FRA's Interim Final Compliance Guide, whichever is later, each employer with less than 400,000 total employee work hours annually shall deliver refresher training at an interval not to exceed 3 calendar years from the date of an employee's last training event, except where refresher training is specifically required more frequently in accordance with this chapter. If the last training event occurs prior to FRA's approval of the employer's training program, the employer shall provide refresher training either within 3 calendar years from that prior training event or no later than December 31, 2023. Each employer shall ensure that, as part of each employee's refresher training, the employee is trained and qualified on the application of any Federal railroad safety laws, regulations, and orders the person is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders.

### § 243.203 Records.

(a) *General requirements for qualification status records; accessibility.* Each employer shall maintain records to demonstrate the qualification status of each safety-related railroad employee that it employs.

(1) The records for former safety-related railroad employees shall be accessible for 6 years at the employer's system headquarters after the employment relationship ends.

(2) Current employee records shall be accessible at the employer's system headquarters.

(b) *Employee information.* The records shall include the following information concerning each such employee:

(1) The name of the employee;

(2) Occupational category or subcategory designations for which the employee is deemed qualified;

(3) The dates that each formal training course was completed;

(4) The title of each formal training course successfully completed;

(5) If the safety-related railroad employee attended safety-related training offered by a business, a training organization, or a learning institution with an FRA-approved program, a copy of the transcript or appropriate record from that business, training organization, or learning institution;

(6) The employee's OJT performance, which shall include the unique name or identifier of the OJT program component in accordance with § 243.103, the date the OJT program component was successfully completed, and the identification of the person(s) determining that the employee successfully completed all OJT training necessary to be considered qualified to perform the safety-related tasks identified with the occupational categories or subcategories for which the employee is designated in accordance with the program required by this part;

(7) The date that the employee's status is determined to be qualified and the employee is designated to perform the safety-related duties identified with any particular occupational categories or subcategories, in accordance with the program required by this part;

(8) If an employee's qualification status was transferred from another entity with an approved program, a copy of the training record from that other entity; and

(9) Any additional information required by this part.

(c) *Record accessibility for other than individual employee records.* Except for records demonstrating the qualification status of each safety-related railroad employee as described in paragraph (b) of this section or otherwise specified in this part, each test, inspection, annual review, or other event record required by this part shall be accessible for 3 calendar years after the end of the calendar year to which the event relates. Each employer shall make these records

accessible at one headquarters location within the United States, including, but not limited to, a railroad's system headquarters, a holding company's headquarters, a joint venture's headquarters, a contractor's principal place of business or other headquarters located where the contractor is incorporated. This requirement does not prohibit an employer with divisions from also maintaining any of these records at any division headquarters.

(d) *Availability of records.* Each employer, training organization, or learning institution required to maintain records under this part shall:

(1) Make all records available for inspection and copying/photocopying to representatives of FRA, upon request during normal business hours; and

(2) Make an employee's records available for inspection and copying/photocopying to that employee, former employee, or such person's representative upon written authorization by such employee during normal business hours.

(e) *Electronic recordkeeping.* Nothing in this section precludes an employer, a training organization, or a learning institution from maintaining the information required to be retained under this part in an electronic format provided that:

(1) The employer, training organization, or learning institution maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or individual records;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) A record cannot be deleted or altered by any individual after the record is certified by the employee who created the record;

(3) Any amendment to a record is either:

(i) Electronically stored apart from the record that it amends; or

(ii) Electronically attached to the record as information without changing the original record;

(4) Each amendment to a record uniquely identifies the person making the amendment;

(5) The system employed by the employer, training organization, or learning institution for data storage permits reasonable access and retrieval

of the information in usable format when requested to furnish data by FRA representatives; and

(6) Information retrieved from the system can be easily produced in a printed format which can be readily provided to FRA representatives in a timely manner and authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by FRA representatives.

(f) *Transfer of records.* If an employer ceases to do business and its assets will be transferred to a successor employer, it shall transfer to the successor employer all records required to be maintained under this part, and the successor employer shall retain them for the remainder of the period prescribed in this part.

#### **§ 243.205 Periodic oversight.**

(a) *General.* As part of the program required in accordance with this part, an employer shall adopt and comply with a program to conduct periodic oversight tests and inspections to determine if safety-related railroad employees comply with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. The program of periodic oversight shall commence on the day the employer files its program with FRA pursuant to § 243.101(a) or on the day the employer commences operations pursuant to § 243.101(b). The data gathered through the testing and inspection components of the program shall be used to determine whether systemic performance gaps exist, and to determine if modifications to the training component of the program are appropriate to close those gaps.

(b) *Locomotive engineer and conductor oversight exception.* Periodic oversight specified in this section is not required for employees covered by parts 240 and 242 of this chapter, but a railroad shall use results of the assessments required by those parts to determine if changes in its training programs are necessary to close any proficiency gaps found during those assessments.

(c) *Railroad oversight.* Each railroad shall identify supervisory employees, by category or subcategory, responsible for conducting periodic oversight tests and inspections for the safety-related railroad employees that it authorizes to perform safety-related duties on its property, except a railroad is not required to:

(1) Provide oversight for a contractor's safety-related railroad employees if that contractor is required to conduct its own periodic oversight because it meets

the criteria specified in paragraph (g) of this section;

(2) Provide oversight for categories or subcategories of a contractor's safety-related railroad employees if the railroad does not employ supervisory employees who are qualified as safety-related railroad employees in those categories or subcategories; or

(3) Provide oversight for any supervisory employee identified by the railroad as responsible for conducting oversight in accordance with this section.

(d) *Operational test exception for a railroad.* A railroad is not required to perform operational tests of safety-related railroad employees employed by a contractor.

(e) *Railroad oversight for contractors.* A railroad may choose to require supervisory employees to perform oversight of safety-related railroad employees employed by a contractor either:

(1) When oversight test and inspection sessions are scheduled specifically to determine if safety-related employees are in compliance with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety; or

(2) When a qualified railroad supervisory employee's duties place this person in the vicinity of one or more safety-related railroad employees employed by a contractor and performing the oversight would result in minimal disruption of this person's other assigned duties.

(f) *Railroad's duty to notify contractor of non-compliance.* A railroad that finds evidence of contractor employee non-compliance with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety during the periodic oversight shall provide that employee and that employee's employer with details of the non-compliance.

(g) *Contractor oversight.* Each contractor shall conduct periodic oversight tests and inspections of its safety-related railroad employees provided:

(1) A contractor employs more than 15 safety-related railroad employees;

(2) A contractor relies on training it directly provides to its own employees as the basis for qualifying those employees to perform safety-related duties on a railroad; and

(3) A contractor employs supervisory safety-related railroad employees capable of performing oversight.

(h) *Oversight divided by agreement.* Notwithstanding the requirements of paragraphs (c) and (g) of this section, a

railroad and a contractor may agree that the contractor will provide the oversight by specifying in the program that the railroad has trained the contractor employees responsible for training and oversight.

(i) *Detailed records required.* Each employer that conducts periodic oversight in accordance with this section must keep a record of the date, time, place, and result of each test or inspection. The records shall specify each person administering tests and inspections, and each person tested. The record shall also provide a method to record whether the employee complied with the monitored duties, and any interventions used to remediate non-compliance. Modifications of the program required by § 217.9 of this chapter may be used in lieu of this oversight program, provided a railroad specifies it has done so in its program submitted in accordance with this part.

(j) *Additional records requirement.* Records required under this section are subject to the requirements of § 243.203.

#### **§ 243.207 Annual review.**

(a) The purpose of this review is to determine if knowledge or performance gaps exist in the application of Federal railroad safety laws, regulations, and orders. This section shall apply to each railroad once a program has been approved by FRA in accordance with this part. This section does not apply to a railroad with less than 400,000 total employee work hours annually. This section does not apply to employers other than railroads except as specified in paragraph (f) of this section.

(b) Except as provided for in paragraph (a) of this section, each railroad that is required to conduct periodic oversight in accordance with § 243.205 is also required to conduct an annual review, as provided in this section, and shall retain, at its system headquarters, one copy of the written annual review.

(c) Each railroad shall designate a person(s) who shall conduct a written annual review. The annual review shall be designed to identify knowledge or performance gaps in occupational categories and determine whether adjustments to the training component of the program are the appropriate intervention to close those gaps or otherwise improve the effectiveness of the program. Such review shall include analysis of the following data:

(1) Periodic oversight data required by § 243.205;

(2) Reportable accident/incident data as defined in part 225 of this chapter;

(3) FRA inspection report data;

(4) Employee training feedback received through a course evaluation

process, if such feedback is available; and

(5) Feedback received from labor representatives, if such feedback is available.

(d) Based upon the results of the annual review, the designated person(s) shall coordinate any necessary adjustments to the initial and refresher training programs. At the railroad's option, the annual review required under this section may be conducted in conjunction with any periodic review required under part 217 of this chapter.

(e) If a railroad utilizes a contractor that directly trains its own safety-related railroad employees, the railroad shall notify the contractor of the relevant training program adjustments made to the railroad's program in accordance with paragraph (d) of this section.

(f) A contractor shall use any information provided by a railroad to adjust its training specific to the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety.

(g) Prior to September 1 of each calendar year, each railroad to which this section applies shall complete its annual review for the previous calendar year.

#### **§ 243.209 Railroad maintained list of contractors utilized.**

(a) Each railroad utilizing contractors to supply the railroad with safety-related railroad employees shall maintain a list, at its system headquarters, with information regarding each contractor utilized unless:

(1) The railroad qualifies each of the contractor's safety-related railroad employees utilized; and

(2) The railroad maintains the training records for each of the contractor's safety-related railroad employees utilized.

(b) The listing required by paragraph (a) of this section shall include:

(1) The full corporate or business name of the contractor;

(2) The contractor's primary business and email address; and

(3) The contractor's primary telephone number.

(c) The information required by this section shall be continuously updated as additional contractors are utilized, and no contractor information shall be deleted from the list unless the contractor has not been utilized for at least 3 years from the end of the calendar year the contractor was last utilized.

#### **Appendix to Part 243—Schedule of Civil Penalties**

APPENDIX TO PART 243—SCHEDULE OF CIVIL PENALTIES <sup>1</sup>

Section	Violation	Willful violation
<b>Subpart B—Program Components and Approval Process</b>		
243.101—Employer program required:		
(a–c) Complete failure to submit, adopt, or comply with program .....	\$7,500–12,500	\$11,000–\$16,000
(a–c) Partial failure to submit, adopt, or comply with program; or failure to correct deficiencies upon FRA's request.	4,500–9,500	6,500–13,000
(d) OJT program requirements or failure to make reference materials available .....	2,000–4,500	4,000–6,500
(e–f) Program validation .....	2,000	4,000
243.105 Claiming optional model program is FRA-approved, when it is not: .....	2,000–4,500	4,000–6,500
243.109 Training program submission, review, and approval process:		
(a) Failure to timely resubmit program .....	2,000–4,500	4,000–6,500
(b) Failure to timely submit informational filing .....	2,000–4,500	4,000–6,500
(c) Failure to submit new portions or revisions .....	4,500	6,500
(d) Railroad failure to serve program .....	1,000	2,000
243.111 Approval of programs filed by training organizations or learning institutions:		
(a–b) Claiming training is FRA-approved, when it is not .....	2,000–4,500	4,000–6,500
(c–f) FRA approved some training, but all conditions not met .....	2,000–4,500	4,000–6,500
(g–h) Records .....	1,000	2,000
<b>Subpart C—Program Implementation and Oversight Requirements</b>		
243.201 Employee qualification requirements:		
(a–b) Failure to designate an employee .....	1,000	2,000
(c–f) Other failures and refresher training (per employee) .....	1,000	2,000
243.203 Records:		
(a–f) Failure to maintain records (per employee) .....	1,000	2,000
243.205 Periodic oversight .....	4,500–9,500	6,500–13,000
243.207 Annual review .....	4,500	6,500
243.209 Railroad maintained list of contractors utilized .....	4,500	6,500

<sup>1</sup> A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$100,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

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**Melissa L. Porter,**  
*Chief Counsel.*

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